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ALLAHABAD SERIES

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(2022)06ILR A5
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal (D) No. 150 of 2022

S.I. Sanjay Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Pankaj Kumar Gupta

Counsel for the Respondents:
Sri Ankit Gaur (State Law Officer)

A. Service Law – Under-performance – Censure entry - The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 4(1)(b)(iv), 14(2), 7 & 7(1).

Opportunity of hearing - No elaborate procedure of holding an inquiry is required in the case of a minor penalty, as is the case when major penalty is imposed. In the case of a minor penalty envisaged u/Rule 4(1)((b)(iv) of the Rules, all that is required is that the Police Officer concerned is to be informed in writing about the action proposed to be taken and imputations of the act or omission, on which the action is proposed, giving him reasonable opportunity of making a representation against the proposed action. This is all that is required u/Rule 14(2) of the Rules, in case where a minor penalty is imposed. (Para 11)

In present case, there was sufficient compliance with the requirement of putting the appellant to notice about the imputation that constituted the omission on his part, against which he was given an opportunity to furnish his explanation that was placed before the Government and duly considered by them before making the order impugned. (Para 12)

B. Jurisdiction - The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 7 - The Government has jurisdiction under the Rules to punish a police officer of the subordinate rank like the appellant and no issue about the jurisdiction or lack of authority can, therefore, be validly raised. It is true that any punishment, including minor penalties, can be imposed upon a police officer by an officer not below the rank of Deputy Inspector General of Police, but Rule 7 clothes the Government in the first place with the power to punish a police officer of the subordinate rank under the Rules. (Para 13, 14)

C. The correctness of the imputations about acts of omissions that are the basis of action against him are purely factual in nature and cannot be gone into by this Court in the exercise of its writ jurisdiction u/Article 226 of the Constitution. (Para 15)

Special appeal dismissed. (E-4)

Present special appeal assails judgment and order dated 23.03.2022, passed by Hon'ble Mrs. Justice Manju Rani Chauhan, J. in Writ-A No. 330 of 2022.

(Delivered by Hon'ble Rajesh Bindal, C.J. & Hon'ble J.J. Munir, J.)

1. This is an appeal by the petitioner of Writ - A No.830 of 2022, impugning the order of the learned Single Judge dated 23.03.2022, dismissing the writ petition.

2. The appellant is a Sub-Inspector of Police, who was promoted from the ranks in the year 2013. He is posted at Police Station Hanumanganj, District Kushinagar. Like other Sub-Inspectors, he was entrusted with investigation of criminal cases, numbering 30, until July, 2021. Out of these 30, the appellant completed investigation into a total of 16, submitting a report in Court. Apparently, the other cases

remained pending, where the investigation was not concluded.

3. On the 9th September, 2021, the Chief Minister issued directions to the higher officials of the Police to review law and order in different districts and find out whether investigation in accordance with law is being completed. The higher officials examined records of different police stations across the State. It is asserted by the petitioner that in twelve different districts, they found criminal cases where the investigation has not been completed and cases were pending with the Police. The petitioner was posted, as already said, at Police Station Hanumanganj, District Kushinagar on 18.03.2021 and the scrutiny by the higher officials found the ratio of completion of investigations in the district to be poor. The superior police officials directed the district-level police officials to submit a detailed report along with names of Investigating Officers, who had not done investigation and submitted a police report before the Court concerned within time. The higher officials also asked from each of the twelve under-performing districts in the matter of investigation, the names of three Sub-Inspectors/ Inspectors (Investigating Officers), who had done the minimum number of investigations. Their names, rank and place of posting were all required to be intimated to the Additional Director General of Police (Crimes). In fact, it was the Additional Director General of Police aforesaid who furnished the individual details of three Investigating Officers from each district to the Government vide his letter dated 26.09.2021.

4. The appellant was identified in District Kushinagar as one of the three Investigating Officers, who had done the minimum number of investigations and he was reported to the Government. It appears that for the aforesaid under-performance in his investigative duties, he was given a warning on 7th March, 2022 by the Superintendent of Police of Kushinagar. On the report submitted to the Government, the order impugned dated 16th November, 2021 came to be passed, awarding the appellant a censure entry. The appellant challenged the order dated 16th July, 2021 passed by the State Government before this Court by means of Writ - A No.830 of 2022. The aforesaid writ petition has been dismissed by the learned Single Judge vide order dated 23.03.2022.

5. Disillusioned, the appellant has preferred this appeal.

6. We have heard Mr. Pankaj Kumar Gupta, learned Counsel for the appellant and Mr. Ankit Gaur, learned State Law Officer on behalf of the respondents.

7. It is submitted by the learned Counsel for the appellant that the learned Single Judge has failed to appreciate that the order impugned has been passed without affording the appellant any opportunity of hearing. He submits that a censure entry is after all one of the minor penalties contemplated under Rule 4(1)(b)(iv) of The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (for short, 'the Rules'), which have adverse civil consequences. The order, therefore, impugned before the learned Single Judge could not have been made without opportunity.

8. It is further submitted by the learned Counsel for the appellant that the

Government have no jurisdiction to pass the impugned order, which vests in the Deputy Inspector General of Police.

9. Learned Counsel for the State has supported the impugned order and submitted that it was passed after due opportunity of hearing.

10. Upon considering the submissions advanced by the learned Counsel for parties and perusing the order impugned, besides the material on record, we do not find any merit in this appeal.

11. The submission of the learned Counsel for the appellant that the order impugned was passed without opportunity is not borne out by the record. In fact, a perusal of the order impugned shows that after identifying the three Investigating Officers in each of the twelve districts, who had done the least number completed investigations, their explanations were sought through the Additional Director General of Police (Crimes) and after securing explanations from each of the Investigating Officers concerned, these were placed before the Government. The learned Counsel for the appellant has not been able to demonstrate from any material that his explanation was not secured or considered by the Government before the impugned order was passed. In the case of a minor penalty envisaged under Rule 4(1)((b)(iv) of the Rules, all that is required is that the Police Officer concerned is to be informed in writing about the action proposed to be taken and imputations of the act or omission, on which the action is proposed, giving him reasonable opportunity of making a representation against the proposed action. This is all that is required under Rule 14(2) of the Rules, in case where a minor penalty is imposed. No elaborate procedure of holding an inquiry is required in the case of a minor penalty, as is the case when major penalty is imposed.

12. To our mind, therefore, there was sufficient compliance with the requirement of putting the appellant to notice about the imputation that constituted the omission on his part, whereagainst he was given an opportunity to furnish his explanation that was placed before the Government and duly considered by them before making the order impugned.

13. So far as the question of jurisdiction is concerned, it is true that any punishment, including minor penalties, can be imposed upon a police officer by an officer not below the rank of Deputy Inspector General of Police, but Rule 7 of the Rules clothes the Government in the first place with the power to punish a police officer of the subordinate rank under the Rules. In this connection, Rule 7(1) of the Rules may be quoted with profit:

"7. **Powers of punishment**.-(1) The Government or any officer of police department not below the rank of the Deputy Inspector General may award any of the punishments mentioned in Rule 4 on any Police Officer."

14. It is, therefore, evident that the Government have jurisdiction under the Rules to punish a police officer of the subordinate rank like the appellant and no issue about the jurisdiction or lack of authority can, therefore, be validly raised.

15. The learned Counsel for the appellant also endeavoured to dispute the correctness of the imputations about acts of omissions that are the basis of action

against him by reference to details of his duty during the relevant period of time that prevented him from concluding the investigation. Those issues are purely factual in nature and cannot be gone into by this Court in the exercise of its writ jurisdiction under Article 226 of the Constitution. Learned Counsel for the appellant has not been able to point out any procedural flaw or infirmity, vitiating the impugned order or any illegality, that may render it unsustainable.

16. In the circumstances, the impugned order passed by the learned Single Judge is unexceptionable.

17. The appeal **fails** and is **dismissed.**

18. There shall be no order as to costs.

(2022)06ILR A8
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 3427 of 2022

Mohd. Adi Ahmad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mujib Ahmad Siddiqui

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava

A. Service Law – Selection – Rule of normalization - The High Courts cannot over step its jurisdiction by giving directions which would amount to setting aside the decision of the expert opinion of testing agency. (Para 7)

The Master Answer Key which is published by the testing agency or formulated by the testing agency for the examination being conducted and held by it, is prepared by team of subject experts. **Once the subject experts have taken the view that a particular answer is the correct answer to a question, there is no mechanism itself for the Court to sit in appeal over and above the opinion of the subject expert.** (Para 6)

B. Publication of revised answer key - Clause 10 of Transparency Rule - As far as the publication of revised answer key by the testing agency is concerned, there is no such rule. Clause 10 of Transparency Rule of the advertisement clearly takes care of the objections which are invited to the Master Answer Key published by the testing agency and then the disposal of objections by the testing agency through its subject experts, which are then considered to be final. (Para 5)

Petitioner has not questioned the advertisement itself and after having submitted to the selection process and appearing in the written examination conducted by the testing agency and even having filed objections as per clause 10, he cannot be permitted to take the plea that in spite of there being no such provision contained u/Clause 10 of the advertisement, as a rule of transparency, the testing agency ought to have published the revised answer key. (Para 6)

C. The rule of normalization is adopted by the testing agency to bring at par the meritorious students who have gained maximum marks in different set of papers which have been formulated by the testing agency to hold examination in different shifts. (Para 11)

It is well within the domain of testing agency to formulate rules and regulations for the purposes of holding free and fair selection. It is not the case of the petitioner that he was not aware of any such terms and conditions under the advertisement regarding modalities to be adopted by the testing agency. It is after the petitioner has found himself to have not succeeded on merits that he has come to challenge the rule of normalization. Therefore,

at this stage, rule of normalization cannot be questioned. Even otherwise, nothing has been argued to demonstrate that the rule of normalization has been adopted at different stages of the selection to prejudice the rights and interest of the candidates who participated in the selection process. (Para 12)

Writ petition dismissed. (E-4)

Precedent followed:

1. UPPSC through its Chairman & anr. Vs Rahul Singh & anr., Civil Appeal No. 5838 of 2018 (Para 7)

2. Smt. Shimla Singh Vs St. of U.P. & anr., Writ-A No. 25791 of 2018, decided on 19.12.2018 (Para 8)

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

1. Heard Sri Mujib Ahmad Siddiqui, learned counsel for the petitioner, Sri Abhishek Srivastava, learned counsel for respondent nos. 2 & 3 as well as learned Standing Counsel.

2. The petitioner before this Court has been an applicant to the post of Junior Engineer (Trainee) pursuant to the advertisement issued by the Electricity Services Commission and he has been declared successful in the written examination but has come to be ousted after verification of credentials and records when the final merit list was published. He raised in this petition twin arguments: one, the selecting agency did not publish the revised answer key after it had invited objections as per the brochure and found certain objections to be valid so as to demonstrate transparency in selection as conceived of vide clause 10 of the advertisement; and the second argument advanced is that the normalization criteria adopted by the testing agency was not a proper criteria and had the normalization not been made applicable, the petitioner would have been selected.

3. Sri Abhishek Srivastava, in compliance of the last order of this Court, has obtained instructions in the matter and placed the same before this Court which are taken on record.

4. As per the instructions obtained by Sri Srivastava, after the written examination was held as per clause 10 of the advertisement, objections were invited to the answer key published by the testing agency and the objections that were received were duly dealt with by the subject experts nominated by the testing agency for the said purpose and finally the report was submitted and on the basis of said report, the testing agency was permitted to declare the result by the Secretary of the Electricity Services Commission under its letter dated 11.11.2021. He, therefore, submits that the testing agency had fully complied with the procedure prescribed for under clause 10 of the advertisement. Secondly, he submits that soon after the notice of this petition was received by him, he had forwarded the copy thereof to Electricity Services Commission who referred the matter of objections regarding questions which are turned out to be 12 in number at the end of the petitioner, to the testing agency. The testing agency got examined the same and found one objection raised by the petitioner regarding question ID No. 9277592169 to be valid and accordingly awarded full marks for that to the petitioner.

5. It is argued by learned counsel for the respondents that even after getting full marks for one objection being found to be valid, the petitioner could not qualify. Learned counsel for the respondents has

further argued that as far as the publication of revised answer key by the testing agency is concerned, there is no such rule. He submits that clause 10 of Transparency Rule of the advertisement clearly takes care the objections are invited to the Master Answer Key published by the testing agency and then the disposal of objections by the testing agency through its subject experts, which shall be final and therefore, he argues that there is no question to publish any revised answer key after the objections are met by the subject experts. With regard to other argument of normalization rule being made applicable to the selection process by the testing agency, he submits that the brochure did provide for normalization method to be adopted and the method to be adopted has been explained away in Annexure No. 1 to the advertisement. He submits that once the normalization criteria was made an integral part of modalities to be adopted by the selecting agency in preparation of final selection and the petitioner submitted to the same while applying against the advertisement and followed the terms and conditions in the advertisement, now he cannot be permitted to take a turn around to suggest that the normalization rule was per se illegal method adopted by the testing agency or was a fraud method that has resulted in rejection of his candidature on merits.

6. Having heard learned counsel for the respective parties and their arguments raised across the bar, I find that both the arguments raised by learned counsel for the petitioner in support of this petition do not hold merit. Firstly, once the petitioner had applied, he has not questioned the advertisement itself and after having submitted to the selection process and appearing in the written examination conducted by the testing agency and even having filed objections as per clause 10, he cannot be permitted to take the plea that in spite of there being no such provision contained under Clause 10 of the advertisement, as a rule of transparency, the testing agency ought to have published the revised answer key. Even otherwise I do not find this argument to be holding any merit as the objections that have been put forth by the petitioner have been met by the subject experts of testing agency and one of the objections raised by the petitioner having been found to be valid, he has been awarded marks for the same, I, therefore, do not find, in the absence of any argument that the other objections if should have been held valid even against grant the opinion of subject expert nominated by the committee. The law on this point is also well settled, the Master Answer Key which is published by the testing agency or formulated by the testing agency for the examination being conducted and held by it, it has its own team of subject experts. Once the subject experts have taken the view that a particular answer is the correct answer to a question, there is no mechanism itself

7. Reliance placed by the learned counsel for the respondent upon the judgment of Supreme Court in **Civil Appeal No. 5838 of 2018, UPPSC through its Chairman & Anr v. Rahul Singh & Anr** is worth consideration here at this stage. Vide paras 14 & 15 of the judgment, the Supreme Court has held that the High Courts cannot over step its jurisdiction by giving directions which would amount to setting aside the decision of the expert opinion of testing agency. Paragraph nos. 14 & 15 of the Judgment are reproduced hereunder:

14. In the present case we find that all the 3 questions needed a long process of reasoning and the High Court itself has

noticed that the stand of the Commission is also supported by certain text books. When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts.

15. In view of the above discussion we are clearly of the view that the High Court over stepped its jurisdiction by giving the directions which amounted to setting aside the decision of experts in the field. As far as the objection of the appellant - Rahul Singh is concerned, after going through the question on which he raised an objection, we ourselves are of the prima facie view that the answer given by the Commission is correct.

8. This above judgment has also been followed by me in the case of **Smt. Shimla Singh v. State of U.P. and Another, Writ - A No. 25791 of 2018** decided on 19.12.2018 and vide paragraph 24 of the judgment I have held thus:

"24. Applying the law as discussed by the Apex Court and held so in the judgment of Rahul Singh (supra), to the facts of the present case, I find that the expert opinion having been obtained in respect of the questions and the way they proved with the aid of relevant text book materials, there is hardly any scope to sit in appeal over such expert opinion. This Court in exercise of power of judicial review will certainly not transgress an area in which it has no expertise and where it has to act and take a decision only with the aid of experts of such field/ area. The questions may carry an answer, which may on the face of it appear to be correct and may be in some of the text books that is indicated to be so but ultimately it is the paper setting Committee and the Moderation Committee which has the advantage of having subject experts of various fields, if have arrived on a conclusion that particular answer is correct answer, this Court will refrain itself from holding it otherwise. ....."

9. In view of the above objection to correctness of answer by subject expert is rejected, and so the argument regarding objection part to the questions raised by the petitioner cannot be accepted and hence rejected.

10. In so far as the normalization rule is concerned, I find that this rule has been made an integral part of modalities to be adopted by the testing agency for holding selection in respect of the advertisement published against which the petitioner has been the applicant.

11. The rule of normalization is adopted by the testing agency to bring at par the meritorious students who have gained maximum marks in different set of papers which have been formulated by the testing agency to hold examination in different shifts.

12. In the considered view of the Court, it is well within the domain of testing agency to formulate rules and regulations for the purposes of holding free and fair selection. It is not the case of the petitioner that he was not aware of any such terms and conditions under the advertisement regarding modalities to be adopted by the testing agency. It is after the petitioner has found himself to have not succeeded on merits that he has come to challenge the rule of normalization. I, therefore, do not find this to be a stage to question the rule of normalization. Even otherwise, nothing has been argued to

demonstrate that the rule of normalization has been adopted at different stages of the selection to prejudice the rights and interest of the candidates who participated in the selection process.

13. The writ petition lacks merit and is accordingly dismissed, consigned to records with no order as to cost.

(2022)06ILR A12
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.06.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ A No. 3793 of 2022

Neeraj Chaturvedi ...Petitioner
Versus
Central Bank of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shreesh Kumar

Counsel for the Respondents:
Gopal Kumar Srivastava

A. Service Law – Transfers/Posting of physically challenged officers - Rights of Persons with Disabilities Act, 2016: Section 2(r), 2(d), 2(s) - If there is any beneficial or compassionate policy to accommodate any employee for the specific and certain reason, the same must be abide by in its letter and spirit. (Para 17)

(i) If the same policy is providing two separate guidelines, the guideline which is of beneficial nature shall prevail over the general guidelines inasmuch as the beneficial guideline is issued to serve a particular purpose and if such guideline is flouted it may cause an irreparable loss to a person which, generally, cannot be compensated in terms of money. The Transfer Policy/Guidelines which provides that whosoever has completed 10 years of service at one place shall be transferred from one zone to another zone, then the same policy also clearly indicates vide para 1.2 that a transfer/posting of a spouse etc. of a person with 'benchmark disability' or long term disability, shall be exempted from routine/rotational transfer in terms of DOPT Guidelines dated 08.10.2018. (Para 18)

The DOPT Guidelines (*infra*) clearly provides that such government employee may be exempted from routine transfer/rotational transfer subject to the administrative constraints. A routine/rotational transfer, which has been made in compliance of the guidelines, may not be considered as administrative constraint. (Para 18)

(ii) There is no good reason to implement the policy vide para-3 i.e. 'Rotational Transfer' ignoring the para 1.2 of the same policy (*infra*). The rotational transfers are meant for a person who has not been protected by any compassionate or beneficial policy but if any employee has been protected from any beneficial or compassionate policy, the same may not be ignored unless there is any administrative reason to transfer such person from one zone to another zone. (Para 19)

B. Normally, the transfer is an exigency/incidence of service and courts ordinarily do not interfere with the transfer orders but if such transfer may be avoided for any specific compelling reason and that reason is unavoidable, the Competent Authority being model employer should consider such condition sympathetically. At the same time the transfer may not be punitive in nature. (Para 22)

In the present case, petitioner's wife is serving on the post of Telephone Attendant in Secretariat Telephone Exchange at Lucknow despite having 100% disability and while discharging her duties on such post she has confidence at the back of her mind that her husband is residing at Lucknow to look-after her in a critical situation, if need be. But, compelling/directing petitioner to submit his joining at Cooch Behar, Kolkata, which is about 1500 KM from Lucknow, would cause

irreparable mental pain to him as he would not be able to look-after and take care of his wife and would cause irreparable mental injury to his wife as well. (Para 20, 22)

Petitioner's grievance has been considered earlier and he was retained at Lucknow and therefore, it should be considered now as well, as it is of permanent nature, irrespective of the question of availability of post. (Para 21)

Writ petition allowed. (E-4)

Present petition assails order dated 16.04.2022, passed by General Manager, Central Bank of India, Human Resource Deptt. transferring 163 employees in different Zones as well as order dated 20.04.2022, whereby petitioner has been directed to be relieved from his present place of posting.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shireesh Kumar, learned counsel for the petitioner and Sri Gopal Kumar Srivastava, learned counsel for the respondents-Bank.

2. By means of this writ petition, the petitioner has assailed the order dated 16.04.2022 passed by the opposite party No.1 transferring as many as 163 employees in different Zones serving at Central Bank of India from one place to another. The petitioner, whose name finds place at serial No.132, has been transferred from Lucknow to Cooch Behar, Kolkota. The petitioner has also assailed the order dated 20.04.2022 whereby he has been directed to be relieved from his present place of posting.

3. The petitioner is serving on the post of Officer (Scale-II) in Central Bank of India.

4. At the very outset, learned counsel for the petitioner, Sri Shireesh Kumar, has drawn attention of this Court towards Annexure No.3 of the writ petition, which is Unique Disability ID issued by the Competent Authority of the Government of India relating to wife of the petitioner, namely, Smt. Priya Chaturvedi, who is permanent disable person having 100% disability.

5. Further attention of this Court has been drawn by learned counsel for the petitioner towards the policy/norms framed on Transfer of Mainstream/ Specialized Officer in Scale-I, II & III of the Bank. Sri Shireesh Kumar has referred para-1.2 of the aforesaid policy, which reads as under:-

"1.2 In respect of transfers/ posting of physically challenged officers, with benchmark disability and Officer who is caregiver of dependent daughter/ son/ parents/ spouse/ brother/ sister with 'Specified Disability' as certified by the certifying authority, as a Person with Benchmark Disability, as defined under Section 2 (r) of the Rights of Persons with Disabilities Act, 2016, in terms of DOPT guidelines O.M.No.42011/3/2014-Estt (Res) dated 8th October, 2018, bank shall follow the guidelines issued by Govt. of India from time to time, subject to administrative constraint."

6. Since one memorandum of DOPT dated 08.10.2018 has been referred in the aforesaid guideline of the Bank so Sri Kumar has demonstrated such office memorandum being issued by the DOPT dated 08.10.2018 which has been annexed as Annexure No.5 to the writ petition. He has drawn attention of this Court towards para-3 (i) & (iii) of the aforesaid office

memorandum of DOPT dated 08.10.2018, which read as under:-

"(i) A Government employee who is a care-giver of dependent daughter/ son/ parents/ spouse/ brother/ sister with Specified Disability, as certified by the certifying authority as a Person with Benchmark Disability as defined under Section 2 (r) of the Rights of Persons with Disabilities Act, 2016 may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints.

(iii) The term 'Specified Disability' as defined herein is applicable as grounds only for the purpose of seeking exemption from routine transfers/ rotational transfer by the Government employee, who is a care-giver of dependent daughter/ son/ parents/ spouse/ brother/ sister as stated in para-3 (i) above."

7. Sri Shireesh Kumar, learned counsel for the petitioner has submitted that so as to understand the meaning of 'care-giver', 'benchmark disability' and 'permanent disability', the relevant provision of Rights of Persons with Disabilities Act, 2016 (here-in-after referred to as the "Act, 2016") may be perused. Section 2 (d) of the Act, 2016 defines 'care-giver', Section 2 (r) defines 'benchmark disability' and Section 2 (s) defines 'person with disability', for convenience, Section 2 (d), (r) & (s) are being reproduced here-in-below:-

"2 (d) "care-giver" means any person including parents and other family Members who with or without payment provides care, support or assistance to a person with disability;

(r) "person with benchmark disability" means a person with not less than forty per cent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;

(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."

8. As per Sri Kumar, the present petitioner being care-giver of his wife who is permanent disabled, may be given the benefit of own policy of the Bank vide item No.1.2 (supra). As per the aforesaid protection, any transfer of employee be it routine transfer or rotational transfer may be exempted from such transfer.

9. Sri Kumar has further submitted that vide office order dated 20.04.2022 (Annexure No.8) the petitioner was directed to get himself relieved but he has not been relieved as he has not submitted any application for relieving, as recital to this effect has been given in para-31 of the writ petition. However in para-32 of the writ petition, it has been indicated that out of so many posts of Manager/ Officer in the rank of the petitioner are vacant in Lucknow Region and the petitioner may be accommodated against any post in such Region inasmuch as if he is compelled to submit his joining to Cooch Behar, Kolkata which is about 1500 KM from Lucknow, he would not be able to look-after his wife, who is requiring permanent care from her husband.

10. Therefore, Sri Kumar has submitted that the impugned transfer order, so far as it relates to the petitioner, may be

stayed and the petitioner may be accommodated at anywhere at Lucknow Region if he may not be permitted to be posted at a place from where he has been transferred to Cooch Behar, Kolkata.

11. Per contra, Sri Gopal Kumar Srivastava, learned counsel for the opposite parties has submitted that the present petitioner is serving at Lucknow Region for the last about 28 years and as per the same Transfer Policy/ Guidelines, any officer who has completed 10 years at one place/zone shall be transferred to another place/zone. Therefore, pursuant to the aforesaid policy the present petitioner has been transferred from Lucknow Zone to another zone.

12. Sri Srivastava has further submitted that on earlier occasion the similar grievance of the petitioner has been considered sympathetically, therefore, he has been retained at Lucknow Zone for about 28 years.

13. Sri Srivastava has also submitted that wife of the petitioner is serving on the post of Telephone Attendant in Secretariat Telephone Exchange, Lucknow.

14. Sri Shireesh Kumar, learned counsel for the petitioner has not disputed the aforesaid submission of learned counsel for the opposite parties, however, he has submitted that she has been given such appointment under the handicapped quota.

15. Sri Srivastava has also apprised the Court that the petitioner has already been relieved on 09.05.2022 and in his place one incumbent has already joined, therefore, it may not be possible for the Bank to permit the petitioner to serve on the same post at the same place. He has also submitted on the basis of instructions that in the Lucknow Region almost all the vacancies are already filled up.

16. Learned counsel for the parties are agreeable that the matter may be disposed of finally at the admission stage as the submissions of learned counsel for the parties have been considered.

17. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that if there is any beneficial or compassionate policy to accommodate any employee for the specific and certain reason, the same must be abide by in its letter and spirit.

18. Since wife of the petitioner is a permanent disable person having 100% disability and to look-after and take care of her is a sole responsibility of the petitioner, then his status shall come within the meaning of term 'care-giver' as defines under Section 2 (d) of the Act, 2016. On account of disability of wife of the petitioner, she is a person with the 'benchmark disability' and a 'person with disability' as per the meaning of Section 2 (r) & (s) of the Act, 2016. If the Competent Authority of the Bank has transferred the petitioner in compliance of the Transfer Policy/ Guidelines which provides that whosoever has completed 10 years of service at one place shall be transferred from one zone to another zone, then the same policy also clearly indicates vide para 1.2 that a transfer/ posting of a spouse etc. of a person with 'benchmark disability' or long term disability, shall be exempted from routine/ rotational transfer in terms of DOPT Guidelines dated 08.10.2018. The DOPT Guidelines (supra) clearly provides that such government employee may be

exempted from routine transfer/ rotational transfer subject to the administrative constraints. A routine/ rotational transfer, which has been made in compliance of the guidelines, may not be considered as administrative constraint. Besides, if the same policy is providing two separate guidelines, the guideline which is of beneficial nature shall prevail over the general guidelines inasmuch as the beneficial guideline is issued to serve a particular purpose and if such guideline is flouted it may cause an irreparable loss to a person which, generally, cannot be compensated in terms of money.

19. Therefore, I do not find any good reason to implement the policy vide para-3 i.e. 'Rotational Transfer' ignoring the para 1.2 of the same policy (supra). The rotational transfers are meant for a person who has not been protected by any compassionate or beneficial policy but if any employee has been protected from any beneficial or compassionate policy, the same may not be ignored unless there is any administrative reason to transfer such person from one zone to another zone.

20. In the present case, the wife of the petitioner is serving on the post of Telephone Attendant in Secretariat Telephone Exchange at Lucknow despite having 100% disability and while discharging her duties on such post she has confidence in the back of her mind that her husband is residing at Lucknow to look-after her in a critical situation, if need be, but if the petitioner is compelled to submit his joining at Cooch Behar which is about 1500 KM from Lucknow, the wife of the petitioner may likely to suffer irreparable loss.

21. Now, the question that there is no post available in Lucknow Region and the petitioner may not be permitted to serve anywhere at Lucknow Region, I am unable to comprehend that when the petitioner has earlier been retained at Lucknow considering his aforesaid grievance then as to why his grievance has not been considered now inasmuch as the grievance of the petitioner is of permanent nature.

22. Normally, the transfer is an exigency/ incidence of service and no courts are ordinarily interfered with the transfer orders but if such transfer may be avoided for any specific compelling reason and that reason is unavoidable, the Competent Authority being model employer should consider such condition sympathetically. At the same time the transfer may not be punitive in nature and in the present case if the petitioner is directed to submit his joining at Cooch Behar, Kolkata, it would cause irreparable mental pain to him that he would not be able to look-after and take care of his wife which would cause irreparable mental injury to her also.

23. Therefore, considering the peculiar facts and circumstances of the issue in question, I hereby allow the present petition at the admission stage. The impugned order dated 16.04.2022 (Annexure No.6), so far as it relates to the petitioner, to be more precise the transfer of the petitioner is concerned, is hereby quashed.

24. Since in place of petitioner someone has submitted his joining, as informed by Sri Gopal Kumar Srivastava as per instructions, therefore, the opposite parties are directed to accommodate the petitioner at any suitable place at Lucknow Region, be it in a rural areas or urban areas as per the convenience of the authorities

and appropriate order to that effect shall be issued forthwith, preferably, within a period of fifteen days from the date of receipt of a certified copy of this order. The petitioner is also directed to submit his joining at a place where he is directed to submit his joining in compliance of this order forthwith.

25. However, no order as to cost.

(2022)06ILR A17
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 4339 of 2022

Laxmi ...Petitioner
Versus
Canara Bank & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shiv Kumar Gupta, Maharani Deen Yadav

Counsel for the Respondents:
Sri Krishna Mohan Asthana

A. Service Law – Compassionate Appointment – Compassionate appointment is not a vested right or an alternate mode of employment. It has to be considered and granted under the relevant rules. <u>The purpose to offer compassionate appointment</u> is to show compassion to the family that has suddenly landed in a crisis for loss of regular income of the deceased bread winner who met an accidental death. **It is not a heritable right to be considered <u>after an unreasonable period</u>, for the vacancies cannot be held up for long and that appointment should not ordinarily await the attainment of majority. Where the family has survived for long, its circumstances must be seen before the competent authority may consider such appointment.** It is not to be ordinarily granted, where a person died close to his retirement. (Para 4, 7, 10)

The intention of giving compassionate appointment is to virtually restore the source of livelihood which the family has stood denuded of on account of bread winner's death in harness but in the present case, where the family has survived for more than a decade and there has never been any effort to seek compassionate appointment for all those years passed, the claim of divorced daughter on account of her being divorced by her husband in the year 2020, is not liable to be considered as divorce of a married daughter after 13 years of the death of her father itself cannot be a cause to show compassion in the matter.

Mother had been given all the terminal dues and she never made any application for compassionate appointment and she also settled her daughter with her husband. Admittedly, she was not dependent of her father when he died and only mother was dependent, who never came forward to seek appointment on compassionate ground. (Para 8, 13, 14)

Writ petition dismissed. (E-4)

<u>Precedent followed</u>:

1. Iqbal Khan Vs St. of U.P. & ors., (2022) 04 ILR A 714 (Para 5)

2. Navendra Kumar Upadhyay Vs St. of U.P. & ors., Special Appeal No. 1601 of 2012, decided on 22.10.2021 (Para 9)

3. U.O.I. Vs Smt. Asha Mishra, Civil Misc. Writ Petition No. 13102 of 2010, decided on 07.05.2010 (Para 10)

4. Central Coalfields Ltd. Through its Chairman and Managing Director & ors. Vs Parden Oraon, Civil Appeal No. 897 of 2021, decided on 9th April, 2021 (Para 11)

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

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

2. By means of this writ petition filed under Article 226 of the Constitution, the petitioner has prayed for a direction to the respondents to consider the claim of the petitioner seeking compassionate appointment raised in her representation dated 18the December, 2021.

3. Sri Krishna Mohan Asthana, learned counsel for the respondents submits that sole bread earner had died on 27th December, 2007 and all the dues were paid to the dependents and further he submits that no such application for compassionate appointment was filed for a period of 13 years and now for the first time application seeking compassionate appointment was made in the year 2021.

4. It is submitted that the compassionate appointment is exception to the general rule of appointment and is offered to the dependents to tide over the situation to meet the sudden crisis on account of death of sole bread earner of the family.

5. The dependents, who have been able to survive for more than 13 years cannot claim compassionate appointment as a matter of right as no such situation has been pleaded except the fact that earlier married daughter had been divorced by her husband in the year 2020. He has placed reliance upon the judgment of Division Bench of this Court in the case of Iqbal Khan v. State of U.P. and others passed in Special Appeal No.- 148 of 2022 decided on 1st April, 2022.

6. Having heard learned counsel for the respective parties and having examined the pleadings raised and the documents brought on record, I find merit in the submissions advanced by learned counsel for the respondent bank.

7. The purpose to offer compassionate appointment is to show compassion to the family that has suddenly landed in a crisis for loss of regular income of the deceased bread winner who met an accidental death.

8. Admittedly, mother had been given all the terminal dues and she never made any application for compassionate appointment and she also settled her daughter with her husband. Now, if daughter has got divorced from her husband, that itself cannot be a ground to give compassionate appointment to the divorced daughter after a lapse of thirteen long years. Admittedly, she was not dependent of her father when he died and only mother was dependent, who never came forward to seek appointment on compassionate ground.

9. In the case of **Navendra Kumar Upadhyay v. State of U.P. and others** (Special Appeal No.- 1601 of 2012) decided on 22nd October, 2021, Division Bench of this Court has held thus:

"The object of compassionate appointment is to enable the family of the deceased - employee to tied over the sudden financial crisis due to death of the bread earner which has left the family in penury and without means of livelihood, it is an exception to the normal rule of public employment, it is a concession. The basic intention to grant compassionate appointment is that on the death of the employee, his family is not deprived of the means of livelihood. It can not be claimed by way of inheritance. Compassionate Appointment can not be treated as a Bonanza. It is not disbursement of gift. It is not sympathy syndrome. It is meant to provide minimum relief for meeting immediate hardship to save the bereaved

family from sudden financial crisis due to death of sole bread winner. If employer finds that Financial arrangement made for family subsequent to death of the employee is adequate members of the family can not insist for compassionate appointment."

10. Another judgment of Division Bench of this Court in the case of **Union of India v. Smt. Asha Mishra** (Civil Misc. Writ Petition No.- 13102 of 2010) decided on 7th May, 2010 has held thus:

"The principles of consideration for compassionate appointment have been firmly settled and have been reiterated from time to time. Compassionate appointment is not a vested right or an alternate mode of employment. It has to be considered and granted under the relevant rules. The object of compassionate appointment is to tide over an immediate financial crisis. It is not a heritable right to be considered after an unreasonable period, for the vacancies cannot be held up for long and that appointment should not ordinarily await the attainment of majority. Where the family has survived for long, its circumstances must be seen before the competent authority may consider such appointment. It is not to be ordinarily granted, where a person died close to his retirement. The Court, however, has emphasised time to time and more authoritatively in National Institute of Technology Vs. Neeraj Kumar Singh, (2007) 2 SCC 481 that such appointment can be granted only under a scheme. It should not be considered after a long lapse of time."

11. Even Supreme Court in the case of **Central Coalfields Limited Through its Chairman and Managing Director and others v. Parden Oraon** (Civil Appeal No.- 897 of 2021) decided on 9th April, 2021 vide paragraph 9 has held thus:

"9. ... The application for compassionate appointment of the son was filed by the Respondent in the year 2013 which is more than 10 years after the Respondent's husband had gone missing. As the object of compassionate appointment is for providing immediate succor to the family of a deceased employee, the Respondent's son is not entitled for compassionate appointment after the passage of a long period of time since his father has gone missing."

12. Following the above judgments yet another Division Bench judgment of this Court very recently in the case of **Iqbal Khan v. The State of U.P. and others** (Special Appeal No.- 148 of 2022) decided on 1st April, 2022 held that objection to offer the compassionate appointment is an exception to the general rule to only enable the family to tide over the sudden financial crisis caused due to the death of sole bread winner.

13. So, the intention is virtually restore the source of livelihood which the family has stood denuded of on account of bread winner's death in harness but where the family has survived for more than a decade and there has never been any effort to seek compassionate appointment for all those years passed, the claim of divorced daughter on account of her being divorced by her husband in the year 2020, is not liable to be considered as divorce of a married daughter after thirteen years of the death of her father itself cannot be a cause to show compassion in the matter.

14. Thus Court is of this considered view that the application of divorced

daughter for compassionate appointment cannot be considered now after more than 13 years.

15. The writ petition lacks merit and is dismissed.

16. Consigned to records.

(2022)06ILR A20
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2022

BEFORE

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

Writ-A No. 6672 of 2022

Prashant Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Atipriya Gautam, Sri Ishir Sripat, Sri Rishabh Kesarwani, Sri Vijay Gautam(Sr. Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law – Selection/Appointment – Suppression - In case offence is petty in nature committed at young age, such as stealing a bread, shouting of slogans or is such which does not involve moral turpitude, cheating, misappropriation etc. or otherwise not a serious or heinous offence and accused has been acquitted or if disclosed would not have rendered an incumbent unfit for post in question, in such a case when verification form is filled, employer may ignore lapse of suppression or submitting false information in appropriate cases on due consideration of various aspects. (Para 9, 10)

There was no suppression of relevant facts or submission of false affidavit at that stage of verification. It is unfortunate that a criminal case of trivial nature came to be registered against the petitioner on 10.05.2021, which was later withdrawn vide order dated 15.02.2022, but the petitioner was not aware of the same, as neither any summons were issued nor he was arrested or had obtained bail from any competent court. Therefore, at the time of verification, he gave an affidavit not disclosing the fact about the pendency of criminal case, which was not deliberate on his part. (Para 8, 11)

Therefore, the order impugned dated 31.03.2022 cancelling the candidature of the petitioner is not sustainable in the eye of law and the same is liable to be set aside.

Writ petition allowed. (E-4)

Precedent followed:

1. Avtar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 5)

2. Pawan Kumar Vs U.O.I. & anr., AIR 2022 SC 2829 (Para 5)

3. St. of U.P. & ors. Vs Vijay Kumar & ors., Special Appeal (Def.) No. 734 of 2016 (Para 5)

Present petition assails order dated 31.03.2022, passed by the Commandant 44th Bn. P.A.C., Meerut, District Meerut, by which the candidature of the petitioner for selection/appointment on the post in question has been cancelled.

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

1. Heard Mr. Vijay Gautam, Senior Advocate assisted by Mr. Rishabh Kesarwani, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. This writ petition has been filed by the petitioner with the following prayer:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the

impugned order dated 31.03.2022 passed by the respondent no.6, (enclosed as Annexure no.1) to the writ petition by which the candidature of the petitioner for selection/appointment on the post of Constable Civil Police and Constable PAC, Direct Recruitment-2018-II has been cancelled.

(ii) Issue a writ, order or direction, in the nature of mandamus, commanding the respondent authorities, to appoint the petitioner finally for the post of Constable Civil Police and Constable PAC, Direct Recruitment-2018-II, pursuant to the advertisement dated 16.11.2018 and in pursuance of the select list issued vide notification dated 02.03.2020 with all consequential benefits.

(iii) Issue a writ, order or direction in the nature of mandamus, directing the respondent authorities, to send the petitioner for necessary training on the post of Constable Civil Police and Constable PAC, direct Recruitment-2018-II pursuant to the advertisement dated 16.11.2018 and in pursuance of the select list issued vide notification dated 02.03.2020...."

3. Learned counsel for the petitioner submits that the petitioner applied pursuant to the advertisement dated 16.11.2018 for the post of Constable Civil Police and Constable PAC, Direct Recruitment-2018-II. The petitioner appeared in the written examination on 27.01.2019. He was declared successful in written examination and, thereafter, he appeared in document verification & Physical Efficient Test (PET) and he was declared medically fit in the aforesaid test. As per the final list of selected candidates, which was published on 02.03.2020, the petitioner was shown as successful candidate. Thereafter, he was allotted district-Meerut for joining his training, however, the competent authority has not permitted the petitioner to join his training (JTC), on the ground that the petitioner has given a false affidavit with respect to pendency of criminal case, which was lodged against the petitioner and one unknown person on 10.05.2021 being Case Crime No.142 of 2021, under Sections 188, 269, 270 IPC and 3 Epidemic Act at P.S. Doghat, District-Baghpat.

4. Learned counsel for the petitioner further submits that pursuant to the order passed by this Court dated 08.10.2021 in Cri. Misc. Writ Petition No.7787 of 2021 (Vinay Kumar and Ors. vs. State of U.P. and Ors.), the State Government has withdrawn all the criminal proceedings, which have been initiated under Epidemic Act 1987, during pandemic of Covid-19 on 26.10.2021. Pursuant to the aforesaid, the criminal case lodged against the petitioner has also been withdrawn on 15.02.2022. The petitioner was neither arrested nor he has obtained bail from any court in the aforesaid case and the said FIR was lodged behind the back of petitioner as the petitioner did not have any knowledge about lodging of the said FIR, therefore, at the time of submitting the affidavit, he has not disclosed about the aforesaid criminal case, which was later withdrawn. Subsequently, the impugned order dated 31.03.2022 has been passed by respondent no.6 whereby the candidature of the petitioner has been cancelled in an arbitrary manner without application of judicial mind, therefore, the order impugned cannot be sustained in the eye of law.

5. He further submitted that as the aforesaid criminal case against the petitioner has been withdrawn vide order dated 15.02.2022 and he has already been exonerated from all the charges, therefore,

the case of the petitioner should have been considered while passing the order impugned. He further submits that while passing the order impugned, the respondent authorities has not applied their mind and passed a technical order without considering the directions as issued by the Apex Court in the cases of ***Avtar Singh Vs. Union of Indian and others, reported in 2016(8) SCC 471*** and ***Pawan Kumar vs. Union of India and another*** reported in ***(2022) 0 Supreme (SC) 391***. He further submits that the petitioners' claim for appointment is liable to be considered in the light of Avtar Singh (supra), which has been followed by the Division Bench of this Court in ***Special Appeal (Def.) No. 734 of 2016 (State of U.P. and others Vs. Vijay Kumar and others)***. Contention is that the petitioner's claim has not been examined, in accordance with law.

6. On the other hand, learned Standing Counsel submits that at the time of submission of affidavit, a criminal case was pending against the petitioner, therefore, the petitioner has suppressed the fact of pendency of criminal case and submitted a false affidavit, hence he is not entitled to be considered for appointment on the said post, as any person desirous of holding the post of government servant has to act with utmost good faith and truthfulness. He further submits that there is no illegality or infirmity in the order impugned, therefore, the writ petition is liable to be dismissed.

7. I have considered the submissions made by learned counsel for the parties as well as gone through the entire materials brought on record.

8. Undisputedly, on the date, when the affidavit has been submitted by the petitioner, though a criminal case was instituted against the petitioner but he did not have knowledge of the same as neither any summons were issued nor he was arrested or had obtained bail from any competent court, therefore, there was no suppression of relevant facts or submission of false affidavit at that stage. It is unfortunate that a criminal case of trivial nature came to be registered against the petitioner on 10.05.2021, which was later withdrawn, but the petitioner was not aware of the same, therefore, at the time of verification, he gave an affidavit not disclosing the fact about the pendency of criminal case, which was not deliberate on his part.

9. The Apex Court in the case of ***Avtar Singh Vs. Union of Indian and others***, reported in ***2016(8) SCC 471*** has held that in case offence is petty in nature committed at young age, such as stealing a bread, shouting of slogans or is such which does not involve moral turpitude, cheating, misappropriation etc. or otherwise not a serious or heinous offence and accused has been acquitted in such a case when verification form is filled, employer may ignore lapse of suppression or submitting false information in appropriate cases on due consideration of various aspects. It has also held that non-disclosure of conviction/acquittal in a case of trivial nature such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse. Paragraph no. 38 of the aforesaid judgment is as under:-

"38. We have noticed various decisions and tried to explain and reconcile

them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2 While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3 The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4 In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted : -

38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3 If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9 In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant

comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11 Before a person is held guilty of suppressio veri or sugge6716The stio falsi, knowledge of the fact must be attributable to him."

10. Following the judgment in the case of ***Avtar Singh (supra)***, the Apex Court in its latest judgment in the case of ***Pawan Kumar vs. Union of India and another, reported in 2022 0 Supreme (SC) 391***, has held that by mere suppression of material/false information regardless of fact whether conviction or acquittal has been recorded, employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen. At the same time, effect of suppression of material/false information involving in a criminal case, if any, is left for employer to consider all relevant facts and circumstances available as to antecedents and keeping in view objective criteria and relevant service rules into consideration, while taking appropriate decision regarding continuance/suitability of employee into service. Paragraph no. 16 of the aforesaid judgment is as under:-

"16. The judgment relied upon by the respondent Rajasthan Rajya Vidyut Prasaran Nigam Limited andanotherv. Anil Kanwariya(2021) 10 SCC 136may not be of any assistance for the reason that it was a case where the respondent employee before submitting application pursuant to the advertisement inviting applications was convicted by the competent Court of jurisdiction and this fact was not disclosed by him while filling his application form and that was the reason favoured upon the Court while upholding action of the authority in passing the order of termination which was impugned in the proceedings. We have already quoted paragraph 38 of the judgment by a three-Judge Bench of this Court in Avtar Singh (supra) and in the context of the factual background of the present case applied the said principles. One distinguishing factor, as noticed above, is that the criminal complaint/FIR in the present case was registered post submission of the application form. We have also taken into account the nature of the allegations made in the criminal case and that the matter was of trivial nature not involving moral turpitude. Further, the proceedings had ended in a clean acquittal. As is clear from paragraph 38 in Avtar Singh (supra), ***all matters cannot be put in a straitjacket and a degree of flexibility and discretion vests with the authorities, must be exercised with care and caution taking all the facts and circumstances into consideration, including the nature and type of lapse."***

11. Having considered the arguments raised by learned counsel for the parties and having gone through the case laws as referred hereinabove, this Court finds that at the time of submission of affidavit, the criminal case was already registered against him but the petitioner did not have knowledge of the same as neither any summons were issued nor he was arrested or had obtained bail from any competent court, therefore, there was no suppression of facts or submission of false affidavit at that stage. Also the aforesaid criminal case, which is trivial in nature was withdrawn vide order dated 15.02.2022, hence the competent authority while passing the order impugned has failed to follow the mandate of the Apex Court in the case of ***Avtar***

Singh (supra) and ***Pawan Kumar (supra)***, therefore, the order impugned dated 31.03.2022 cancelling the candidature of the petitioner is not sustainable in the eye of law and the same is liable to be set aside.

12. In view of the above, the impugned order dated 31.03.2022 passed by respondent no.6 is **set aside** and the matter is remitted to the respondent no.6, who in turn, shall consider the case of the petitioner herein and take a decision afresh, in accordance with law as well as keeping in view the law laid down by Apex Court in **Avtar Singh (supra)** and **Pawan Kumar (supra)**, within a period of two months from the date of receipt of certified copy of this order, if there is no other legal impediment.

13. With the aforesaid observations/directions, this writ petition is, accordingly, **allowed**.

(2022)06ILR A25
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 9763 of 2021

C/M Shiraze Hind Inter College, Jaunpur & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Raees Ahamad, Sri Sanjay Kumar Om

Counsel for the Respondents:
C.S.C., Sri Rahul Mishra, Ms. Shahla Naz

A. Service Law – Jurisdiction - Power to stay order of termination - U.P. Secondary Education Services Selection Board Act, 1982: Section 30, 32; U.P. Intermediate Education Act, 1921: Section 16(G) to 16(I), 16(G)(3)(a), 16(G)(7), 16-FF; U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 (U.P. Act No 24 of 1971) - The District Inspector of School has no jurisdiction to interfere with the power of administration of minority institution w.r.t. their right to take disciplinary action against their staff. Petitioner's college is a minority college, therefore, District Inspector of School has no jurisdiction to pass the order dated 25.02.2021. (Para 31, 32)

U.P. Intermediate Education Act, 1921 – Sections 16(G)(3)(a) - Since no appropriate guidelines have been provided for exercise of power u/s 16G(3)(a) of the Act, such an uncanalised power on the Inspector or the Inspectress would tantamount to an inroad into the power of disciplinary control of the Managing Committee of the minority institution over its employees; hence **the said provision would not apply to the minority institution as it impinges the right of minority to have disciplinary control over its employees.** (Para 23, 24, 28)

Protection is given to the minority institutions u/Art. 30(1) of the Constitution of India for their administration. Regulations which are framed to ensure the standard of institution and are for the benefit of institution are permissible, but the moment it goes beyond a mere regulation and may impair the right of administration of minority institutions, Art. 30 of Constitution of India comes into play and such regulation is hit by Art. 30 of Constitution of India. (Para 27)

B. U.P. Secondary Education Services Selection Board Act, 1982 - Sections 30 & 32 - It is worth to point out that after enactment of Act, 1982, the power of approval or disapproval as provided u/s 16(G)(3)(a) of the Act, 1921 has been vested in the Board under the Act No. 5 of 1982. S.32 of the Act No. 5 of 1982 which deals with the applicability of Act, 1921 and provides that provision of Act, 1921 and regulations framed therein so far as they are not inconsistent with the provisions of

the Act, 1982 or rules made thereunder shall remain in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in the rank of a teacher. (Para 29)

Section 30 of the Act, 1982 states that the provisions of the said Act shall not apply to the institution established and administered by a minority referred to in Clause (1) of Article 30 of Constitution of India. Thus, reading of S.30 of the Act, 1982 clearly suggests that legislature did not want to put any fetter upon the power of management of minority institution in disciplinary matters otherwise there was no reason for the legislature to exclude the minority institution from the purview of Act, 1982. (Para 30)

Writ petition allowed. (E-4)

Precedent followed:

1. T.M.A. Pai Foundation & ors. Vs St.of Karn. & ors., (2002) 8 SCC 481 (Para 24)

2. Committee of Management Clancy Intermediate College Through Manager Vs St. of U.P. & ors., Writ-A No. 15765 of 2016 (Para 25)

3. Committee of Management St. John Inter College Vs Girdhari Singh & ors., 2001 (4) SCC 296 (Para 18)

4. Kumari Udyan Balika Inter College, Kanpur & ors. Vs D.I.O.S., Kanpur Nagar & ors., Writ-A No. 15379 of 2006, decided on 08.03.2013 (Para 18)

Precedent distinguished:

1. The State of Uttar Pradesh & ors. Vs Principal Abhay Nandan Inter College & ors., AIR 2021 SC 4968 (Para 19, 33)

Present petition assails order dated 25.02.2021, passed by the District Inspector of Schools, District Jaunpur, staying the order of termination of respondent no. 4 (Shri Ashutosh Kumar Singh) subject to the decision of Criminal Case No. 141/2020 and directing the petitioner to submit his salary bills.

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri S.K. Om, learned counsel for the petitioners, learned Standing Counsel for respondent nos.1 to 3 and Sri Rahul Mishra, learned counsel for the respondent no.4.

2. The petitioner by means of the present writ petition has assailed the order dated 25.02.2021 passed by respondent no.3 by which he has stayed the order of termination of respondent no.4 subject to the decision of Criminal Case No.141 of 2020, under Sections 379, 419, 420 and 506 I.P.C. and directed the petitioner to submit salary bills of respondent no.4.

3. The petitioner is Committee of Management of Shiraze Hind Inter College, Murki, Kerakat, District Jaunpur (hereinafter referred to as 'college'). The said college is recognized and aided intermediate college governed by the provision of U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921') and also U.P. Act No.24 of 1971. The petitioner claims that the college is a minority college and the provision of U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as 'Act, 1982') is not applicable to the college being minority college.

4. The respondent no.4- Ashutosh Kumar Singh was appointed as Assistant Teacher on 04.08.2010 in the college. The respondent no.4 failed to discharge his duties properly as he was involved in groupism, politics and also trying to control the management of the college which effected the study of the students and future of the students of the college was at stake.

5. The respondent no.4 was issued a show cause notice by the petitioner which

was replied by the respondent no.4 on 10.02.2020. The reply of respondent no.4 was placed before the petitioner for consideration. The petitioner found the reply of respondent no.4 to the show cause notice unsatisfactory and consequently, suspension order dated 17.02.2020 was issued against respondent no.4.

6. Thereafter, disciplinary committee on 05.05.2020 issued charge sheet against the respondent no.4 levelling six charges, which reads as under;-

"अतः आपके विरूद्ध जांच उपरान्त आरोप पत्र निम्नलिखित बिन्दुओं पर दिया जाता है।

(1) आपके कार्यकाल में विद्यालय ,शीराजे हिन्द इण्टर कालेज मुर्की, केराकत, जोनपुर) की साख समाज में गिरी एवं विद्यालय, विद्यालय न रहकर राजनीति का अड्डा और एक अन्य स०अ० मो० राफे के साथ आपका धनोपार्जन का अड्डा बनकर रहा गया।

(2) आपके और अन्य स०अ० मो० राफे द्वारा छात्रों को कोचिंग और ट्यूशन पढ़ाने के लिए उत्प्रेरित किया जाता है और इसको लेकर छात्रों को मारा पीटा भी जाता है। आपके इस क्रिया कलाप से विद्यालय से छात्रों का पलायन तेजी से हो रहा है।

(3) आपके क्रिया कलाप एवं स०अ० मो० राफे के साथ गुटबाजी करके विद्यालय की व्यवस्था पर अधिकार जमाने हेतु प्रबन्ध समिति के साथ नूरा कुश्ती करने में व्यस्थ रहते हैं।

(4) आपको दिनांक 04.02.2020 को कारण बताओ नोटिस का जवाब कमेटी को न देकर आपने उल्टे कमेटी से ही सवाल पूछ लिये इससे प्रतीत होता है कि आप दबंग, अनुशासनहीन और सरकश किस्म के व्यक्ति हैं और आपका असामाजिक तत्वों से भी गठजोड़ है।

(5) आप द्वारा बारबार शासनप्रशासन को गुमराह करने का प्रयास किया गया जिससे विद्यालय को काफी आर्थिक व सामाजिक नुकसान उठाना पड़ा।

(6) विद्यालय में पठन पाठन कार्य में रूचि नहीं देते है। मोबाइल पर 'पबजी' गेम में व्यस्त रहते हैं।"

7. The respondent no.4 submitted reply to the aforesaid charge sheet on 09.05.2020. The respondent no.4 was aware of the fact that college was minority college and Section 16(G)(7) of the Act, 1921 is not applicable yet he wrote a letter dated 11.05.2020 to respondent no.3-District Inspector of Schools, Jaunpur.

8. On receiving the letter of respondent no.4, the respondent no.3-District Inspector of School passed an order dated 11.05.2020 directing the petitioner to submit salary bills of respondent no.4 as the suspension order became inoperative on expiry of 60 days in absence of approval of respondent no.3 in view of Section 16 (G) (7) of the Act, 1921.

9. In the reply to the charge sheet, the respondent no.4 denied all the charges levelled against him. However, disciplinary committee did not find the reply of respondent no.4 satisfactory and accordingly, petitioner committee of management passed an order dated 18.05.2020 terminating the service of respondent no.4.

10. Further case of the petitioner is that respondent no.4 submitted a representation against the order of dismissal dated 18.05.2020 on 04.06.2020 before the respondent no.3 levelling false and frivolous allegation against the petitioner. The respondent no.3 took cognizance of the representation of the respondent no.4 in exercise of power conferred upon him under Section 16-FF of the Act, 1921 and issued a notice to petitioner to appear before him on 22.06.2020. The petitioner showed their

inability to appear on 22.06.2020 due to pandemic COVID-19.

11. When respondent no.4 failed in his attempt to get reinstated, he in collusion with respondent no.3 got issued a show cause notice to petitioner calling upon him to show cause as to why the college may not put under authorised controller.

12. The aforesaid notice was replied by the petitioner on 29.10.2020. However, respondent no.2 by order dated 28.12.2020 put the college under authorised controller.

13. Being aggrieved by the order of appointment of authorised controller, petitioner preferred Civil Misc. Writ Petition No.586 of 2021 and Contempt Application (Civil) No.1296 of 2021. However, the respondent no.2 after receiving notice of the contempt application, recalled the order dated 28.12.2020.

14. Further case of the petitioner is that they came to know in the first week of March that respondent no.3 has reinstated the respondent no.4 by order dated 25.02.2021 which order could be obtained by the petitioner under Right to Information Act. The order dated 25.02.2021 passed by respondent no.3 is impugned in the writ petition.

15. The respondent no.4 has filed counter affidavit denying the averments made in the writ petition. The respondent no.4 stated in the counter affidavit that enquiry against him was conducted dehors the principle of natural justice. It is stated that petitioner has neither supplied any evidence/material alongwith charge sheet based on which charge sheet was issued nor any oral evidence of any of the witness was recorded. Thus, respondent no.4 was not given any opportunity to rebut the charges levelled against him nor was given opportunity to cross examine any of the witnesses, who supported the charges. It is stated that Section 16(G) to Section 16(I) of the Act, 1921 which provides condition for service of Head Master or Teacher is applicable to the minority institutions. On the strength of aforesaid pleadings, it is stated in the counter affidavit that approval of the District Inspector of School is necessary before termination order is issued.

16. In the rejoinder affidavit filed by the petitioners, they denied the averments contained in the counter affidavit of respondent no.4.

17. The only contention which has been advanced by the learned counsel for the petitioner is that the order dated 25.02.2021 of respondent no.3 disapproving the termination order of respondent no.4 is without jurisdiction since the provision of Section 16(G)(3)(a) to Section 16 (I) of the Act, 1921 is not applicable in the case of minority institution. In other words, it is contended that District Inspector of Schools has exercised the power not vested in him under the statue in passing the order dated 25.02.2021 by which he has stayed the termination order of respondent no.4 and directed the petitioner to submit salary bills of respondent no.4 which shall be subject to decision of Criminal Case No.141 of 2020, under Sections 379, 419, 420 and 506 I.P.C. against respondent no.4.

18. In support of his case, learned counsel for the petitioner has placed reliance upon the judgement of Apex Court in the case of ***Committee of Management***

St. John Inter College Vs. Girdhari Singh and Others 2001 (4) SCC 296, and judgement of this Court in the case in the case of ***(Kumari Udyan Balika Inter College, Kanpur and Others Vs. D.I.O.S., Kanpur Nagar and Others)*** passed in Writ-A No.15379 of 2006.

19. Per contra, learned counsel for the respondents would contend that provision of Section 16(G)(3)(a) to Section 16 (I) of the Act, 1921 is applicable in the present case in view of the judgement of Apex Court in the case of ***The State of Uttar Pradesh and Others Vs. Principal Abhay Nandan Inter College and Others AIR 2021 SC 4968.***

20. I have considered the rival submissions of learned counsel for the parties and perused the record.

21. In the instant case, it is not in dispute that the college is a minority college established under Article 30 of the Constitution of India.

22. Now, before appreciating the controversy on facts, it would be apt to refer to the judgement of Apex Court relied upon by the learned counsel for the petitioner.

23. In the case of ***Committee of Management St. John Inter College (supra)***, the Apex Court has reversed the judgement of High Court holding that in case of a minority institution, approval under Section 16(G)(3)(a) of the Act, 1921 is necessary. Paragraph 6 of the said judgement is reproduced herein below:-

"6. Let us now notice some of the decisions of this Court. In Kerala Education Bill, 1957, AIR 1958 SC 956, this Court had observed the constitutional right to administer an educational institution by the minority of their choice does not necessarily militate against the claim of the State to insist that it may prescribe reasonable regulations to ensure the excellence of the institutions. In Sidhajbhai Sabbai vs. State of Gujarat AIR 1963 SC 540, a Constitution Bench observed that Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed and such regulations are not restrictions on the substance of the right which is guaranteed; they secure the proper functioning of the institution, in the matters educational. In State of Kerala vs. Very Rev. Mother Provincial, (1970) 2 SCC 417, it had been stated that the right of management in respect of a minority institution cannot be taken away and vested with somebody else, as that would be encroachment upon the guaranteed right but that right is not an absolute one and it is open to the State to regulate the syllabus of the examination and discipline for the efficiency of the institution and the right of the State to regulate the education or educational standards and allied matters cannot be denied. In St. Xavier's College Society vs. State of Gujarat (1974) 1 SCC 717, this Court had observed:

"31. Regulations which will serve the interest of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions.

In Lilly Kurian vs. Sr. Lewina (1979) 2 SCC 124, the Court had observed: "36. Protection of the minorities is an

article of faith in the Constitution of India. The right to the administration of institutions of minority's choice enshrined in Article 30(1) means 'management of affairs' of the institution. This right is, however, subject to the regulatory power of the State. Article 30(1) is not a charter for mal-administration; regulation, so that the right to administer may be better exercised for the benefit of the institution, is permissible; but the moment one goes beyond that and imposes, what is in truth, not a mere regulation but an impairment of the right to administer, the Article comes into play and the interference cannot be justified by pleading the interests of the general public; the interests justifying interference can only be the interests of the minority concerned."

In Frank Anthony Public School Employees Association vs. Union of India (1986) 4 SCC 707, the Court was examining the validity of Section 12 of the Delhi School Education Act. Sections 8(1), 8(3), 8(4) and 8(5) were held not to have encroached upon any right of the minority to administer their educational institutions. But Section 8(2) which stipulated that no employee of a recognised private school shall be dismissed, removed or reduced in rank nor will his services be terminated except with the prior approval of the Director was held to have interfered with the right of the minority, and therefore, the said provision was held to be inapplicable to the minority institutions. The aforesaid dictum, no doubt, was in respect of an unaided minority institution. The conspectus of the aforesaid decision would indicate that there would be no bar for the Government to have regulatory measures for ensuring a standard of excellence of the institutions and such a measure would not in any way affect the right of the minority to administer its institutions engrafted in Article 30 of the Constitution. But notwithstanding the same, if the so called regulatory measures confer power on any specified authority, without indicating any guidelines for exercise of that power, then exercise of such power by the appropriate authority would offend the provisions of Article 14 and would not be allowed to be retained, as that would amount to an arbitrary inroad into the right of the minority, in the matter of administering its institutions. In another words, if the regulatory provision conferring power on the educational authority is uncanalised and unguided and does not indicate any guidelines under which the educational authority could exercise the said power, then in such a case, the conferment of a blanket power on the educational authority would interfere with the right of control of the employer-minority institution in the matter of exercising disciplinary control over the employees of the institution. So adjudged, we are unable to find any guideline in Section 16G(3)(a) of the Uttar Pradesh Intermediate Education Act to be followed by the Inspector in the matter of approving or disapproving the order of termination of service of an employee of the aided educational institution. We are unable to accept the reasoning of the majority judgment of the Full Bench of the Allahabad High Court that Regulation 44 provides the guidelines. The said Regulation 44 merely prescribes the period within which the Inspector or Regional Inspectress is required to communicate his/her decision to the Management and further in a case where all the papers have not been received from the Management, the said Inspector/Inspectress could call for the papers from the Management. But that by no stretch of imagination can be held to be providing the guidelines for exercise of power in the matter of approval or

disapproval of the order of termination passed by the Management. Since no appropriate guidelines have been provided for exercise of power under Section 16G(3)(a) of the Act, it must be held that such an uncanalised power on the Inspector or the Inspectress would tantamount to an inroad into the power of disciplinary control of the Managing Committee of the minority institution over its employees and as such the said provision would not apply to the minority institution, as was held by this Court in Frank Anthonys case. In this view of the matter, the majority view in the Full Bench Judgment of Allahabad High Court must be held to be erroneous and cannot be sustained."

24. This Court also in the case of ***Kumari Udyan Balika Inter College (supra)*** after noticing various paragraphs of the judgement of Apex Court in the case of ***T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others (2002) 8 SCC 481*** and in the case of ***Committee of Management St. John Inter College (supra)*** has held that District Inspector of Schools had no jurisdiction to revoke the order of dismissal of a teacher of a minority institution. Relevant extract of the judgement of this Court is extracted herein below:-

"A similar matter came up before a Division Bench of this Court in Special Appeal no.1059 of 2001, Mohammad Shafiquzzama vs. Committee of Management, Daulat Hussain Muslim Indian Intermediate College, Allahabad & others and the Division Bench of this Court has held as follows:-

"Counsel for the parties stated that no Educational Tribunal has yet been set up by the State Government as observed by the Apex Court in the said judgement nor any notification has been issued by the State Government authorizing the District Judge or the Additional District Judge to hear the cases of employees of minority institutions. The appellant who is challenging the disciplinary proceedings and the consequential dismissal order, has remedy of filing a civil suit challenging the dismissal order and the provision. Section 9 of the Code of Civil Procedure is wide engouth to provide remedy to the appellant. Till the Educational Tribunal is constituted by the State Government as observed by the Apex Court, it is open to the appellant to file a civil suit in competent court challenging the dismissal order. In view of the fact that the appellant is not alleging violation of any statutory provision in conduct of enquiry, no relief can be granted to appellant in the writ proceedings. However, we observe that in case the appellant challenges the dismissal order in a civil suit, the observations made by the learned Judge of this Court while dismissing the writ petition on merits of the case, shall not come in the way of the appellant and the suit proceedings be decided independently on the basis of the materials before the competent court and the said court will not in any manner feel itself bound by the observations made by the learned Single Judge in dismissing the writ petition. In view of the nature of the disputed which has been raised by the appellant we further observe that if civil suit is filed by the appellant the same may be disposed of expeditiously. We do not find any good ground to interfere with the order of the learned single Judge dismissing the writ petition.

This special Appeal is dismissed with the observations as made above."

25. Similar view has been taken by this Court in the case of ***Committee of Management Clancy Intermediate College***

Through Manager Vs. State of U.P. and Others passed in Writ-A No.15765 of 2016.

26. A scant analysis of the judgement of Apex Court in the case of ***Committee of Management St. John Inter College (supra)*** shows that Apex Court has considered the issue as to what restrictions/regulations would not interfere with the right to run minority institution under Article 30 of the Constitution of India.

27. The Apex Court emphasized that the protection given to the minority institutions under Article 30(1) of the Constitution of India for mal administration, regulations which are framed to ensure the standard of institution and are for the benefit of institution are permissible, but the moment it goes beyond a mere regulation but may impair the right of administration of minority institutions, Article 30 of Constitution of India comes into play and such regulation is hit by Article 30 of Constitution of India.

28. The Court found that as Section 16(G)(3)(a) of the Act, 1921 provides no appropriate guidelines to the District Inspector of School the manner in which the power conferred on it is to be exercised, that would tantamount to an inroad into the power of disciplinary control of managing committee of minority institution over its employees; hence the said provision would not apply to the minority institution as it impinges the right of minority to have disciplinary control over its employees.

29. It is worth to point out that after enactment of Act, 1982, the power of approval or disapproval as provided under Section 16(G)(3)(a) of the Act, 1921 has been vested in the Board under the Act No.5 of 1982. Section 32 of the Act No.5 of 1982 which deals with the applicability of Act, 1921 provides that provision of Act, 1921 and regulations framed therein so far as they are not inconsistent with the provisions of the Act, 1982 or rules made thereunder shall remain in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in the rank of a teacher.

30. Further, Section 30 of the Act, 1982 states that the provisions of the said Act shall not apply to the institution established and administered by a minority referred to in Clause (1) of Article 30 of Constitution of India. Thus, reading of Section 30 of the Act, 1982 clearly suggests that legislature did not want to put any fetter upon the power of management of minority institution in disciplinary matters otherwise there was no reason for the legislature to exclude the minority institution from the purview of Act, 1982.

31. Thus, in view of the judgemen of Apex Court, the District Inspector of School has no jurisdiction to interfere with the power of administration with respect to their right to take disciplinary action against their staff.

32. In view of the aforesaid fact, this Court finds that as admittedly, petitioner's college is a minority college, therefore, District Inspector of School has no jurisdiction to pass the order dated 25.02.2021.

33. Now, coming to the judgement relied upon by the learned counsel for the respondents in the case of ***Principal Abhay Nandan Inter College (supra).*** Perusal of paragraphs 32 to 35 of the said judgement

on which reliance has been placed by the learned counsel for the respondents does not indicate that Apex Court has held that District Inspector of School has jurisdiction to interfere with the power of management of a minority institution to take disciplinary action against their staff. Perusal of the aforesaid paragraphs further indicates that Apex Court has elaborated that the regulations framed for the benefit of public at large and for minority institution don't impinge the right of minority to run minority institution under Article 30 of Constitution of India, but it does not deal with a situation as in the present case.

34. Thus, judgement of the Apex Court relied upon by the learned counsel for the respondents is not applicable in the facts of the present case.

35. Accordingly, order impugned dated 25.02.2021 is quashed with liberty to respondent no.4 to pursue his remedy available to him under the law.

36. For the reasons given above, the writ petition is allowed with no order as to costs.

(2022)06ILR A33
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.03.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 10502 of 2019

Kalyan Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Rai, Sri Prateek Rai

Counsel for the Respondents:
A.S.G.I., Sri Ankush Tandon, C.S.C., Sri Ishan Shishu, Sri Anoop Trivedi (Senior Adv.)

A. Service Law – Dismissal – Disciplinary proceeding - Industrial Disputes Act, 1946 - Section 10 - The competence of an authority to hold an enquiry against an employee who has retired, depends upon the statutory rules which govern the terms and conditions of his service. No disciplinary proceedings can be continued against the employee after retirement unless and until rules governing such proceedings provided for the same. (Para 10, 12, 15)

The relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. **Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even after his retirement, but nature of punishment would change. The punishment of dismissal/removal from service would not be imposed.** (Para 10)

B. Maintainability - There is no factual controversy involved in the case that may require any reference inasmuch as it also not being a case where enforcement of any provision of standing orders is sought. **It would be a futile exercise to ask for the petitioner to raise reference because the legal issue involved can be answered in this petition itself and the establishment being an authority within the meaning of Art. 12 of the Constitution of India, this petition can be decided on merits.** (Para 6, 11)

C. Appointments made long back pursuant to a selection need not be disturbed. A three decade old issue of entry into the service of establishment should not have been reopened at the fag end of service career of an employee. (Para 8, 15)

While it may be true that furnishing a forged document would not justify the appointment obtained on the said basis but for that

appropriate time would be a reasonable one when proper verification of such a document could be done. It is the duty of those who are responsible for making selection and appointment to verify all the credentials of a candidate before giving appointment but once after due verification entry is given, then it should be only an exceptional circumstance to annul the appointment. **A third party complaint should normally not be entertained as of compulsion. Establishment must safeguard its employees' interest first while embarking upon an enquiry at the instance of a third partly complaint which may often be made with ulterior and ill-motives.** (Para 18)

Writ petition allowed. (E-4)

Precedent followed:

1. Buddhi Nath Chaudhary & ors. Vs Abahi Kumar & ors., Appeal (Civil) 1397 of 2001 (Para 8)

2. Anant R. Kulkarni Vs Y.P. Education Society & ors., (2013) 6 SCC 515 (Para 10)

Present petition assails order dated 17.04.2018, passed by Chief Production Manager & Disciplinary Authority, Indian Oil Corporation Ltd. Mathura Refinery, Mathura, awarding the petitioner punishment of dismissal from service and the order dated 12.06.2019, passed by Executive Director & Appellate Authority, Indian Oil Corporation Ltd. Mathura Refinery, Mathura, rejecting the appeal.

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

1. The sole question of law that arises for consideration in the present case is as to whether petitioner could have been inflicted with a major penalty of termination/dismissal/removal from service after attaining the age of superannuation even in the face of the fact that certified standing orders framed under the Industrial Disputes Act, 1946 are absolutely silent on this point.

2. A preliminary objection has been raised by the learned counsel for the respondent regarding maintainability of this writ petition on the ground that petitioner has alternative efficacious remedy under Section 10 of the Industrial Disputes Act 1946, inasmuch as, services of the petitioner while in service being governed under the certified Standing orders, writ jurisdiction under Article 226 of the Constitution, cannot be invoked to enforce the same.

3. Briefly stated facts of the case are that petitioner who was appointed in the year 1981 as a helper and later on received promotions, finally came to be retired from service of respondents establishment on 22nd February, 2017 as a Senior Technical Assistant Grade VI (production).

4. A disciplinary proceeding was initiated against the petitioner in the matter of a complaint made by a third party and the complaint was that, while petitioner applying for employment in the year 1981, he had submitted a transfer certificate, in which he showed himself as class VIIIth passed, whereas transfer certificate was allegedly a forged document. A report was called for from the District Basic Education Officer which was submitted on 23rd July, 2016 in which it came to be reported that transfer certificate did not appear to be genuine one as per report of the principal. However, on further verification a second report suggested that transfer certificate was genuine one and that there was no dispute regading the same. Two reports being contradictory to each other, respondent establishment called for a third report which was submitted on 2nd August,

2016 and on the basis of same an inhousing enquiry was got conducted by District Basic Education Officer and in this report, it came to be reported that transfer certificate did not appear to be a genuine document. Accordingly, disciplinary proceeding was instituted and chargesheet was issued to the petitioner on 27.8.2016 alomost 34 years after the petitioner was appointed imputing with the charge that he obtained employment by submitting forged document. Petitioner did submit reply as enquiry proceeded with but the enquiry could be completed and report could be submitted on 12.12.2017 only after petitioner got superannuated. On the basis of the enquiry report petitioner was served with a show cause notice.

5. Petitioner challenged the enquiry before Delhi High Court taking the plea that since he had retired and the standing orders did not provide for disciplinary proceedings to continue after retirement of the employee, hence the enquiry report and the proceedings pursuant thereto was liable to be set aside. The Delhi High Court in its order dated 12.03.2018 provided the petitioner to submit reply before the competent authority itself and competent authority was directed to look into his reply and pass appropriate orders. Petitioner submitted reply questioning the continuance of proceeding even after his retirement, however, disciplinary authority rejected the same on the ground that since the Delhi High Court had rejected the plea of the petitioner to quash the proceedings, this chapter was closed. Petitioner preferred writ petition before this Court against the said order and this Court remitted the matter vide order dated 08.02.2019, directing petitioner to prefer appeal before the appellate authority and it was left open for him to take such plea regarding jurisdiction of the authority to continue disciplinary proceedings after retirement of an employee and in the event if petitioner took such a plea, the same was directed to be considered. The appellate authority dismissed the appeal on the same ground that since Delhi High Court had already rejected petitioner's plea regarding continuance of disciplinary proceedings after retirement, so it was not open to question the same. Hence this petition.

6. So far as issue regarding maintainability of the writ petition is concerned, I am of the view that since there is no factual controversy involved in the case that may require any reference inasmuch as it also not being a case were enforcement of any provision of standing orders is sought, the writ petition was rightly entertained and now case can be decided on merits as pleadings have been exchanged.

7. The only issue is as to whether standing orders did provide to meet such any eventuality as has cropped up in the present case and if not, how far employer is justified to continue with disciplinary proceedings against a superannuated employee.

8. In the present case, learned counsel for the petitioner has relied upon the judgment of the Supreme Court in the case Buddhi Nath Chaudhary and Others v. Abahi Kumar and Others passed in Appeal (Civil) 1397 of 2001, in which the Supreme Court has held thus:

"The selected candidates, who have been appointed, are now in employment as Motor Vehicle Inspectors for over a decade. Now that they have worked in such posts for a long time, necessarily they would

have acquired the requisite experience. Lack of experience, if any, at the time of recruitment is made good now. Therefore, the new exercise ordered by the High Court will only lead to anomalous results. Since we are disposing of these matters on equitable consideration, the learned counsel for the contesting respondents submitted that their cases for appointment should also be considered. It is not clear whether there is any vacancy for the post of Motor Vehicle Inspectors. If that is so, unless any one or more of the selected candidates are displaced, the cases of the contesting respondents cannot be considered. We think that such adjustment is not feasible for practical reasons. We have extended equitable considerations to such selected candidates who have worked in the post for a long period, but the contesting respondents do not come in that class. The effect of our conclusion is that appointments made long back pursuant to a selection need not be disturbed. Such a view can be derived from several decisions of this Court including the decisions inRam Sarup vs. State of Haryana & Ors., 1979 (1) SCC 168;District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & Anr. vs. M. Tripura Sundari Devi, 1990 (3) SCC 655; and H.C.Puttaswamy & Ors. vs. The Honble Chief Justice of Karnataka High Court, Bangalore & Ors., 1991 Supp. (2) SCC 421. Therefore, we must let the matters lie where they are."

9. Learned counsel appearing on behalf of the respondent Sri Ankush Tandon submits that there is judgment that of course, provides that such proceedings can be continued even after retirement but he very fairly concedes that the order of termination from service cannot be passed.

10. Vide paragraph 18 to 24 of the judgment in the case of **Anant R.Kulkrni v. Y.P. Education Society and Others (2013) 6 SCC 515**, Supreme Court has held thus:

"18. This Court in NOIDA Entrepreneurs Association v. NOIDA & Ors., AIR 2011 SC 2112, examined the issue, and held that the competence of an authority to hold an enquiry against an employee who has retired, depends upon the statutory rules which govern the terms and conditions of his service, and while deciding the said case, reliance was placed on various earlier judgments of this Court includingB.J. Shelat v. State of Gujarat & Ors., AIR 1978 SC 1109;Ramesh Chandra Sharma v. Punjab National Bank & Anr., (2007) 9 SCC 15; and UCO Bank & Anr. v. Rajinder Lal Capoor.

19.In State of Assam & Ors. v. Padma Ram Borah, AIR 1965 SC 473, a Constitution Bench of this Court held that it is not possible for the employer to continue with the enquiry after the delinquent employee stands retired. The Court observed:-(AIR 475 para 7)

"According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961." (Emphasis added) While deciding the said issue, the Court placed reliance on the judgment inR.T. Rangachari v. Secretary of State for India in Council.

20.In State of Punjab v. Khemi Ram, AIR 1970 SC 214, this court observed: (SCC p. 32, para 12)

"12. There can be no doubt that if disciplinary action is sought to be taken against a government servant it must be done before he retires as provided by the said rule. If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed therein."

21.In Kirti Bhusan Singh v. State of Bihar & Ors., AIR 1986 SC 2116, this Court held as under: (SCC pp. 678-79, para 6)

"6.... We are of the view that in the absence of such a provision which entitled the State Government to revoke an order of retirement..... which had become effective and final, the order passed by the State Government revoking the order of retirement should be held as having been passed without the authority of law and is liable to be set aside. It, therefore, follows that the order of dismissal passed thereafter was also a nullity."

22.In Bhagirathi Jena v. Board of Directors, O.S.F.C. & Ors., AIR 1999 SC 1841, this Court observed: (SCC pp. 668-69, para 7)

"... There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

23.In U.P. State Sugar Corporation Ltd. & Ors. v. Kamal Swaroop Tondon, this Court dealt with a case wherein statutory corporation had initiated proceedings for recovery of the financial loss from an employee after his retirement from service. This Court approved such a course observing that in the case of retirement, master and servant relationship continue for grant of retrial benefits. The proceedings for recovery of financial loss from an employee is permissible even after his retirement and the same can also be recovered from the retrial benefits of the said employee.

24. Thus, it is evident from the above, that the relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even after his retirement, but nature of punishment would change. The punishment of dismissal/removal from service would not be imposed."

11. In such above view of the matter, it would be a futile exercise to ask for the petitioner to raise reference because this legal issue can be answered in this petition itself and the establishment being an authority within the meaning of Article 12 of the Constitution of India, I proceed to decide this petition on merits.

12. It is a settled legal position that no disciplinary proceedings can be continued after retirement unless and until rules

governing service conditions provided otherwise.

13. The only issue is as to whether the judgment of Delhi High Court will come in the way of granting relief to the petitioner in the present case or not. What I find is that in the order of Delhi High Court, it was directed that petitioner's reply will be considered and petitioner did raise specific point in his reply which was not considered and same was brushed aside in view of judgment of the Delhi High Court. I am not convinced with the finding returned by the authority on this point. The judgment of High Court did not close the chapter, it left it open instead, for the authority to take decision on this point, if it is raised in reply.

14. Besides above, after decision was taken by the appropriate appellate authority, petitioner had preferred an appeal and this Court in writ petition no. 2037 of 2019 had again directed for the appellate authority to consider the jurisdictional aspect of the matter if raised in appeal. This order had never been challenged by the respondents in appeal in this Court or in Supreme Court. Thus mandate contained in the order of this Court dated 08.02.2019 was binding upon the appellate authority. The appellate authority having not considered the same, the order passed by the appellate authority is also not sustainable and deserves to be quashed.

15. Now this matter can again be remitted to the appellate authority to reconsider but since even disciplinary authority had assigned the same reason to reject the plea of the petitioner, which is not sustainable as this legal issue has already been met and answered by the Supreme Court in its various decisions, it would be absolutely a futile exercise to remit the matter to the appellate authority. The legal position is settled enough that no disciplinary proceedings can be continued against the employee after retirement unless and until rules governing such proceedings provided for the same and even if they are continued then major penalties like termination or dismissal cannot be inflicted upon a retired employee. Learned counsel appearing for the respondents could not show any provision of law that permits the authorities to continue disciplinary proceedings after retirement of an employee and to impose penalty in the nature it is awarded.

16. From the perusal of the order of this Court as well as the order of the Supreme Court a three decade old issue of entry into the service of establishment should not have been reopened at the fag end of service career of an employee.

17. Besides the above further I find that a number of enquiries one after another got conducted and while one enquiry said that original documents were not available, the other enquiry said that the document supplied could not be appreciated as certain extracts of an old torn register were only available. Petitioner has worked for so many years with the establishment and also received promotions obviously for his good work and conduct and there has never been any complaint against him regarding the same.

18. One must understand that an employee has toiled for over three decades in the service of the establishment and there being no complaint with regard to work and conduct of such an employee, he does not deserve to be reawarded with penalty of dismissal/removal from service just for a document submitted at the time of entry

into service, verification of which was not possible as the original records got weeded out and destroyed with the passage of time. While it may be true that furnishing a forged document would not justify the appointment obtained on the said basis but for that appropriate time would be a reasonable one when proper verification of such a document could be done. Again the question is that at whose instance enquiry is set up, is equally important. It is the duty of those who are responsible for making selection and appointment to verify all the credentials of a candidate before giving appointment but once after due verification entry is given, then it should be only an exceptional circumstance to annul the appointment. A third party complaint should normally not be entrained as of compulsion. Establishment must safeguard its employees' interest first while embarking upon an enquiry at the instance of a third partly complaint which may often be made with ulterior and illmotives.

19. In view of aforesaid, the order dated 17.04.2018 passed by respondent no. 4 awarding the petitioner punishment of dismissal from service and the order dated 12.06.2019 passed by respondent no. 3 rejecting the appeal are hereby quashed. The writ petition succeeds and is allowed. The petitioner is held entitled to all consequential benefits.

(2022)06ILR A39
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 10680 of 2021

Preeti & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shantanu Khare, Sri Ashok Khare (Sr. Adv.), Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Ajay Kumar Sharma, Sri Manish Dev, Ms. Dolly Dwivedi, Ms. Archana Singh

A. Service Law – Denial of mutual inter-district transfer - U.P. Basic Education (Teachers) (Posting), Rules, 2008 - Rule 8, 8(2)(d) - There was no fault of the petitioners in not submitting application for mutual transfer online as the fault is attributed to the respondents in not giving any further time to permit the eligible teachers to submit online application who could not submit the same in view of Para 2(1)(a) of the GO dated 02.12.2019 limiting the applicability of the GO to the male teachers who have completed three years of service on the date of issuance of GO. In such view of the fact, the first ground on which the claim of petitioners is denied, is not sustainable in law. (Para 24 to 26)

The facts as emerges in the present petition are that the petitioner nos. 1 & 2 have been appointed on 01.11.2018 and 08.02.2018 respectively. Under the GO dated 02.12.2019 on account of limitation imposed u/Para 2(1)(a), the petitioner no. 2 having not completed three years of service could not submit his transfer application online inasmuch as the eligibility was to be computed u/Clause 17 of the said GO on the date of the GO permitting submission of applications. Once the condition enumerated in Para 2(1)(a) of the GO dated 02.12.2019 was excluded in case of mutual transfer by virtue of GO dated 16.02.2021, the petitioners became eligible to submit application for grant of mutual transfer. On being eligible for mutual transfer, the petitioners submitted application for mutual transfer. The authorities did not consider their application for mutual transfer which gave rise to the petitioners for filing present petition. (Para 23)

It is obvious that to extend the benefit of GO dated 16.02.2021 to eligible teachers, the State

Government should have permitted some time to the teachers to submit online application who could not submit application for mutual transfer because of rider imposed u/para 2(1) (a) of the GO dated 02.12.2019.

B. U.P. Basic Education (Teachers) (Posting), Rules, 2008: Rule 8 – U/Rule 8(2)(d) of the Rules, 2008, the power to consider inter-district transfer is conferred upon the authorities in exceptional and extraordinary circumstances. (Para 29 to 31)

Inter-district transfer and mutual inter-district transfer in the middle of the session are to be dealt differently - It is also relevant to mention that **if no mid-session transfer is permissible that will make the power to consider transfer under Rule 8(2)(d) of Rules, 2008 redundant** inasmuch as, if a teacher applies for inter-district transfer on the first day of session, it is obvious that consideration of his/her inter-district transfer would fall in the middle of Session even if the authorities take the minimum of 24 hours time to consider such application. Therefore, to achieve the object of conferring power on authorities for consideration of transfer in exceptional and extraordinary circumstances, a teacher may submit application to the competent authority for transfer in extraordinary contingency even in middle of the session and the same may be considered by the competent authority expeditiously. In the event, if the competent authority conclude that it is a fit case for exercise of power u/Rule 8(2)(d) of Rules, 2008, he may pass an order of transfer, but **the transfer would become effective in case of inter-district transfer not being a mutual transfer from the first day of the new session so that teacher may join at transferred school on first day of session, so that studies of students may not suffer for want of teacher.** (Para 33)

C. *Divya Goswami* (*infra*)(*distinguished*) - In the case of mutual transfer, the teachers who are seeking mutual transfer replaces one teacher by another and as such on mutual transfer, the teachers are available to impart education in both the schools and hence, the studies of the students will not suffer. It is pertinent to note that reading of Paragraph No. 64(1) in the case of *Divya Goswami* (*infra*) does not hint that it has put any rider for consideration of mutual inter-district transfer. It only says that no inter-district transfer is permissible during the mid of the academic year with an object that the studies of the students in the school should not suffer. (Para 27, 32)

D. The denial of the mutual transfer on the ground that the petitioners secured less marks than the cut-off marks has no nexus with the object sought to be achieved while considering the application of mutual transfer. The mutual inter-district transfer are exceptions and perhaps for that reason, stipulation of minimum length of service in Para 2(1)(a) of the GO dated 02.12.2019 has been waived in the case of mutual transfer. (Para 34)

E. Writ Jurisdiction u/Article 226 - Mandamus should not be issued by the Court, where the power is vested with the authorities to exercise such discretion in accordance with Rules, but **in the instant case the counter affidavit has been filed stating therein the grounds, on which the transfer applications of the petitioners for mutual transfer were not considered, which are found to be unsustainable in law**. Thus, it is not found to be a fit case to be relegated to the competent authority to decide the matter afresh. (Para 36)

Writ petition allowed. (E-4)

Precedent followed:

1. Anuruddha Kumar Tripathi Vs St. of U.P. & ors., Writ-A No. 4950 of 2018, decided on 30.05.2018 (Para 29)

2. Tej Pratap Singh Vs St. of U.P. & ors., Writ-A No. 3967 of 2021 (Para 30)

Precedent distinguished:

1. Divya Goswami Vs St. of U.P., Writ Petition No. 878 of 2020, decided on 03.11.2020 (Para 12, 27)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the petitioners, learned Standing Counsel for respondent no.1 to 3, Ms. Dolly Dwivedi, Advocate holding brief of Ms. Archana Singh, learned counsel for respondent nos.4 & 5 and Sri Manish Dev, Advocate holding brief of Sri Ajay Kumar Sharma, learned counsel for respondent no.6.

2. The petitioners by means of the present writ petition have prayed for the following reliefs:-

"(i). A writ, order or direction of a suitable nature commanding the respondent no.4 to forthwith sanction mutual inter district transfer of the two petitioners on the basis of their applications dated 03.03.2021 and 05.03.2021 within a period to be specified by this Hon'ble Court.

(ii). A writ, order or direction of a suitable nature commanding the respondent to permit the petitioner no.1 to function as an Assistant Teacher in Junior Basic School of District Gautam Budh Nagar and to permit the petitioner no.2 to function as an Assistant Teacher in a Junior Basic School of District Saharanpur and to pay them their regular monthly salary against such respective post."

3. The brief facts of the case are that petitioners were selected and appointed as Assistant Teacher in pursuance to the recruitment undertaken by the respondent-Board in the year 2017-18 for recruiting 69,000 Assistant Teachers. The petitioner no.1 was appointed on 01.11.2018 and posted at Prathmik Vidyalaya, Tapri Kalan, Development Block Balia Kheri, District Saharanpur while the petitioner no.2 was appointed on 08.02.2018 and posted at Prathmik Vidyalaya Nagla Bhatona, Development Block Jewar, District Gautam Budh Nagar.

4. The husband of the petitioner no.1 namely, Anil Kumar Mittal, is an employee of Delhi Judicial Academy falling under the control of Delhi High Court. On such account, the petitioner no.1 desired to be posted in District Gautam Budh Nagar which is adjacent to Delhi. The petitioner no.2 is a resident of District Saharanpur and desired to be posted at Saharanpur.

5. The State Government issued a Government Order dated 02.12.2019 inviting applications for inter-district transfer to be submitted on or before 20.01.2020. Paragraph 2(1)(a) of the Government Order dated 02.12.2019 provides that male teachers who had completed three years minimum service as regular teacher and female teachers, who had completed minimum period of one year of satisfactory service, were eligible to apply for inter-district transfer.

6. According to para 17 of the aforesaid Government Order, the eligibility was to be computed on the date the Government Order was issued.

7. The further case of the petitioners is that on account of limitation contained in paragraph 2(1)(a) of the Government Order dated 02.12.2019 with regard to the minimum length of service, the petitioners even though desirous of mutual transfer, could not submit application for mutual transfer pursuant to the Government Order dated 02.12.2019.

8 It appears that subsequently, Government Order dated 16.02.2021 was

issued whereby, clause 2(1)(a) of the Government Order dated 02.12.2019 was clarified by which it waived the stipulation of minimum length of service in Government Order dated 02.12.2019 for mutual transfers. As the petitioners did not fulfill the minimum length of service as prescribed in Clause 2(1)(a) of the Government Order dated 02.12.2019, therefore, they did not submit online application for grant of mutual transfer.

9. It is stated that despite the clarification of clause 2(1)(a) of the Government Order dated 02.12.2019 by Government Order dated 16.02.2021, no time was granted to the teachers like petitioners to submit online application for consideration of mutual transfer as these teachers could not submit online application due to stipulation of minimum length of service for being eligible to apply for inter district transfer.

10. Thereafter, the petitioner no.1 filed application on 03.03.2021 seeking inter-district mutual transfer with the petitioner no.2 before the Director General/School Education & State Project Director and also to the Secretary, Board of Basic Education. The petitioner no.2 on 05.03.2021 filed inter-district transfer application seeking mutual transfer with petitioner no.1 before the Director General/School Education & Secretary, Board of Basic Education. It is further stated that the petitioner no.1 is to look after a one year old girl child born on 13.01.2020.

11. When no action was taken on the application of petitioners for mutual transfer, the petitioners have approached this Court by filing the present writ petition praying for the aforesaid reliefs.

12. In the counter affidavit filed by the respondent nos.4 & 5, it is stated that a Writ Petition No.878 of 2020 (Divya Goswami Vs. State of U.P.) was filed and in compliance of the order dated 03.11.2020 and 03.12.2020 passed by this Court, Government Order No.148/68-5-2021-15(149)/2010 dated 05.02.2021 and Government Order No.191/68-5-2020-15/2010 dated 16.10.2021 were issued. In pursuance to the said Government Orders, a software was developed by N.I.C. for the purpose of inter-district transfer of board's teachers for the year 2019-20 and the entire proceeding of inter-district transfer had been completed on 17.02.2021.

13. It is further stated that after the last date for inter-district transfer, no inter-district transfer has been done. It is further stated that at present no policy is in existence regarding inter-district transfer or mutual transfer. It is further stated that for want of online application by the petitioners, their claim for inter-district transfer could not be considered.

14. The further case of the respondents is that as the marks obtained by the petitioners for transfer was less than the cut off marks prescribed for inter-district transfer, therefore, they could not be transferred to the District opted by them. It is further stated that as the petitioners did not apply online inter-district transfer, therefore, their application could not be considered. The further case of the respondents is that in view of paragraph 64(1) of the judgement of this Court in the case of ***(Divya Goswami) (supra)***, no inter-district transfer is permissible during the mid of the academic session.

15. A rejoinder affidavit has been filed by the petitioners stating therein that

they stood precluded from applying for the mutual transfer on account of the limitation contained in clause 2(1)(a) under which a male teacher could not have applied for transfer before three years. This condition was deleted by Government Order dated 16.02.2021, but the benefit of this Government Order was limited to those who had already submitted applications.

16. It is further pleaded that the transfer contemplated under Government Order dated 02.12.2019 is based upon the allocation of marks contained in para 8 of the Government Order. Such allocation of marks become irrelevant in case of mutual transfer. It is further stated that restriction against mid academic session transfer would be inapplicable to a case of mutual transfer as the purpose of such restriction is to maintain the continuity of studies. In the case of mutual transfer, one teacher gets replaced by the another and vice-versa which necessarily does not affect the teaching work. It is further stated that in case the petitioners are made to wail till the beginning of next academic session, then in such a case if petitioners file such application on the first day of the academic session-2022-23 and its processing takes 24 hours time, such application would be again in the middle of the academic session 2022-23.

17. It is further stated that in pursuance to the Government Order dated 02.12.2019 the transfer was finalized in the month of January, 2021 in the mid-session.

18. Learned counsel for the petitioners has contended that the three grounds as stated in the counter affidavit on which, the petitioners' application have not been considered, are not sustainable in law. He submits that the first ground that the petitioners did not apply online in pursuance to the Government Order dated 02.12.2019 is misconceived inasmuch as had the Government Order dated 02.12.2019 been specific and clear excluding mutual transfer from the condition no.2(1) (a) of the Government Order dated 02.12.2019, the petitioners would have applied. He further submits that on account of the bar created by the Government Order dated 02.12.2019 that a male teacher who has not completed three years of regular service cannot avail transfer precluded the petitioners from applying for the inter-district transfer. Accordingly, he submits that since the Government Order dated 16.02.2021 by which stipulation of minimum length of service provided in para 2(1)(a) of the Government Order dated 02.12.2019 for inter district transfer was waived in case of the mutual inter-district transfer, therefore, the respondents ought to have permitted some time to the eligible teachers desirous of inter-district mutual transfer to apply, and as such, aforesaid ground of denial of inter-district transfer is misconceived as the petitioners could not apply for the reasons beyond their control.

19. He further submits that the second ground in view of para 64(1) of the judgement of this Court in ***Divya Goswami (supra)*** that no transfer in mid of the academic session is permissible is also not sustainable for the reason that in mutual transfer, the studies of the students do not suffer as one teacher is replaced by another teacher which is not a case in inter-district transfer in respect of individual teacher. He submits that the transfer with respect to session 2020-21 was finalized in mid session between October, 2021 to January, 2022. He further submits that in case the petitioners submit application on the first

day of session, the consideration of their application would fall in the mid of sessions inasmuch as even if such consideration takes minimum time of 24 hours, the same would fall in the mid of the academic session. Thus, the submission is that the second ground for not considering the transfer of petitioners is also not sustainable.

20. He further submits that in the case of mutual transfer, the marking system is totally irrelevant for the reason that here the two teachers agree for mutual transfer whereas in the case of individual transfer, the marking system plays an important role in regulating the transfer so as to avoid arbitrariness in granting individual transfer.

21. Per contra, learned counsel for the respondents has submitted that under the Government Orders, those teachers who had submitted application, were eligible for consideration of their transfer applications. Since the petitioners did not apply for their mutual transfer online, therefore, their claim for transfer could not be considered. She further submitted that this Court in paragraph 64 (1) of the judgement of ***Divya Goswami (supra)*** has prohibited the mid session transfer with an object that the studies of the students in the school should not suffer and as this Court has put a restriction upon the mid session transfer and that being the law of the land, the petitioners are not entitled to mid session transfer, therefore, the relief as claimed by the petitioners is misconceived. Lastly, she has contended that as the petitioners have secured less marks than the cut off marks provided for the district in which the petitioners want transfer, therefore, they could not be considered for transfer.

22. I have heard the rival submissions of the parties and perused the record.

23. The facts as emerges in the present petition are that the petitioner nos.1 & 2 have been appointed on 01.11.2018 and 08.02.2018 respectively. Under the Government Order dated 02.12.2019 on account of limitation imposed under para 2(1)(a) of the said Government Order, the petitioner no.2 having not completed three years of service could not submit his transfer application online inasmuch as the eligibility was to be computed under Clause 17 of the said Government Order on the date of the Government Order permitting submission of applications. Once the condition enumerated in paragraph 2(1)(a) of the Government Order dated 02.12.2019 was excluded in case of mutual transfer by virtue of Government Order dated 16.02.2021, the petitioners became eligible to submit application for grant of mutual transfer. On being eligible for mutual transfer, the petitioners submitted application for mutual transfer. The authorities did not consider their application for mutual transfer which gave rise to the petitioners for filing present petition seeking the relief, extracted above.

24. Now, so far as the ground taken by the respondents in the counter affidavit that the petitioners did not submit online application for consideration of their transfer therefore their application were not considered, is misconceived in the facts of the present case inasmuch as the petitioner no.2 in view of para 2(1)(a) of the Government Order dated 02.12.2019 was not eligible for submitting online application for transfer. Since the petitioner no.2 did not fulfill the condition enumerated in Government Order dated 02.12.2019 regulating the inter-district transfer, there was no occasion for the petitioner no.2 to submit online application. The petitioners could become eligible to

submit transfer application only after the Government Order dated 16.02.2021 excluded mutual transfer from the ambit of paragraph 2(1)(a) of the Government Order dated 02.12.2019.

25. As soon as the petitioners became eligible to submit application in view of Government Order dated 16.02.2021, both the petitioners submitted application for grant of mutual transfer. It is obvious that non submission of application of transfer by petitioner no.2 was beyond his control in view of limitation imposed under para 2(1)(a) of the Government Order dated 02.12.2019. Once the Government Order dated 16.02.2021 excluded the applicability of the condition imposed under para 2(1)(a) of the Government Order dated 02.12.2019 by the Government Order dated 16.02.2021 in the case of mutual transfer, it is obvious that to extend the benefit of Government Order dated 16.02.2021 to eligible teachers, the State Government should have permitted some time to the teachers to submit online application who could not submit application for mutual transfer because of rider imposed under para 2(1)(a) of the Government Order dated 02.12.2019.

26. Thus, it is evident that there was no fault of the petitioners in not submitting application for mutual transfer online as the fault is attributed to the respondents in not giving any further time to permit the eligible teachers to submit online application who could not submit the same in view of para 2(1)(a) of the Government Order dated 02.12.2019 limiting the applicability of the Government Order to the male teachers who have completed three years of service on the date of issuance of Government Order. In such view of the fact, the first ground on which the claim of petitioners is denied, is not sustainable in law.

27. So far as the second ground for denial of claim of petitioners based on para 64(1) of the judgement in the case of ***Divya Goswami (supra)***, is concerned, this Court finds that the rider imposed by the judgement of ***Divya Goswami (supra)*** in para 64(1) is not applicable in the facts of the present case. The reason being that the object of not permitting mid session transfer by this Court in Divya Goswami case was that the studies of the students should not suffer. In the case of mutual transfer, the teachers who are seeking mutual transfer replaces one teacher by another and as such on mutual transfer, the teachers are available to impart education in both the schools and hence, the studies of the students will not suffer.

28. It is pertinent to note that the State Government has power under Rule 8 of U.P. Basic Education (Teachers) (Posting), Rules, 2008 (hereinafter referred to as 'Rules, 2008') to regulate posting of teachers. Rule 8 of the said rule is reproduced herein below:-

"8. Posting. - (1)(a) Three options for schools shall be asked from the handicapped candidates in order of their merit and after receiving such options the handicapped candidates shall be posted on the basis of options given by them and the vacancies. (b) Based on the order of their merit, female teachers would be required to submit under their signature option of three schools each from the general and backward block and accordingly, posting would be given in one of these schools.

(c) The posting of male teachers shall be made in accordance with the order of

candidates, in the roster prepared under Rule 7.

(2)(a) The newly appointed male teachers shall initially be posted compulsorily in backward areas for a period of at least five years.

(b) Newly appointed female teachers shall also be compulsorily posted in backward areas for a period of at least two years.

(c) Mutual transfers within the district from general block of backward block and vice-versa would be permitted with the condition that the teacher on mutual transfer to a backward block shall have to serve in that block compulsorily for five years. Mutual transfers would be permitted only in case of those teachers who have more than remaining five year's service.

(d) In normal circumstances the applications for inter-district transfers in respect of male and female teachers will not be entertained within five years of their posting. But under special circumstances, applications for inter-district transfers in respect of female teachers would be entertained to the place of residence of their husband or in law's district.

(e) If by virtue of posting of newly appointed or promoted teachers the primary and upper primary schools of backward blocks get saturated i.e., no post of teacher is vacant in these schools, then handicapped and female teachers on their choice can be adjusted against the vacant posts of general blocks from these saturated blocks.

(f) Mutual transfers of male/female teachers from one backward block to another can be considered.

(3) Teachers transferred from one district to another will be given posting as per the provisions of these rules."

29. Under Rule 8 (2) (d) of the Rules, 2008, the power to consider inter-district transfer is conferred upon the authorities in exceptional circumstances. This Court has held that even in the case of male teachers, the rider imposed of five years can be relaxed in extra ordinary or exceptional circumstances and the application for transfer can be considered. In this respect Para-19 & 20 of the judgement of this Court in case of ***Anuruddha Kumar Tripathi Vs. State of U.P. and Others*** passed in ***Writ-A No.4950 of 2018*** is reproduced here-in below:-

"19. In light of the aforesaid discussions, it is held that transfer of a male assistant teacher from one district to another, in a basic school, can ordinarily be made only after completion of 05 year initial posting in backward area in accordance with Rule 8(2)(d) of the Rules of 2008 as well as the policy framed for the purpose. However, in extraordinary or exceptional circumstances an application for transfer can be considered by the Basic Shiksha Parishad even before expiry of such term. The question whether in a given case extraordinary circumstances exists or not has to be examined by the Basic Shiksha Parishad.

20. In such circumstances, this writ petition stands disposed of permitting the petitioner to represent in the matter before the Secretary, Basic Shiksha Parishad, U.P. Allahabad, by way of a representation together with certified copy of this order, within two weeks from today. Petitioner shall be at liberty to annex all material in support of his plea that there exists exceptional circumstances justifying his transfer from Lakhimpur Kheri to Banda even before completion of his 05 year term. The Secretary of the Basic Shiksha Parishad, U.P. Allahabad shall examine as

to whether the ground on which petitioner is seeking his transfer would fall within the exceptional circumstances or not? A specific order, in that regard, shall be passed within a further period of three months, thereafter. No order as to costs."

30. Similar view has been reiterated by this Court in ***Writ-A No.3967 of 2021 (Tej Pratap Singh Yadav Vs. State of U.P. and 3 Others)***. Relevant extract of the said judgement is reproduced here-in-below:-

"This Court in Writ Petition No. 7096 of 2010 (Sarita Gupta Vs. State of U.P. and others) has considered the provisions of Uttar Pradesh Basic Education (Teachers) (Posting) Rules, 2008 to observe that the provisions of transfer for the purposes of husband and wife in the same district is a special provision which will prevail upon the general restrictions of transfer. Since the petitioner and his wife both are teachers in the educational institution run by the Basic Shiksha Parishad, it would be open for the authority concerned to post both husband and wife at one place.

The fact that the husband and wife are posted at different places would be a relevant circumstance and may require waiver of five year term for seeking transfer.

Petitioner is presently working at Sitapur and is seeking his transfer to Etawah where his wife is working. There is no consideration of petitioner's claim on merits. Even otherwise it is pointed out that the petitioner by now has completed 5 years. In such circumstances, it would be appropriate to direct the Secretary Basic Shiksha Parishad to reconsider petitioner's claim for inter district transfer, keeping in view the aforesaid facts and observations made above, afresh within a period of two months from the date of presentation of copy of this order. The order impugned in the writ petition dated 29.9.2020 shall remain subject to the fresh order to be passed by the Secretary concerned."

31. Thus, from the aforesaid two judgements, it is evident that the power under Rule 8 (2) (d) of the Rules, 2008 have been conferred upon the authorities to exercise the same in exceptional and extraordinary circumstances and an application for transfer can be considered by the authorities

32. It is also pertinent to note that reading of Paragraph No. 64(1) in the case of ***Divya Goswami (supra)*** does not hint that it has put any rider for consideration of mutual inter-district transfer. In such view of the fact, second ground is also misconceived.

33. It is also relevant to mention that if no mid-session transfer is permissible that will make the power to consider transfer under Rule 8(2)(d) of Rules, 2008 redundant inasmuch as, if a teacher applies for inter-district transfer on the first day of session, it is obvious that consideration of his/her inter-district transfer would fall in the middle of Session even if the authorities take the minimum of 24 hours time to consider such application. Therefore, to achieve the object of conferring power on authorities for consideration of transfer in exceptional and extraordinary circumstances, this Court believes that in such a case, a teacher may submit application to the competent authority for transfer in extraordinary contingency even in middle of the session and the same may be considered by the competent authority expeditiously. In the event, if the competent authority conclude that it is a fit case for exercise of power under Rule 8(2)(d) of

Rules, 2008, he may pass an order of transfer, but the transfer would become effective in case of inter district transfer not being a mutual transfer from the first day of the new session so that teacher may join at transferred school on first day of session, so that studies of students may not suffer for want of teacher.

34. Now, so far as the third ground that the petitioners have obtained less marks than the cut-off marks for transfer to their choice district is concerned, the said contention is also misconceived for the reason that the mutual inter-district transfer are exceptions and perhaps for that reason, stipulation of minimum length of service in para 2(1)(a) of the Government Order dated 02.12.2019 has been waived in the case of mutual transfer, therefore, the denial of the mutual transfer on the ground that the petitioners secured less marks than the cut-off marks has no nexus with the object sought to be achieved while considering the application of mutual transfer.

35. In such view of the fact, this Court finds that the denial of mutual inter-district transfer to the petitioners are illegal and arbitrary.

36. It is pertinent to note that this Court is conscious of the fact that the Court should not issue mandamus where the power is vested with the authorities to exercise such discretion in accordance with Rules, but in the instant case the counter affidavit has been filed stating therein the grounds on which the transfer application of the petitioners for mutual transfer were not considered which are not found to be not sustainable in law by this Court for the reasons stated above. Thus in such view of fact, this Court does not find it to be a fit case to relegate the matter to the competent authority to decide the matter afresh.

37. In such view of the fact, this Court issues a writ of Mandamus to the authority concerned to pass a mutual transfer order transferring the petitioner no.1 from Junior Basic School, Tapri Kalan, Saharanpur (U.P.) to Junior Basic School of District Gautam Buddh Nagar and petitioner no.2 from Junior Basic School of District Gautam Buddh Nagar to Junior Basic School, Tapri Kalan, Saharanpur (U.P.) within a period of three weeks from the date production of a certified copy of this order.

38. Accordingly, the writ petition stands ***allowed*** with no order as to cost.

(2022)06ILR A48
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE SIDDHARTH VARMA, J.

Writ A No. 17252 of 2021

Sandeep Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vipin Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Regularisation – Compassionate Appointment - U.P. Collection Peons' Service Rules, 2004; U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Rule 2(a) - Mere inaction on the part of the State will not deny the benefit of right which accrued on account of the Regularization rules. The advantage which the petitioner would have got, had the petitioner's father been regularized before his

death, should have been extended to the petitioner. (Para 8)

The petitioner's father was considered to be a fit case for being regularized on 22.02.2019. However, in between, on 30.11.2017, he died. The petitioner thereafter prayed for an appointment under the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 on 06.03.2019. By the impugned order dated 19.09.2020, the claim of the petitioner has been refused by saying that the petitioner's father was not a regular Government servant as has been defined in the Dying in Harness Rules and therefore, petitioner was not entitled for getting an appointment under the said Rules. (Para 1, 2, 4)

Hon'ble Court observed that a list of peons who were to be regularized was issued on 24.12.2016 in which the petitioner's father was shown at Serial No. 9. However, since the petitioner's father was above 45 years of age, outright regularisation was not done but a permission was sought from the State Government for the relaxation of age. The State Government relaxed the age of the petitioner's father and considered him to be a fit case for being regularized on 22.02.2019.

When the matter w.r.t. age relaxation had been forwarded to the Additional Chief Secretary, Revenue Department, Government of Uttar Pradesh, Lucknow much before the father of the petitioner had died, then the case of the petitioner could not be jeopardized simply because the age relaxation was conveyed to the District Magistrate on 22.02.2019 i.e. after the petitioner's father had died on 30.11.2017. The petitioner ought to be given the advantage which would have accrued to him. Had the State acted with alacrity, the District Magistrate could have passed the order on the age relaxation of the petitioner's father before his death. (Para 7)

Writ petition partly allowed.(E-4)

Precedent followed:

1. Nikhil Bharadwaj Vs St. of U.P. & ors.., Writ-A No. 2988 of 2021, decided on 06.10.2021 (Para 5)

Precedent distinguished:

1. Pawan Kumar Yadav Vs St.of U.P. & ors., 2010 (8) ADJ 664 (Para 6)

Present petition assails order dated 19.09.2020, passed by District Magistrate, Bhadohi.

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

1. The present writ petition is being decided on a pure question of law as to whether would the petitioner's father was to be treated as a Government employee on the date when he died when the regularisation order was passed after his death ?

2. The facts of the case are that the petitioner's father was initially appointed on the post of Seasonal Collection Peon on 1.2.1995 in Tehsil Gyanpur, District Sant Ravidas Nagar (Bhadohi). After having put in substantial number of years of service, he was considered eligible for regularisation as per the U.P. Collection Peons' Service Rules, 2004. A list of peons who were to be regularized was issued on 24.12.2016 in which the petitioner's father was shown at Serial No.9. However, since the petitioner's father was above 45 years of age, outright regularisation was not done but a permission was sought from the State Government for the relaxation of age. The State Government relaxed the age of the petitioner's father and considered him to be a fit case for being regularized on 22.2.2019. However, in between, on 30.11.2017, the petitioner's father died. The petitioner thereafter prayed for an appointment under the U.P. Recruitment of Dependants of Government Servants Dying

in Harness Rules, 1974 (hereinafter referred to as the "Dying in Harness Rules") on 6.3.2019. The District Magistrate vide letter dated 15.3.2019 sought directions from the Additional Chief Secretary, Revenue Department, Government of Uttar Pradesh, Lucknow as to what was to be done with regard to the case of the petitioner. However, when no response was there from the side of the respondent-Additional Chief Secretary, the petitioner filed a writ petition being Writ-A No.16701 of 2019 (Sandeep Kumar Yadav vs. State of U.P. & Ors.) wherein on 22.10.2019, the following order was passed :-

"Petitioner's father was employed as Seasonal Collection Peon. A decision had been taken by the District Magistrate during his lifetime to regularise his services. It appears that orders of regularisation could not be passed as a recommendation had been made to the State Government for grant of relaxation as the father of petitioner has crossed the maximum age fixed in the rules. The State Government has granted such permission in accordance with law. It is therefore, submitted that petitioner's father would be covered within the definition of Government Servant and, therefore, on account of his death in harness on 30.11.2017, petitioner's claim for grant of compassionate appointment is liable to be considered under Uttar Pradesh Dying in Harness Rules, 1974. Representation of petitioner made in that regard since has remained without any decision taken by the Committee as such the petitioner has approached this Court.

Perusal of record would go to show that District Magistrate, Bhadohi has sought some clarification from the State Government in the matter relating to grant of compassionate appointment. In the facts and circumstances of the present case, it would be appropriate to direct second respondent to respond to the letter of the District Magistrate, Bhadohi dated 15.03.2019 within a period of six weeks from the date of presentation of a certified copy of this order. The District Magistrate, Bhadohi i.e. respondent No.3 shall pass appropriate orders in respect of petitioner's claim within a further period of three months thereafter."

3. In response thereof the District Magistrate, Bhadohi passed the order dated 19.9.2020 which has been challenged in the instant writ petition.

4. Primarily by the order dated 19.9.2020 the claim of the petitioner has been refused by saying that the petitioner's father was not a regular Government servant as has been defined in the Dying in Harness Rules. By the impugned order, it has been virtually said that since as per Rule 2(a) of the Dying in Harness Rules, the petitioner's father was not a Government Servant, the petitioner was not entitled for getting an appointment under the Dying in Harness Rules.

5. Learned counsel for the petitioner has relied upon a judgment of this Court dated 6.10.2021 passed in Writ-A No.2988 of 2021 and has submitted that had the petitioner's father been regularized as per his entitlement before his death, then the petitioner's claim could have been considered. However, since the lethargy of the State Authorities had delayed the regularisation of the petitioner's father, the regularisation was not done during his life-time. He submits that if the regularisation had been done during the life-time of the petitioner's father, then the petitioner would

have definitely been entitled for appointment under the Dying in Harness Rules.

6. Learned Standing Counsel, however, relying upon a judgment rendered by a Full Bench of this Court in **Pawan Kumar Yadav vs. State of U.P. & Ors**. reported in **2010 (8) ADJ 664** has submitted that since the petitioner's father was not a Government servant as has been defined in Rule 2(a) of the Dying in Harness Rules, the petitioner was not entitled to be considered for appointment.

7. Having heard learned counsel for the petitioner and learned Standing Counsel, the Court is of the view that when the matter with regard to age relaxation had been forwarded to the Additional Chief Secretary, Revenue Department, Government of Uttar Pradesh, Lucknow much before the father of the petitioner had died, then the case of the petitioner could not be jeopardized simply because the age relaxation was conveyed to the District Magistrate on 22.2.2019 i.e after the petitioner's father had died on 30.11.2017. The petitioner ought to be given the advantage which would have accrued to him. Had the State acted with alacrity, the District Magistrate could have passed the order on the age relaxation of the petitioner's father before his death.

8. Under such circumstances, the Court presumes that the advantage which the petitioner would have got, had the petitioner's father been regularized before his death, should have been extended to the petitioner. Under such circumstances, the order dated 19.9.2020 is quashed and is set-aside. The matter is remitted back to the District Magistrate, Bhadohi who shall, within a period of one month from the date of presentation of a certified copy of this order, reconsider the case of the petitioner treating that the petitioner's father was a regularized employee at the time of his death.

9. The writ petition is, accordingly, partly allowed.

(2022)06ILR A51
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Contempt Application (Civil) No. 5344 of 2021

Prem Shankar ...Applicant
Versus
Rajeev Pandey Spl. Land Acquisition officer Bareilly & Anr. ...Respondents

Counsel for the Applicant:
Krishna Kant Mishra

Counsel for the Respondents:
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A. Contempt of Courts Act, 1971-Section 12-acquisition of the land-deliberate and wilful disobedience of the order-representation was to be decided by the Special Land Acquisition Officer-Committee adjudicated the claim and found the applicant entitled for 1/3 rd share for the compensation-applicant aggrieved by the compensation awarded may approach before the appropriate forum, but no contempt proceedings are maintainable as there is no wilful disobedience of the Writ Court. (Para 1 to 38)

The application is dismissed. (E-6)

List of Cases cited:

1. Reddy Veerana Vs St. of U.P. & ors. Civil appeal No. 3636 of 2022

2. Dr. U.N Bora, Ex. Chief Executive Officer & ors. Vs Assam Roller Flour Mills Assn. & anr. (2022) 1 SCC 101

3. Suman Chadha & ors. Vs C.B.I. (2021) AIR SC 3709

4. Bhopendra Singh & ors. Vs Awas Vikas Parishad & ors. First Appeal No. 33 of 2004

5. Ram Kishan Vs Tarun Bajaj & ors. (2014) 16 SCC 204

6. Sushila Raje Holkar Vs Anil Kak (Retd.) (2008) 14 SCC 392

7. Re: P.C Sen (1969) 2 SCR 649

8. Jhareswar Prasad Paul & anr. Vs Tarak Nath Ganguly & ors. (2002) 5 SCC 352

9. Prithawi Nath Ram Vs St. of Jharkhand & ors. (2004) AIR SC 4277

10. Three Cheers Entertainment Pvt. Ltd. & ors. Vs Cese Ltd (2008) 16 SCC 592

11. Mrityunjoy Das & anr. Vs Sayed Hasibur Rahman & ors. (2001) 3 SCC 739

12. Murray & Co. Vs Ashok Kr. Newatia

13. Chhotu Ram Vs Urvashi Gulati & anr. (2001) 7 SCC 530

14. Anil Ratan Sarkar & ors. Vs Hirak Ghosh & ors. (2002) 4 SCC 21

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Shiva Kant Mishra, Advocate holding brief of Sri K.K. Mishra, learned counsel for the applicant and Sri Manish Goyal, learned Additional Advocate General assisted by Sri R.K. Mishra, learned Standing Counsel for the opposite parties.

2. This contempt proceeding under Section 12 of The Contempt of Courts Act, 1971 has been initiated against the opposite parties for deliberate and wilful disobedience of the order dated 30.07.2019 passed in Writ-C No.17534 of 2019 (Prem Shankar Vs. State of U.P. and others).

3. Case, in nutshell, is that the applicant who is the owner with transferable rights of Gata Nos. 275, 276, 277, 296 and 297, measuring 3519 Sq. Metre, his land was taken over for construction of mini by-pass without adverting to acquire the land under the provisions of Land Acquisition Act, 1894.

4. The applicant had approached for payment of compensation which was not paid as per the Government Order dated 19.03.2015 and 12.05.2016, the applicant was constrained to approach this Court and file writ petition.

5. The writ Court, on 30.07.2019, directed the applicant to file a comprehensive representation ventilating all his grievances which he had taken in the writ petition before the Special Land Acquisition Officer, Bareilly who was to decide the same by reasoned and speaking order within three months. When no action was taken by the opposite party no.1, the present contempt proceedings were initiated.

6. Initially, on 19th April, 2022, the opposite parties filed their affidavit of compliance stating therein that the District Magistrate, on 13.04.2020 had constituted a Committee to decide the claim of the applicant as per the Government Order dated 19.03.2015. The Committee enquired and determined the amount of compensation to the tune of Rs.27,44,82,000/- and submitted its report to the District Magistrate. The District

Magistrate on 13.04.2022 had made an endorsement on the report of the Committee, and forwarded it for approval to the Commissioner, Bareilly Division. The approval was awaited.

7. The case was taken up on 19.04.2022 and the Court directed the matter to be placed on 10.05.2022 and by that time, the payment was to be released, in case of non-compliance, the opposite parties were to remain present in the Court. On 10.05.2022, the lawyers were on strike and the matter was deferred for 17.05.2022 and the officers were required to be present before the Court. On 17.05.2022, affidavit of compliance was filed by all the three officers who were present in the Court and are arrayed as opposite parties.

8. In the affidavit filed by the District Magistrate, Bareilly, in paragraph 11, it is stated that the Commissioner on 05.05.2022 made an objection to the report forwarded by the District Magistrate and directed that the matter should be re-visited in the light of the Government Order dated 19.03.2015. On the same day, the Public Works Department also submitted its report/objections, wherein it was stated that the acquisition proceedings started in 2001 and the possession was transferred in 2003. The land in question was recorded in the name of one Smt. Bhagola Devi W/o late Mishri Lal, Janki Prasad, Prem Shankar (applicant) and Sri Devi Das sons of late Mishri Lal. It was further stated that the names of the co-tenure holders were recorded in the revenue records over the agricultural land. The revenue records does indicate that the land was recorded as abadi. The objections and the reports of Commissioner, Bareilly and Public Works Department have been brought on record as Annexures 1 and 2 to the affidavit of compliance dated 10.05.2022. Thereafter, on 06.05.2022, the District Magistrate constituted a new Committee for determining the share of the applicant. The Committee submitted its report on 07.05.2022 mentioning therein that land in question was agricultural and not abadi at the time of notification/acquisition, and share of applicant was 1/3rd.

9. The Valuation Approval Committee which was convened on 09.05.2022, determined the value of compensation payable to the applicant (1/3rd share) to the tune of Rs.75,07,200/-. The said report was approved by the District Magistrate and the directions were issued to the Public Works Department for payment of compensation amount. Copy of the report of the approval of District Magistrate has been brought on record as Annexures 3 and 4 of the affidavit of compliance.

10. Sri Shiva Kant Mishra, learned counsel for the applicant submitted that the compensation payable to the applicant is to the tune of Rs.27,44,82,000/- which was recommended by the Committee constituted by District Magistrate on 13.04.2022 which was in accordance with the Government Order dated 19.03.2015. According to him, once the amount was quantified, no occasion arose for re-determining the compensation, as Commissioner was not the authority to have given any approval or disapproval to the amount already quantified, and the opposite parties are in contempt of not complying the order of the writ Court. He invited the attention of the Court to the Government Order dated 19.03.2015 which requires for the payment of the amount to the landholders whose land is taken as per agreement.

11. He then contended that the Committee had found that the rate payable

as per the circle rate was Rs.39,000/- per Sq. Metre and pursuant to the Government Order dated 19.03.2015, the amount as per the circle rate was payable, which was rightly calculated by the Committee on 13.04.2022. According to him, once the amount was quantified and an admission has been made by the officers of the State Government by filing an affidavit, they cannot resile at a subsequent stage and deny the payment.

12. Reliance has been placed upon the judgments of the Apex Court in case of **Reddy Veerana Vs. State of Uttar Pradesh and others**, decided on 05.05.2022 arising out of **Civil appeal No.3636 of 2022**, **Dr. U.N. Bora, Ex. Chief Executive Officer and others Vs. Assam Roller Flour Mills Association and another 2022 (1) SCC 101, Suman Chadha and others Vs. Central Bank of India, AIR 2021 SC 3709**, and **Bhopendra Singh and others Vs. Awas Vikas Parishad and others, First Appeal No.33 of 2004**, decided on **04.08.2005** by the High Court of Uttaranchal at Nainital.

13. Sri Manish Goyal, learned Additional Advocate General appearing for the opposite parties submitted that the direction of the writ Court was only to the extent of deciding the representation by the Special Land Acquisition Officer, Bareilly. The writ Court had not adjudicated the matter on merits and order dated 30.07.2019 categorically takes note of the fact that without any opinion on the merits of the case, applicant was granted opportunity to file a comprehensive representation before the Special Land Acquisition Officer, Bareilly.

14. As the earlier Committee constituted by the District Magistrate on 13.04.2022 calculated the compensation on the basis of the land situated in the Abadi area, but when approval was sought from the Commissioner, it came into the light that the land which was taken over, was agricultural land and not abadi.

15. Moreover, the objections of the Public Works Department brought into the light that the applicant was only one of the co-sharers of the land taken over for construction of mini by-pass, and there were two other co-sharers who were also entitled for compensation. As the matter was referred back to the District Magistrate to enquire again, Committee was re-constituted and on enquiry, it was found that entry in revenue records reflected that land was recorded as agricultural land. Further, the applicant was only entitled to 1/3rd share in the land taken over and compensation to the tune of Rs.75 lakhs and odd was directed to be paid.

16. According to Sri Goyal, the applicant is not entitled to the amount quantified on 13.04.2022 as no approval was accorded by the Commissioner, and the State cannot be compelled to pay the amount for which the applicant is not entitled for. He next contended that in case, the applicant is aggrieved by the order passed by the District Magistrate that the applicant is entitled to only 1/3rd amount of compensation of the land taken over, he may approach the reference Court or any other judicial forum as the order of the writ Court has been duly complied with which was to the extent of deciding the representation of the applicant.

17. Having heard rival submissions and after perusing the material on record, I find that the proceedings initiated at the behest of applicant against the State

Officials under Section 12 of the Contempt of Courts Act are for punishing them for wilful disobedience of the order of the writ Court. According to the applicant, the officers are in contempt as they have filed an affidavit on the earlier occasion stating that the applicant was entitled to the payment of Rs.27,44,82,000/- and now resiling back from the said affidavit and coming with a case that the applicant is only entitled for Rs.75 laksh and odd would attract the wrath of Section 12 of the Contempt of Courts Act, 1971.

18. Before proceeding to decide the issue as to whether any deliberate or wilful disobedience of the order has been made by the opposite party, a glance of Section 2(b) of Contempt of Courts Act, 1971 is necessary for better appreciation of the case, which is extracted hereasunder:-

"2. (b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;"

19. From the reading of the said provisions, it is clear that to attract provision of civil contempt, the party approaching the Court has to show that there is any wilful disobedience of any judgment or order of the Court.

20. In order to punish a contemnor, it has to establish that disobedience of the order is "wilful". The Supreme Court in its celebrated judgment rendered in the case of **Ram Kishan Vs. Tarun Bajaj and others 2014 (16) SCC 204**, held that the word "wilful" introduces a mental element and hence, requires looking into the mind of a person/contemnor by gauging his actions, which is an indication of one's state of mind. According to Court, the word "wilful" means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bona fide or unintentional acts or genuine inability. Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. The relevant paras 11 and 12 of the judgment are extracted hereasunder:-

"11. Contempt jurisdiction conferred onto the law courts power to punish an offender for his wilful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities.

12. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is "wilful'. The word "wilful' introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of one's state of mind. "Wilful' means knowingly

intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct"

21. In **Dr. U.N. Bora (Supra)**, the Hon'ble Apex Court held that wilful disobedience will be in case where the action is deliberate, conscious and intentional. The Court further held that while dealing with the contempt petition, the Court was not expected to conduct a roving enquiry and go beyond the very judgment which has allegedly been violated. Relevant para 8 is extracted hereasunder:-

"8. We are dealing with a civil contempt. The Contempt of Courts Act, 1971 explains a civil contempt to mean a willful disobedience of a decision of the Court. Therefore, what is relevant is the "willful" disobedience. Knowledge acquires substantial importance qua a contempt order. Merely because a subordinate official acted in disregard of an order passed by the Court, a liability cannot be fastened on a higher official in the absence of knowledge. When two views are possible, the element of willfulness vanishes as it involves a mental element. It is a deliberate, conscious and intentional act. What is required is a proof beyond reasonable doubt since the proceedings are quasi-criminal in nature. Similarly, when a distinct mechanism is provided and that too, in the same judgment alleged to have been violated, a party has to exhaust the same before approaching the court in exercise of its jurisdiction under the Contempt of Courts Act, 1971. It is well open to the said party to contend that the benefit of the order passed has not been actually given, through separate proceedings while seeking appropriate relief but certainly not by way of a contempt proceeding. While dealing with a contempt petition, the Court is not expected to conduct a roving inquiry and go beyond the very judgment which was allegedly violated. The said principle has to be applied with more vigor when disputed questions of facts are involved and they were raised earlier but consciously not dealt with by creating a specific forum to decide the original proceedings."

22. It is made clear that in the present case, the writ Court on 30.07.2019 had required the Special Land Acquisition Officer, Bareilly to decide the representation of the applicant by a reasoned and speaking order. There was no adjudication of claim by the writ Court. The writ Court had specifically observed that the petition was disposed of without going into the merits of the case. Once, the

writ Court did not adjudicate the matter on merit leaving it open to the authorities to decide the claim, the contempt Court cannot go behind the order passed by the writ Court and conduct a roving and fishing enquiry as has been held in the judgment of the Apex Court.

23. The argument raised at the behest of the applicant falls flat in view of the judgment cited above as there is no wilful disobedience by the officers concerned, as no claim was adjudicated by the writ Court leaving it open for the authorities to decide the claim in accordance with law.

24. Moreover, the report of the Committee endorsed by the District Magistrate on 13.04.2022 cannot be said to be a final order which was subject to approval of the Commissioner, Bareilly Division who had taken a decision on 05.05.2022 remitting back the file to the District Magistrate to re-constitute the Committee and submit a fresh report. It was when the Committee was re-constituted, it was found on enquiry that the land which was taken in the year 2003 was in fact, agricultural land recorded in the name of three persons and the applicant was one of co-tenureholder, and was entitled to only 1/3rd share of compensation.

25. The argument on behalf of the applicant that he was entitled to the entire share cannot be accepted as authorities have found him entitled to only 1/3rd share and the calculation having been made on the basis of the land recorded in the revenue records as agricultural land. The compensation earlier determined on 13.04.2022 was on the basis of the land situated in abadi whose value was more than the agricultural land.

26. In **Sushila Raje Holkar Vs. Anil Kak (Retd.) 2008 (14) SCC 392**, the Apex Court held that the proceeding under Contempt of Courts Act has a serious consequence. The Court held that where there is a allegation against a contemnor that he has wilfully committed breach of the order passed by a competent Court of law, then for the said purpose, it may be permissible to read the order of the Court in its entirety. Para 23 of the judgment is extracted hereasunder:-

"A proceeding under the Contempt of Courts Act has a serious consequence. Whether the alleged contemnor has willfully committed breach of the order passed by a competent court of law or not having regard to the civil/evil consequences ensuing therefor require strict scrutiny. For the said purpose, it may be permissible to read the order of the court in its entirety. The effect and purport of the order should be taken into consideration. Whereas the court shall always zealously enforce its order but a mere technicality should not be a ground to punish the contemnor. A proceeding for contempt should be initiated with utmost reservation. It should be exercised with due care and caution. The power of the court in imposing punishment for contempt of the court is not an uncontrolled or unlimited power. It is a controlled power and restrictive in nature (See Re: P.C. Sen [(1969) 2 SCR 649] and Jhareswar Prasad Paul and Another v. Tarak Nath Ganguly & Ors. [(2002) 5 SCC 352]. A contemnor, thus, may be punished only when a clear case for contumacious conduct has been made out."

27. In the case in hand, the alleged breach is of the order of the writ Court dated 30.07.2019 which nowhere quantifies the amount or decide the lis between the

parties. It only relegates the matter to the authorities and directs the applicant to approach through a representation which has to be decided. Thus, according to judgment of the Apex Court rendered above, no contempt is made out against the opposite part.

28. It is well settled that Court dealing with application for Contempt of Courts cannot traverse beyond the order. It cannot test correctness, or otherwise of the order or give additional direction or delete any direction, as it would amount to be exercising review jurisdiction with an application for initiation of contempt proceedings. It is impermissible. The Apex Court had occasion to hold such view in case of **Prithawi Nath Ram Vs. State of Jharkhand and others, AIR 2004 SC 4277.**

29. The contempt Court while exercising jurisdiction under Section 10 read with Section 12 of Contempt of Courts Act, 1971 is only to see that the order of the writ Court is complied with. It acts like an Executing Court and cannot go behind the order passed, which is to be complied with by the authorities. It is not a Court of adjudication, rather it is an Executing Court.

30. In case, the Contempt Court starts lifting the wheel and adjudicates upon a matter, the entire purpose and the scheme envisaged under the Act, 1971 would fail. The Contempt Court has been given limited jurisdiction, to the extent that in case, a contemnor violates and does not comply the order of the adjudicating Court and there is a wilful disobedience on his part, he is liable to be punished for civil contempt.

31. The Executing Court cannot, in the garb of getting an order of adjudicating Court complied with, enter into an area which is prohibited and adjudicate and record its own finding.

32. In the present case, the writ Court did not decide the lis between the parties, rather it remitted the matter to the competent authority for adjudication. Interference by the Contempt Court into the action of the competent authority would amount to adjudicating the claim, which is not in the domain of the Contempt Court.

33. The Contempt Court has its limitation, it cannot enter the arena which is forbided. The adjudication of a claim cannot be done by the Executing Court, as the role assigned is to the adjudicating authority/Court.

34. Once, the authorities had decided the claim of the applicant, order of the writ Court stood complied with and in case of applicant being dissatisfied, has an efficacious remedy to approach the Court or any forum provided under law, and the same cannot be decided under the contempt jurisdiction. In Dr. U.N. Bora (Supra), the Apex Court had clearly held that no roving enquiry can be conducted by a Contempt Court.

35. Similarly, in **Three Cheers Entertainment Private Limited and others Vs. Cesc Limited, 2008 (16) SCC 592**, the Hon'ble Apex Court had the occasion to consider whether a contempt proceedings can be drawn by a roving enquiry. The Court held a roving enquiry is not permissible. Relevant paras 25, 29, 30 are extracted hereasunder:-

"25. Indisputably, the majesty of the Court is required to be upheld. The Court must see that its orders are complied with. But for the said purpose, a roving enquiry is not permissible. Several proceedings which seek to achieve the same purpose are unknown to the process of law. If the trial was to be held on the issues framed by the learned Single Judge, it should have been allowed to be brought to its logical conclusion. When the trial was incomplete, we fail to see any reason why the contempt proceeding was heard on affidavits. Even if that was done, reliance was sought to be placed on the depositions of the witnesses in the said enquiry, which was admittedly incomplete. Witnesses affirming affidavits before the learned Single Judge were not being cross- examined so as to enable the counsel for the parties to draw their attention to the earlier statement made by them in terms of Section 145 of the Evidence Act.

29. Contempt of court is a matter which deserves to be dealt with all seriousness. In ***Mrityunjoy Das & Anr. v. Sayed Hasibur Rahman & Ors****. [(2001) 3 SCC 739], this Court held :*

*"13. Before however, proceeding with the matter any further, be it noted that exercise of powers under the Contempt of Courts Act shall have to be rather cautious and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The court must otherwise come to a conclusion that the conduct complained of tantamounts to obstruction of justice which if allowed, would even permeate in our society (****vide Murray & Co. v. Ashok Kr. Newatia)****. This is a special jurisdiction conferred on to the law courts to punish an offender for his contemptuous conduct or obstruction the majesty of law."*

30. In ***Chhotu Ram v. Urvashi Gulati & Anr. [(2001) 7 SCC 530],*** *this Court held that a contempt of court proceeding being quasi criminal in nature, the burden to prove would be upon the person who made such an allegation. A person cannot be sentenced on mere probability. Willful disobedience and contumacious conduct is the basis on which a contemnor can be punished. Such a finding cannot be arrived at on ipse dixit of the court. It must be arrived at on the materials brought on record by the parties.*

Yet again in ***Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors. [(2002) (4) SCC 21],*** *it was opined :*

"15. It may also be noticed at this juncture that mere disobedience of an order may not be sufficient to amount to a "civil contempt' within the meaning of Section 2(b) of the Act of 1971 - the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act and lastly, in the event two interpretations are possible and the action of the alleged contemnor pertains to one such interpretation - the act or acts cannot be ascribed to be otherwise contumacious in nature. A doubt in the matter as regards the willful nature of the conduct if raised, question of success in a contempt petition would not arise." "

36. After considering the facts and circumstances of the case, this Court finds that as the order of the writ Court dated 30.07.2019 was specific to the extent that the representation of the applicant was to be decided by the Special Land Acquisition Officer, the Committee constituted by District Magistrate has finally adjudicated the claim and found the applicant entitled for the compensation to his 1/3rd share amounting to Rs.75,07,200/-.

37. Thus, if the applicant is aggrieved by the compensation so awarded by the State authorities, he may approach the forum available under the law challenging the said order, but no contempt proceedings are maintainable as there is no wilful disobedience of the order of the writ Court. Once, the claim has been adjudicated, the applicant has a remedy of challenging the same if he is not satisfied by the claim decided by the State officials.

38. The contempt application is devoid of merits and is hereby **dismissed**.

39. Contempt notice stands discharged.

(2022)06ILR A60
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.06.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No. 35 of 2019

Dharmesh Pasi ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Jail Appeal, Ranjana Srivastava(A.C.), Ranjana Srivastava, Subhi Guha(Amicus curiae)

Counsel for the Respondents:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860 - Sections 304 & 506-Challenge to-Conviction-no previous enmity-in order to reach fast at the destination, appellant crossed the green crop of the deceased and when they were prevented they attacked upon the deceased-Injuries were on vital part-in a sudden provocation he attacked upon the deceased and later he died- no intention to kill the deceased but the act was done with the knowledge that would likely cause death-No force was applied against the accused-No difference or disparity between the ocular and medical evidence-The prosecution has been successful in proving its case beyond reasonable doubt under Part II of Section 304 IPC.(Para 1 to 22)

The appeal is dismissed. (E-6)

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

1. This jail appeal has been preferred against the order of conviction and sentence dated 06.10.2018 by the Court of Additional Sessions Judge, Court No.9, Hardoi in Sessions Trial No.260 of 2016 in case crime no.43/2016, under Section ? 304, 506 IPC, Police Station ? Behata Gokul, District ? Hardoi.

2. In brief, facts of the case are that Lalu alias Akhilesh lodged an FIR on 02.02.2015 that on 01.02.2015 at around 04:00 PM he was sitting in the western side of the plot of Jagpal Rathore. Suddenly Dharmesh came with unknown person and started going from his plot. When his father opposed, Dharmesh attacked from the wooden patra an unknown person attacked with lathi. When his father cried he saw and ran towards them then they ran away giving death threats. His father received injury at his head and stomach. With the help of villagers he moved him to the hospital where he died during the treatment. He requested to lodge FIR and take appropriate action. According to him Mahipal has also seen the occurrence.

3. The grounds of the appeal are that when the accused was in jail he forwarded jail

appeal with the allegation that he has been punished with seven years rigorous imprisonment and Rs.10,000/- fine in case crime no.43/2016 in Sessions Trial Case No.260/2016, under Section 304 Part ? II IPC by the Court of ASJ-IX th, Hardoi on 06.10.2018. He belongs to a poor family. There is no other person to do 'pairavi' on his behalf, therefore, a jail appeal be preferred.

4. This application was forwarded by Jail Superintendent, Lucknow which was treated as jail appeal.

5. From the perusal of the above jail appeal it is apparent that no proper grounds have been taken by the accused-appellant.

6. During the course of trial following evidence were recorded :- .

ORAL EVIDENCE
PW-1 Lalu alias Akhilesh
PW-2 S.M. Mohd. Ujair
PW-3 Mahipal
PW-4 Dr. Sanjay Kumar Saini
PW-5 I.O. Inspector Brijesh Kumar Tripathi
PW-6 IO/SO Amar Pal Sharma
Documentary Evidence
Tahrir Exhibit Ka-1
Chic FIR Exhibit ka-2
GD Exhibit Ka-3
Police Proforma No.127 exhibit ka-3
Postmortem report - exhibit Ka-4,
Map exhibit ka-5,
Recovery memo ? Exhibit Ka-6,
Map recovery ? Exhibit ka-7,
Charge sheet - Exhibit ka-8,
Inquest ? Exhibit ka-9,
Police Form 33 ? Exhibit ka-10,
Police Form 379 ? Exhibit ka-11,
letter to RI ? Exhibit ka-12,
Letter to CMO ? Exhibit ka-13 and specimen seal ? Exhibit ka ? 14

7. After recording of evidence statement of the accused was recorded under Section ? 313 CrPC in which he said that he was falsely implicated on the pretext of village pradhan election. According to him the case was lodged on account of 'ranjish' and said to produce evidence in defence but no evidence was produced by him.

8. PW-1 Lalu alias Akhilesh is the informant and son of the deceased and also eyewitness who deposed that on 01.02.2016 at about 04:00 PM he was giving water in his wheat crop. His father was also there. who was sitting on the boundary of his nearby plot. At the same time accused Dharmesh with wooden patra and other person with lathi crossed his plot. His father forbade them then both the accused person started abusing his father. When his father prevented them then accused Dharmesh beat him with his wooden patra and the unknown person also beat him. When his father cried he saw the occurrence and ran towards him to save his life but both the accused persons threatened him to life. At the same time his relative Mahipal who was going from Hardoi to village Jagdishpur saw the occurrence. On his cry accused ran away after giving threatening to life. He transported his father to district hospital Hardoi where during the treatment his father died. Next day he lodged the FIR. This witness has proved the tahrir exhibit ka-1.

9. PW-2 Head Moharrir Mohd. Ujair is the formal witness who has proved Kayami GD exhibit ka-3 and chic FIR Exhibit ka-2 and also photocopy of hand written G.D. as Exhibit Ka-3 A.

10. PW-3 Mahipal is an eyewitness who has supported the prosecution version and has said that at about 04:00 PM he was going to his village from the market of Jagdishpur. When he reached near the plot of the deceased he saw that accused Dharmesh was beating the deceased from wooden patra. He challenged him as to why he was beating the deceased then accused Dharmesh ran away from the plot. According to him at that time Lalu alias Akhilesh son of deceased Ujja was also present. According to him the injured was taken to the District hospital where he died during the treatment. According to him the deceased died due to the injury caused by the accused Dharmesh.

11. PW-4 Dr. Sanjay Kumar Saini is the witness of postmortem. He has done the autopsy of the dead body of the deceased. He found three ante-mortem injuries on the body of the deceased. These are as under :-

(i) Contusion 3 x 2 cm on the skull.

(ii) Lacerated wound 1.5 cm x 0.5 cm on the back and outer area of right thumb.

(iii) Contusion 16 x 12 centimeter area of chest and the abdomen according to him when he opened his body he found ribs were broken and liver was torn, lungs and spleen were pale. The deceased died at 08:35 PM on 01.02.2016 in District Hospital Hardoi.

12. According to the witness the deceased died due to bleeding, haemorrhage and shock.

13. PW-5 Brijesh Kumar Tripathi was the Investigating Officer of occurrence who has done investigation in the case. This witness has proved map of the spot as exhibit ka-5. Recovery memo of the weapon as exhibit ka-6, map of the recovery memo as exhibit ka-7, charge sheet as exhibit ka-8 and wooden patra as material exhibit ? 1.

14. PW-6 was appointed as S.I. on the day of occurrence. According to him he received copy of the tahrir and death memo and on the direction of SHO reached mortuary where he did inquest of the exhibit ka-9 of the deceased and prepared challan in his exhibit ka-10, photo in his exhibit ka-11, letter to RI exhibit ka-12 and letter to CMO as exhibit ka-13. He has also proved the specimen seal as exhibit ka-14.

15. This case is based on direct evidence. There are two eyewitnesses PW-1 informant Lalu alias Akhilesh son of the deceased and PW-3 Mahipal independent eyewitness. Both the witnesses of fact have deposed against the accused and have deposed that wheat crop was standing in the plot. He was giving water. His father was also present there and when accused and the unknown person started crossing the wheat field and when his father prevented them then they attacked upon him and caused fatal injuries due to which he later on died. Similar statement has been given by PW-3 Mahipal. Thus, from the evidence of both the witnesses of fact it is clearly established that the accused and the unknown person caused fatal injuries to the deceased due to which he succumbed.

16. It has already been said that no evidence in defence has been produced by the appellant. So far as the alleged enmity is concerned, no oral or documentary evidence has been produced by the accused, therefore, it is established that there was no occasion of false implication of the accused in the present case by the informant.

17. From the perusal of the evidence it is established that this occurrence actually took place when accused and his unknown companion started crossing the wheat crop field and they were prevented by the deceased to save the damage of property.

18. In the lower court learned counsel for the applicant had questioned that since the informant PW-1 does not know the number of the plot in suit, therefore, the case is doubtful. The lower court has not accepted that such ignorence is fatal for the prosecution. The witness has said that the area of the plot is 5 bigha and 70-80 feet in length and width. From the map and evidence of I.O. it is established that the place of occurrence is not changed. Only not knowing the Khasra number of the plot is not material and on this basis the informant PW-1 cannot be said to be a false witness. It is also not established that the crops were so long that it was impossible to recognize the accused. Similarly, PW-3 Mahipal has also no enmity with the accused. He is also eyewitness who intervened in the occurrence and when he challenged the accused, he ran away from the wheat field. He recognizes the accused from his childhood. In this regard he said that he knows him because his 'mausi' lives in his village. It has come in the evidence of PW-1 that the wheat crop was up to the height of waist so it was quite probable to see and recognize the accused. It is also discussed by the lower court that informant PW-1 could not chase the accused persons but firstly he attended his father. Till then the accused persons had run away. Such conduct is quite natural and from such conduct of informant it cannot be inferred that he is telling a lie. In similar situation different persons act differently. A person can face and chase the accused persons, another person can run away from the spot, another person can attend the injured, so it depends upon the mental condition of the person concerned. The lower court has also discussed that informant PW-1 has not correctly counted the number of attacks by each accused separately. There is no law that it is mandatory for the witness to give description of exact numbers of attack by all accused persons. PW-1 has said that accused persons beaten his father three-four times by lathi attack and three- four times from wooden patra. So inability in giving the correct description is not the requirement of law. PW-3 only recognizes the present accused-appellant. He could not see another person. The lower court has not found this witness a chance witness. Lower court has relied on the citation Kallu vs. State of Haryana [AIR (2012) Supreme Court 3212] in which Punjab and Haryana High Court has held that there is no rule of law that the evidence of chance witness cannot be relied on though his evidence should be minutely observed. This Court also finds the evidence of PW-3 credible in absence of any motive and enmity with the accused.

19. From the evidence it is established that informant PW-1 carried his father with the help of Malkhan (Driver of hospital), Dinesh Pal and Ram Singh in the jeep of Malkhan. He reached hospital at about 07:00 PM and PW-3 has not accompanied the informant - deceased and above mentioned persons. Only on this acount it cannot be said that PW-3 has not seen the occurrence. It is not necessary that every eyewitness shall also accompany the injured to the hospital. Lower court has also discussed this fact that sister of the informant Lalu has been married in the family of PW-3 Mahipal but this alone is not sufficient to conclude that PW-3 is a

false and planted witness. Since the place of occurrence is situated on the way of Bazar to his village, therefore, he cannot be said to be a chance and planted witness. Even under Section 134 of the Evidence Act single testimony is sufficient to prove the guilt. Certainly PW-1 was present at the spot at the time of occurrence and he has given evidence in support of the prosecution, therefore, it cannot be said that only to strengthen the prosecution story PW-3 has been mentioned as eyewitness. Learned lower court has relied on the citation Bhagwan Jagannath Markand vs. State of Maharashtra [(2016) 10 SCC 537] in which Hon'ble Supreme Court has held that testimony of a witness cannot be refused only on the ground that he is relative of the deceased but it has been directed that his evidence should be seen with care and caution and if the same inspires confidence then the accused can be convicted.

20. In this case the occurrence took place at about 04:00 PM of 01.02.2016 and the report was lodged at 11:20 AM of 02.02.2016. The distance between the place of occurrence and police station is about 8 Kms. Firstly injured was taken to the district hospital Hardoi where he died at about 07:10 PM. The information was sent to the police station Kotwali Shahar from the hospital same day. The distance from the Sadar hospital to Behta Gokul police station is about 16 Kms. Inquest was conducted at about 07:40 PM of 02.02.2016 at District Hospital. Death memo was issued on 08:35 pm of 01.02.2016. It appears that informant PW-1 is the sole son of the deceased.

21. In these circumstances, it was not possible for the informant to leave the dead body and go to police station to lodge the FIR just after the incident or just after the death of his father. There is some cutting over the inquest. The lower court has relied on the ruling Brahma Swaroop vs. State of U.P. AIR 2011 Supreme Court page 280 in which it is held that the purpose of inquest is to know as to how the injuries were caused and what is the apparent cause of death. It is held in several cases that inquest is not substantive piece of evidence. This Court is of the opinion that only delay of some hours in lodging of FIR and some cutting over the inquest is not fatal for the prosecution and in this context the lower court has correctly analyzed the case.

22. There is no difference or disparity between the ocular and medical evidence. According to prosecution case the deceased was beaten by lathi and wooden patra and the injuries are contusion and lacerated wound which can be caused by wooden patra and lathi. Thus, the ocular and medical evidence are in support of each other and wooden patra has also been recovered from the pointing of the accused. The lower court has convicted and sentenced the accused under Part - II of Section 304 IPC. According to Section 304 IPC whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death or with imprisonment of either description for a term which may extend to 10 years or with fine or with both. If the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injuries as is likely to cause death. In the first Part of Section 304 IPC

an accused can be punished up to the imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine whereas as per Second Part the maximum sentence is 10 years or with fine or with both if the act is done with the knowledge. First part of Section 304 IPC is based on the intention of the accused whereas Second Part is based on the knowledge. Lower Court concluded that there was no intention of the accused to kill the deceased. The occurrence occurred suddenly without any prior meeting of mind. Accused with another unknown co-accused were going to their destination and it appeared that to reach fast at the destination they crossed the green wheat crop and to avoid damage when they were prevented by the deceased they attacked upon him from the weapon which they were having in their hands which became fatal for the deceased and during the course of treatment he died.

23. Considering these facts of the offence the lower court has convicted and sentenced the accused under Part-II of Section 304 IPC. This Court is also of the opinion that there was no previous enmity between the accused and the deceased or the informant. In order to reach suddenly at the destination appellant-accused crossed the green crop of the deceased and when he was prevented then in sudden provocation he attacked upon the deceased and later on deceased succumbed.

24. From the above discussion it is established that the deceased died due to injuries caused by the accused and his unknown companion who could not be recognized and who could not be tried. It is also obvious that there was no intention of the accused to kill the deceased. It was an incident of sudden provocation but injuries numbers 1 and 3 are on the vital part and one should have knowledge that if he causes such injuries to any person such person may die.

25. Thus, it is established that accused has caused the offence under Section - 304 Part-II IPC and it would also be presumed that act was done with the knowledge that would likely cause death or shall cause such bodily injury which would likely cause death.

26. The lower court has acquitted the accused under Section 506 IPC. There is no evidence that accused threatened to dire consequences or life threat to the informant. So far as the injured deceased is concerned he has died. No cross appeal has been preferred by the State, therefore, this Court is also of the opinion that charge under Section 506 IPC is not proved.

27. The accused has been convicted under Part-II of Section 304 IPC as has been sentenced for seven years rigorous imprisonment and Rs.10,000/- fine and in case of default for non-payment three months additional rigorous imprisonment has been awarded. Out of Rs.10,000/- fine Rs.5,000/- amount of fine has been given to the informant. The appellant has not engaged any private counsel and an amicus curiae has been appointed to defend his case who argued the case before this Court. It is not known to this Court as to whether the accused appellant has any family burden or not ? He was not expected to cross the green wheat crop. Certainly, if any person crosses the green wheat crop, his foot shall damage the crop. There was alternative route for the accused to go through the boundaries of the plot but he selected to cross the green wheat crop and

upon preventing by the deceased, in a fit of anger he along with his unknown companion hit the deceased who later on died. This Court is of the opinion that seven years' rigorous imprisonment and Rs.10,000/- fine is not much more in the attending circumstances. No force was applied against the accused. Informant and deceased were working on the plot in rightful manner and there was no occasion to do the alleged act by the accused which resulted in the death of the deceased. This Court is of the view that the whole aspect of the case has been fully proved by the oral and documentary evidence. The prosecution has been successful in proving the case beyond reasonable doubt under Part-II of Section 304 IPC, therefore, the appeal fails and is liable to be ***dismissed***. Accordingly, the appeal is dismissed. The order of conviction and sentence dated 06.10.2018 passed by the lower court is affirmed. A copy of this judgment be sent to the concerned court and concerned Jail Superintendent for compliance.

(2022)06ILR A66
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2022

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

First Appl. From Order No. 2351 of 2017

Raja Beti & Ors. ...Appellants
Versus
Ashok Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Shrinath Dwivedi, Sri Amit Kumar Sinha, Sri Ashok Kumar Singh, Deepali Srivastava Sinha

Counsel for the Respondents:
Sri N.K. Srivastava

A. Civil Law - Motor Vehicles Act,1988 - Sections 166, & 168 - Motor Accident claim - deceased was working as Lekhpal at the time of accident - Claims Tribunal awarded only Rs. 65,000/- towards non pecuniary damages & nothing was awarded towards pecuniary loss on the ground that after the death of deceased, the widow was getting family pension as well as employment under the Dying in Harness Rules and receiving Rs. 7,500/- per month as such there was no financial loss to the family of the deceased Claims Tribunal - Held - law has been settled by the Hon'ble Apex Court in the case of Vimal Kanwar that the amount received by the widow towards family pension and the salary received on compassionate appointment under the Dying in Harness Rules cannot be deducted from the compensation for which claimants are entitled under the Motor Vehicles Act (Para 10)

B. Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 168 - Motor Accident claim - Determination of compensation - deceased, aged about 42 years, was working as Lekhpal at the time of accident, there was five dependents on the income of the deceased - Calculation - Monthly Income Rs. 7000 - Annual Income : 7000 x 12 = Rs. 84,000 - 30% future prospectus for the age group of 40 to 50 years - Future prospects (30%) = Rs. 25,200 - Total annual income 84000 + 25200 = Rs. 109200 - deduction should be 1/4th where the number of dependents are 4 to 6 - Deduction towards personal expenses (1/4th) 109200 - 27300 = Rs. 81900 - multiplier of 14 for the age group of 41 to 45 years - Multiplier applicable (14) : Rs. 81900 x 14= Rs. 11,46,600 - Non-pecuniary damages : Rs. 70,000 - Total : 1146600 + 70,000 = Rs. 1216600 – claimants are also entitled for interest at the rate of 7% on the enhanced amount from the date of filing claim petition (Para 12, 13)

Allowed . (E-5)

List of Cases cited :

1. Vimal Kanwar & ors. Vs Kishore Dan & ors. 2013 (3) T.A.C. 6 (S.C.)

2. Smt. Sarla Verma Vs. D.T.C. 2009 (2) T.A.C. 677 (S.C.)

3. National Insurance Co.Ltd. Vs Pranay Sethi 2017 (4) T.A.C. 673

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Ashok Kumar Singh and Sri Amit Kumar Sinha, learned counsel for the appellants and Sri N.K. Srivastava, learned counsel for the respondent no. 5 and perused the record. No one is present on behalf of other respondents.

2. This first appeal from order has been filed by the claimants-appellants for enhancement of compensation against the judgment and award dated 08.08.2005, passed by Ist Additional District Judge / Motor Accident Claims Tribunal, Chitrakoot, in M.A.C.P. No. 163/70 of 2000 (Raja Beti and others vs. Ashok Kumar and others) by which compensation of Rs. 65,000/- only has been awarded to the claimants on account of death of Sri Bachcha Lal, aged about 42 years.

3. It is submitted by learned counsel for the claimants-appellants that the deceased was working as Lekhpal in Tehsil Karvi, District Chitrokoot at the time of accident and was getting salary of Rs. 7,000/- per month. The Claims Tribunal had acted in arbitrary manner has awarded only Rs. 65,000/- on the ground that after the death of Bachcha Lal, the claimant appellant no. 1 who is widow of Bachcha Lal was getting family pension @ Rs. 3,500/- per month and was also provided employment under the Dying in Harness Rules and was also getting salary to the tune of Rs. 4,000/- per month. The Claims Tribunal was of the view that since the widow was getting family pension as well as employment under the Dying in Harness Rules and receiving Rs. 7,500/- per month and there is no financial loss to the family of the deceased on account of death of Baccha Lal. The Claims Tribunal had awarded Rs. 50,000/- for loss of consortium, Rs. 5,000/- for funeral expenses and Rs. 10,000/- for pain and suffering and total amount of Rs. 65,000/- has been awarded to the claimants.

4. Learned counsel for the appellants has placed reliance upon the judgment of Hon'ble Apex Court in the cases of ***Vimal Kanwar and others vs. Kishore Dan and Others*** reported in ***2013 (3) T.A.C. 6 (S.C.).*** The relevant paragraph no. 19 and 20 are reproduced herein below :-

"19. The first issue is "whether Provident Fund, Pension and Insurance receivable by claimants come within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction."

The aforesaid issue fell for consideration before this Court in Helen C. Rebello (Mrs) and others vs. Maharashtra State Road Transport Corporation & Anr. reported in (1999) 1 SCC 90. In the said case, this Court held that Provident Fund, Pension, Insurance and similarly any cash, bank balance, shares, fixed deposits, etc. are all a "pecuniary advantage" receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable

for deduction. The following was the observation and finding of this Court:

"35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz., accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No correlation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any correlation. The insured (deceased) contributes his own money for which he receives the amount which has no correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

20. The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction."

"Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependents, one of the dependents may request for compassionate appointment to maintain the family of the deceased employee dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of

accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependents may be entitled for compassionate appointment but that cannot be termed as "Pecuniary Advantage" that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

5. It is submitted by learned counsel for the appellant that the family pension and salary received on appointment under dying in harness cannot be treated as pecuniary benefits and are not liable to be deducted for determination of compensation.

6. On the other hand learned counsel appearing on behalf of respondent-Insurance Company has submitted that the compensation awarded by the Claims Tribunal is just and proper and no ground for enhancement is made out but he has not disputed the aforesaid legal positions.

7. From the perusal of impugned award, it is apparent that nothing has been awarded by the Claims Tribunal towards pecuniary loss to the legal heirs of deceased and only Rs. 65,000/- has been awarded towards non pecuniary damages, whereas, the law has been settled by the Hon'ble Apex Court in the case of ***Vimal Kanwar (supra)*** that the amount received by the widow towards family pension and the salary received on compassionate appointment under the Dying in Harness Rules cannot be deducted from the compensation for which claimants are entitled under the Motor Vehicles Act.

8. The compensation for which the claimants are entitled under the Motor Vehicles Act are reassessed. There is no dispute regarding the age of the deceased as 42 years at the time of accident. It is also undisputed that the deceased was working as Lekhpal in Tehsil Karvi, District Chitrakoot and was getting salary of Rs. 7,000/- per month.

9. The Hon'ble Apex Court in the case of ***Smt. Sarla Verma vs. D.T.C.*** reported in ***2009 (2) T.A.C. 677 (S.C.)*** has provided the multiplier of 14 for the age group of 41 to 45 years and it is also provided that deduction should be 1/4th where the number of dependents are 4 to 6. The relevant paragraphs no. 14 and 21 are reproduced herein below :-

"14. 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, the general practice is to apply standardized 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 dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.

21. 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, Trilok Chandra and Charlie), 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. "

10. Since, the age of the deceased was 42 years at the time of accident, the appropriate multiplier would be 14 and since, there was five dependents on the income of the deceased, the deduction towards personal expenses would be 1/4th.

11. The Hon'ble Apex Court in the case of ***National Insurance Company Ltd. vs. Pranay Sethi*** reported in ***2017 (4) T.A.C. 673*** has also provided 30% future prospectus for the age group of 40 to 50 years. the claimants are also entitled for 30% future prospectus. The Hon'ble Apex Court has also provided certain guidelines for calculating the just compensation under the Moter Vehicles Act. Relevant paragraph 61 is reproduced herein below :-

"61. In view of the aforesaid analysis, we proceed to record our conclusions:

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) 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 aforesaid amounts should be enhanced at the rate of 10% in every three years."

12. Considering the facts and circumstances of the case and law settled by Hon'ble Apex Court, the compensation awarded by the Claims Tribunal is reassessed as follows :-

1. Monthly Income : Rs. 7,000/-

2. Annual Income : Rs. 7,000//- x 12 = Rs. 84,000/-

3. Future prospects (30%) = Rs. 25,200/-

4. Total annual income : Rs. 84,000/- + Rs. 25,200/- = Rs. 1,09,200/-

5. Deduction towards personal expenses (1/4th) : Rs. 1,09,200/- - Rs. 27,300/- = Rs. 81,900/-

6. Multiplier applicable (14) : Rs. 81,900/- x 14= Rs. 11,46,600/-

7. Non-pecuniary damages : Rs. 70,000/-

Total : Rs. 11,46,600/- + Rs. 70,000/- = Rs. 12,16,600/-

13. The Appeal is hereby partly allowed and award of the Claims Tribunal is modified and compensation awarded by the Claims Tribunal is enhanced from Rs. Rs. 65,000/- to Rs. 12,16,600/-. The claimants-appellants are also entitled for interest at the rate of 7% on the enhanced amount from the date of filing claim petition. The respondent-Insurance Company is directed to pay enhanced amount a well as interest to the claimants within two months from today.

14. No order as to costs.

(2022)06ILR A71
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2022

BEFORE

THE HON'BLE OM PRAKASH-VII, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Government Appeal No. 1880 of 1984

The State of U.P. ...Appellant
Versus
Brij Raj Singh & Ors. ...Respondents

Counsel for the Petitioner:
A.G.A.

Counsel for the Respondents:
Ma, Sri Kuldeep Johri

A. Criminal Law - Code of Criminal Procedure, 1973-Section 372 - Indian Penal Code, 1860-Sections 302/149, 148 & 307/149 - Challenge to-Acquittal-the occurrence is of day light-all the accused persons were present on the spot having firearms in their hand-they have committed the offence in furtherance of common object of wrongful assembly-no contradiction in the prosecution evidence-Mere rivalry in gram panchayat election is not sufficient cause to commit the offence-Trial court wrongly appreciated the evidence holding the accused respondents not guilty for committing the murder of the deceased.(Para 1 to 62)

B. 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. (Para 47 to 49)

The appeal is allowed. (E-6)

List of Cases cited:

1. Surjit Singh @ Gurmit Singh Vs St. of Punj. (1993) Supp 1 SCC 208

2. Majju & anr. Vs St. of M.P. (2002) SCC Cri. 597

3. Prithvi (Minor) Vs Mam Raj & ors. (2004) 13 SCC 279

4. Kathi Bharat Vajsur & anr. Vs St. of Guj. (2012) AIR SC 2163

5. Yogesh Singh Vs Mahabeer Singh & ors. (2016) AIR SC 5160

6. St. of U.P. Vs Jagdeo & ors. (2003) 1 SCC 456

7. Munigadappa Meenaiah Vs St. of A.P. (2008) 11 SCC 661

8. Brahma Swarup & ors. Vs St. of U.P. (2004) 2 JIC 827 All

9. Hardev Singh & ors. Vs Harbhej Singh & ors. (1996) 4 Crimes 216 SC

10. St. of U.P. Vs Naresh & ors. (2011) ACR 370

11. St. of Raj. Vs Bhawani & anr. (2003) 7 SCC 291

12. Amar Singh Vs Balwinder Singh & ors. (2003) 46 ACC 619

13. Munshi Prasad & ors. Vs St. of Bih. (2002) SCC Cri. 175

14. Gopal Singh Vs St. of U.K. (2013) 7 SCC 545

15. Rohtash Kumar Vs St. of Har., CRLA No. 896 of 2011

16. Bipin Kuamr Mondal Vs St. of W.B. (2010) 12 SCC 91

17. Uma Shankar Vs St. of U.P. (2015) 89 ACC 421

18. Kaki Ramesh & ors. Vs St. of A.P. (1994) SCC Cri 1214

19. Subodh Nath & anr, Vs St. of Tripura (2013) 4 SCC 122

20. Marwadi Kishor Parmanand & anr. Vs St. of Guj. (1994) 4 SCC 549

21. Hayat Singh Bora Vs St. of U.K. (2012) 77 ACC 615

22. St. of U.P. Vs Shane Haidar & ors. (2015) 1 J.Cr.C. 775

23. Hardev Singh Vs Harbhej Singh & ors. (1996) 4 Crimes 216

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. The instant Government Appeal has been filed against the judgment and order dated 09.03.1984 passed by the Additional Sessions Judge, Bareilly in S.T. No. 67 of 1993, Case Crime No. 114 of 1982, State of U.P. Vs. Braj Raj Singh and Others, under Sections 147/ 148/ 149/ 302/ 307 IPC whereby the learned Trial Court acquitted the accused persons from the charges of offence defined under Sections 302/149, 148, 307/149 IPC.

2. The record indicates that the accused Braj Raj Singh, Kandhari Singh and Master Singh have died during the pendency of instant appeal and the appeal has been abated for above accused respondents. At present accused-respondents Ram Chandra Singh and Omkar Singh are surviving. Hence, we are proceeding to consider the Governement Appeal in respect of the said accused respondents, namely, Ram Chandra Singh and Omkar Singh.

3. In brief, the facts of the case are that the informant Phoolan Singh S/o Malkhan Singh lodged the FIR under Section 147, 148, 149, 307 and 302 IPC against the accused persons Braj Raj Singh, Kandhari Singh, Omkar Singh, Ram Chandra Singh and Master Singh with the contention that accused Braj Raj Singh had

taken some loan from the Lala Ram Awtar, which could not be repaid, consequently the land of Braj Raj Singh got auctioned in lieu of loan amount. The brother of informant Buddha Singh took part in auction proceedings and was successful bidder. He paid Rs. 8,000/- as auctioned money but due to subsequent litigation Buddha Singh could not get possession over the property auctioned. Since Buddha Singh had purchased the aforesaid land of Braj Raj Singh in auction, therefore, Braj Raj Singh and his family members were feeling enmity with Buddha Singh. On 29.10.1982 at about 3.00 p.m. the informant alongwith his brother Buddha Singh was going with his animals towards pond for providing them bath, as they reached near the hut (Mandvi/Chhappar) of accused Master Singh, the accused persons who were carrying the guns in their hand came out from inside the hut of Master Singh. Accused Braj Raj Singh exhorted them to kill. As the informant and Buddha Singh saw and felt intention of the armed accused persons and heard the voice of exhortation they ran towards north east by raising alarm to save their life. After running some distance informant and Buddha Singh for taking shelter, entered into the house of Phoolan Singh S/o Lakhan Singh and tried to close the door. At same time all the accused persons, who were chasing them reached there and opened fire on informant and Buddha Singh with intention to kill. The brother of the informant fell down by receiving the fire arm injuries, informant also received the pellet injuries on his body. At that time witnesses Phoolan Singh S/o Lakhan Singh, Bheekam Singh, Balbir Singh, Hardwari Singh, Indar Pal Singh and Badri Singh and other villagers reached on the spot. Having seen them, the accused persons fled away towards north. While causing the attack, accused persons Kandhari Singh and Ram Chandra Singh were carrying their licensee guns and Braj Raj Singh, Omkar Singh and Master Singh were carrying single barrel guns in their hands. Buddha Singh had died on the spot. Accordingly, the FIR of the occurrence was lodged under Crime No. 114 of 1982 against aforesaid accused persons at Police Station Bhuta.

4. The investigation was entrusted to S.I., Pooran Singh, who reached on spot prepared the inquest report, sent the body of the deceased for post mortem, sketched the spot map, recorded statement of witnesses, prepared the recovery memo of empty cartridge, pellets and bamboo stick. After completing investigation, the Investigating Officer submitted charge sheet against accused persons in Court concerned.

5. The trial of the case was committed to Court of Sessions, where the charges under Sections 148, 302 read with Section 149 and 307 read with Section 149 IPC were framed against the accused persons, who denied and abjured the charges, claimed not guilty and preferred trial.

6. On behalf of the prosecution informant Phoolan Singh S/o Malkhan Singh as P.W. 1, Indra Pal Singh as P.W. 2, Phoolan Singh S/o Lakhan Singh as P.W. 3, Soran Singh as P.W. 4 and Jawahar Lal as P.W. 5 recorded their statements as witnesss.

7. P.W. 1 Phoolan Singh S/o Malkhan Singh in his oral testimony narrated almost the same fact, as mentioned in the FIR. He deposed that Buddha Singh had purchased the land of Braj Raj Singh in auction, due to the said reason the accused Braj Raj

Singh and his family members were enimical with Buddha Singh and in furtherance of the aforesaid enmity, on 29.10.1982 when he and his brother Buddha Singh were going towards pond with their animals, armed accused persons, who were present in the hut (Mandvi / Chhappar) of accused Master Singh seeing them (victims) came out with exhortation and threat to kill. Having seen their gesture and smelling danger, the informant and Buddha Singh ran towards north and east to save their lives. They took shelter in the house of Phoolan Singh, at the same time the accused persons, who were chasing them, rached at the door of house of Phoolan Singh S/o Lakhan Singh and opened fire on Buddha Singh and informant when they were trying to hide themselves. After receiving the fire arm injuries, Buddha Singh fell down and died on the spot, whereas informant received injuries of pellets on his body. When the witnesses and other village persons reached on the spot, the accused persons escaped. He lodged the FIR in Police Station concerned and undergone the treatment of their injuries after medical examination.

8. P.W. 2 -Indra Pal Singh, who is the S/o informant's brother stated in his oral statement that informant and Buddha Singh were going towards pond with their animals, on the way they had seen that the armed accused persons came out from the hut (Mandvi / Chhappar) of accused Master Singh and exhorted and extended threat to kill Buddha Singh. Hearing the exhortation, feeling the danger the informant and deceased turned back and ran away from the spot. The accused persons started chasing them. Having seen the above activities, the witness also followed them. The informant and deceased entered inside the open house of Phoolan Singh S/o Lakhan Singh and to save their lives, they tried to close the door of house, but all the accused persons, who had reached there, opened fire indiscriminately. In the firing of accused persons informant and Buddha Singh received fire-arm injuries. Buddha Singh died on the spot. The witness also stated that the occurrence took place due to enimity because the deceased had purchased the land of Braj Raj Singh in auction.

9. Wintess Phoolan Singh S/o Lakhan Singh deposed as P.W. 3. He did not support the prosecution case. Consequently, he had been declared as hostile witness. Although in his examination- in- chief he stated that on the date of occurrence at about 03-04 p.m., the informant and his brother Buddha Singh entered into his house raising voice for help and in his house they received the fire arm injuries, but who had opened the fire, he could not see.

10. P.W. 4 Soran Singh and P.W. 5 Jawahar Lal, as formal witnesses, have proved the investigation proceedings.

11. Since the accused persons had accepted genuineness of medical examination report of informant Phoolan Singh and post mortem report of deceased Buddha Singh, the doctors had not been produced by the prosecution.

12. In their statement under Section 313 Cr.P.C., the accused persons, except the accused Master Singh (since died), had accepted that the deceased Buddha Singh had purchased the land of Braj Raj Singh in auction. All the accused persons stated that the facts and allegations of prosecution are false and concocted. They are innocent and they have been roped in the case due to the

reason of previous enmity and village party bandi.

13. Learned trial Court after hearing the arguments of rival parties acquitted the accused persons from the charges of offences defined under Sections 147, 148, 149, 302 and 307 IPC, which has been assailed by the prosecution by way of instant appeal.

14. We have heard the arguments of learned AGA as well as learned counsel for the accused respondents and perused the record carefully.

15. Learned AGA argued that judgment and order of acquittal is misconceived and bad in the eye of law. The impugned judgment and order passed by the Trial Court is against the provisions of law and same is based on conjectures and surmises. Prosecution had succeeded to prove its case beyond any shadow of doubt against the accused persons but the trial Court failed to appreciate the evidence available on record in right perspective. To substantiate his arguments, learned AGA referred the evidence of P.W. 1 and P.W. 2, who were eye witnesses of occurrence, and submitted that P.W. 1 is injured witness. The statement of eye witnesses is supported with medical evidence. The findings recorded by the Trial Court in the impugned judgment and order are perverse and same are liable to be set aside and the appeal deserves to be allowed.

16. In reply, learned counsel for the accuesed respondents vehemently opposed the arguments of learned AGA. Learned counsel for the respondents submitted that the deceased had been attacked by some unknown persons, who were interested in the lady, namely, Dhandei. She was living with deceased Buddha Singh illicitely who had enticed her. The prosecution story is false and baseless. There is no existance of hut (Chhappar/ Mandvi) of accused Master Singh (since died) in the village nor accused persons were present in the hut of accused Master Singh (since died). The alleged pond, where deceased as well as the informant were going with their animals, was dried and also was too far from the residence of victims. The accused persons are innocent. They have not committed any offence, rather they have been falsely implicated in the case by the informant due to enmity and village party bandi. The FIR was ante timed. Motive of offence has not been proved. The prosecution witnesses had given false statements. The investigation was defective and biased. The prosecution failed to prove its case against accused persons beyond reasonable doubt. Findings recorded by the trial court in the impugned judgment and order are in accordance with facts, evidence and law. The appeal has no force and is liable to be dismissed.

17. 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). There was no hut (madai) belonging to Master Singh (since died) in the village in question nor the accused persons were hiding in the said hut at the time of incident.

(ii). F.I.R. was lodged after due consultation with the help of police personnel and same is ante-timed document.

(iii). PW-1 and PW-2 are interested witnesses. They have made false statement

before the Court. Their statements were not reliable.

(iv). Prosecution case is not supported with independent evidence.

(v). None has seen the incident.

(vi). Incident did not take place in the manner and style as stated by the prosecution witnesses.

(vii). Alleged motive has also not been proved by the prosecution beyond reasonable doubt.

(viii). Accused were implicated in this case due to previous enmity and parti-bandi.

(ix). The Investigating Officer has not conducted the investigation fairly.

(x). Deceased and injured witness were not going to Tall (pond) alongwith their cattle for providing them water.

(xi). There are major contradictions in the statement of prosecution witnesses on material points.

18. 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.

F.I.R.:-

19. The date and time of incident, as shown in the FIR, was 03.00 p.m. on 29.10.1982 and the FIR of the case was lodged at Police Station Bhuta at 07.15 p.m. on the same day. The distance of Police Station from the place of occurrence has been shown as 08 mile (i.e. equal to approx 12.87 K.M.). P.W. 1 had stated in his evidence that after the occurrence, they moved from his village at about 04.00 p.m. to lodge FIR at Police Station concerned by bullockart and reached there in three hours and lodged the FIR. So far as the condition of informant is concerned, he had received three injuries of lacerated wound on non-vital part of the body for which the doctor opined that the injuries were simple in nature. Apart from that he had received eight wounds of .8 diameter in the part of upper abdomen. The occurence had taken place at 3.00 p.m. and FIR was lodged at 7.15 p.m. i.e. after 4.15 hours. Therefore it can not be said that the informant was not in a condition to lodge FIR. Moreover, the informant had gone under medical examination at 01.10 a.m. on 30.10.1982 i.e. after 10 hour, even then the doctor who had examined him, did not mention any srious condition of patient in his medical examination report. The genuineness of the medical examination report of informant has been accepted by the learned counsel for respondents. The witnesses of rural background have tendency to explain the conditions in exaggerate form which is natural, and does not amount to material contradiction. In view of report of injured informant, it can not be said that informant was not in fit physical condition and the FIR had been lodged by the consultation of police persons. It has also been argued by learned counsel for appellant that inquest report was having overwriting in the date of 29.10.1982, which creates doubt about timing of registration of FIR. Inadvertently or by mistake mentioning of wrong date is possible and it is quite common also, and if the wrong entry of date is corrected, and the concerning witness has given the proper explanation of such overwriting and there is no other evidence on record which may prove that such overwriting has been done knowingly or has been done to mislead any other fact, in that case such overwriting in inquest report can't be said to be fatal for prosecution case. The view taken by trial Court, regarding anti timed FIR is presumptive, wrong and against the settled

law. Taking into consideration the mode of conveyance i.e. bullockart, timing mentioned in the FIR, other connecting circumstances and evidence and in absence of any evidence contrary, it can be concluded that the FIR of the occurrence was lodged with due promptness, without any unnecessary delay or consultation. It is not an ante-timed document. Finding of the Trial Court recorded in the impugned judgment and order on this point is perverse and against the evidence and settled principle of law.

Injured / eyewitnesses:-

20. The informant Phoolan Singh (P.W. 1) was an injured person, who had received the multiple injuries of pellets and soon after the occurrence had gone to Police Station along with the persons of his village, namely, Phoolan Singh S/o Lakhan Singh, Bheekam Singh, Brahm Pal Singh and Indra Pal Singh. There is no evidence of any deliberations or any conspiracy to lodge the false 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 fire arms. The injured witness P.W. 1 had received four injuries of laccerated wound caused by pellets of fire arm. On the other hand deceased Buddha Singh had received ten injuries of gun shot entry wounds. No suggestion has been given by counsel for defence to witness P.W. 1 in his cross examination indicating the fact of any deliberation of P.W. 1 with any other person to implicate the accused persons falsely. Although, in the impugned judgment and order, to show contradiction, learned Trial Court has discussed the evidence of P.W. 2, who had mentioned in his oral statement the distance of Police Station from the place of occurrence as 18 miles, but the said distance is not proved. Apart from that witness P.W. 2 who had affixed his thumb impression on his oral evidence, seems an illiterate / rustic person. The witness P.W. 2 had stated that they reached at Police Station by 07.00 p.m. on the date of occurrence. Considering the above part of his statement, the trial Court wrongly interpreted the statement of witness P.W. 2, and wrongly believed the distance of Police Station from the place of occurrence as 18 miles. The above distance has been shown in FIR as 8 k.m. and the fact has not been confronted with the Investigating Officer in his cross examination. In absence of any evidence regarding the distance of Police Station as 18 miles, the distance mentioned in the FIR, which has been mentioned by a public servant performing his public duty, is liable to be believed and can be concluded that the FIR of the occurrence was lodged by the informant promptly.

21. The witness P.W. 1 has stated that on the date of occurrence, while going towards pond with their animal, he had accompanied his brother Buddha Singh. On the way the accused persons came out from the hut (Mandvi / Chhappar) of Master Singh (since died). The accused persons gave threat of life to deceased. Seeing the activities of the accused persons the deceased and witnesses P.W. 1 ran towards north then towards east to save their lives. The accused persons chased them and for taking shelter, when they reached inside the house of Phoolan Singh S/o Lakhan Singh, the accused persons opened fire indiscriminately from the gate of his house. It has been mentioned in the statement of P.W. 1 that in the house of Phoolan Singh the victims had tried to shut the door, but before closing the door the accused persons had reached at the gate and started firing

from outside the gate in which Buddha Singh received as many as 10 fire arm injuries and fell down on the spot.

22. Learned counsel for the accused respondents has submitted that the witness P.W. 1 in his cross examination has stated that he could not see as to which accused had fired how many shots / bullets on them, therefore the witness P.W. 1 can not be termed as eyewitness. In our view, the aforesaid argument of learned counsel for the respondent is not acceptable, as at the time of firing, both the victims, (the deceased as well as the informant) were trying to save their lives. The accused persons had started firing from the gate of Phoolan Singh's house which was indicriminate, therefore, in the above situation, if the witness P.W. 1, who was under shelter and had received the pellet's injuries in firing, could not see that which of the accused had fired how many shots / bullets, (as it was asked by defence counsel in cross examination of witness), it can not be inferred that P.W. 1 was not the eye account witness of the incident. It is to be noticed that witness P.W. 1 had received the injuries of lacerated wound caused by pellets of fire arm during the course of same occurrence. Soon before the occurrence he was accompaying Buddha Singh with whom the accused persons were having enmity due to the reason that he had purchased the land of accused Braj Raj Singh in auction and was trying to take possession over the said land. In this context, learned counsel for the respondents argued that if the accused persons had opened fire to kill Buddha Singh why they left informant and Phoolan Singh S/o Lakhan Singh alive, who were also present at the place of occurrence. Learned AGA in reply has submitted that the accused persons as well as victims were resident of same village, there was direct enmity of accused persons with Buddha Singh. Only Buddha Singh was target. Therefore, if accused persons, who were not the habitual criminals, have not killed the other persons, who were also present in the house of Phoolan Singh S/o Lakhan Singh it was their natural behaviour. It is not denied that the witness P.W. 1 had not received the injuries in the same occurrence. Therefore, his presence on the spot is established and in this regard, in absence of any evidence otherwise the evidence of witness P.W. 1 is liable to be believed. In our considered view he is trustworthy witness. Finding of the Trial Court recorded in the impugned judgment and order on this point is also perverse and against the evidence and settled principle of law.

23. 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."*

24. 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."***

25. 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.

Relative and interested witness:-

26. P.W. 2, the son of deceased's brother, is also resident of the same village and locality, therefore, his presence on the place of occurrence is not improbable. He had also given the evidence of occurrence as eye witness account and further stated that when the accused persons were firing on the deceased and informant, he had taken shelter behind the animals. No questions have been asked in cross examination of P.W. 2 challenging the above fact and there is no reason on record to disbelieve his testimony. The oral testimony of eye witnesses P.W. 1 and 2 are supported with medical examination report of injured witness P.W. 1 and with post mortem report of deceased Buddha Singh. The genuineness of its contents have been admitted by the accused persons, hence in absence of any evidence contrary, the same are admissible in evidence.

27. In the case of ***Kathi Bharat Vajsur and Anr. Vs. State of Gujarat AIR 2012 SC 216***3 the Hon'ble Apex Court has held in para 21, which reads as under:-

"21. When the medical evidence is in consonance with the principal part of the oral / ocular evidence thereby supporting the prosecution story, there is no question of ruling out the ocular evidence merely on the ground that there are some inconsistencies or contradictions in the oral evidence. We are not inclined to agree with Shri. Dholakia on this count."

28. Learned counsel for the accused respondents has submitted that the witnesses P.W. 1 and 2 are the relative of

victim and are interested witnesses. Since P.W. 1 is the real brother of the deceased Buddha Singh and P.W. 2 is the S/o Buddha Singh's brother, therefore, their evidence is not trustworthy. We are not convinced with the argument of learned counsel for the respondents. Although witnesses P.W. 1 and P.W. 2 are close relative and family members of deceased yet there is no discrepancy in their evidence on the point of occurrence. A close scrutiny of evidence of P.W. 1 and 2 indicates that there is no contradiction in their statements on material points. Neither any contrary evidence nor any cogent evidence is on record, which may prove the facts otherwise or may place the ground to disbelieve their testimony. Hence, finding of the Trial Court recorded in the impugned judgment and order on this point is also perverse and against the evidence and settled principle of law.

29. 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. In the case of ***Brahma Swarup & Others Vs. State of U.P. 2004 (2) JIC 827 (All)***, this Court has also 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.

Hostile witness:-

35. Although P.W. 3 Phoolan Singh S/o Lakhan Singh has not fully supported the prosecution story in his oral statement yet he is the same person in whose house the informant and deceased Buddha Singh took shelter to save their lives and on the same place they had received the fire arm injuries. P.W. 3 has not denied the above fact in his evidence. The part of oral evidence of an hostile witness, which supports the prosecution case, is admissible in evidence. So far as evidence of hostile witness is concerned, in the case of ***State of Rajasthan Vs. Bhawani & Another (2003) 7 SCC 29***1 it has been held by Hon'ble Apex Court in para no. 10, which reads as under:-

"10. The fact that the witness was declared hostile by the Court at the request

of the prosecuting counsel and he was allowed to cross-examine the witness, no doubt furnishes no justification for rejecting en bloc the evidence of the witness. But the Court has at least to be aware that prima facie, a witness who makes different statements at different times has no regard for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. The Court should be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. The High Court has accepted the testimony of the hostile witnesses as gospel truth for throwing overboard the prosecution case which had been fully established by the testimony of several eyewitnesses, which was of unimpeachable character. The approach of the High Court in dealing with the case, to say the least, is wholly fallacious."

36. In the instant case in the light of the statement of P.W. 3, taking into consideration of evidence of eye witnesses P.W. 1 and 2, it can not be said that prosecution could not prove its case beyond reasonable doubt by the evidence of trustworthy witnesses. Learned Trial Court, against the settled law, has wrongly appreciated the evidence of witness P.W. 3, which resulted in acquittal of accused respondents.

Number of witnesses:-

37. Learned counsel for the accused respondents submitted that prosecution had failed to prove its case by proper / independent witness. P.W.1 and P.W. 2 are relative witness. P.W. 3 has been declared as hostile, therefore, no proper and independent witnesses have been produced by prosecution. In our view, the argument of learned counsel has no force, as no fixed / particular number of witness is prescribed in law for the proof of any fact. In this regard Section 134 of Evidence Act makes following provision:-

*"**134 Number of witnesses**- No particular number of witnesses shall in any case be required for the proof of any fact."*

38. Accordingly quality of evidence is material not the number.

39. On the above point, it has been held by Apex Court in the case of ***Amar Singh Vs. Balwinder Singh & Others 2003 (46) ACC 619*** that no particular number of witnesses are required for proof of any fact.

40. In the case of ***Munshi Prasad And Others Vs. State of Bihar 2002 SCC (Cri) 175***, the Apex Court has held that it is the quality of the evidence and not the quantity, which is required. It is to be seen that whether prosecution has been able to bring home the charges with the evidence available on record and if the evidence on record is otherwise satisfactory and trustworthy, an increase of number of witnesses are not required.

41. Learned counsel for accused respondents also argued that the occurrence, as alleged, took place in the aabadi of village in day light even then no public witness has been procured / produced by the prosecution. The evidence on record shows that there are two groups of Thakurs in the village. The victims and assailants belong to rival groups. In general, in villages and in backward areas where generally the people are uneducated / less educated, unexperienced and rustic, nobody wants to interfere in dispute / invite

enimity by giving evidence before police and Court. In society the behaviour of police with illiterate people / general public is known by everybody. Therefore, if any public witness of village concerned has not come forward as witness of the occurrence, the prosecution case does not malign, particularly when the eye witnesses have proved the FIR version by their oral evidence and which has also been corroborated by documentary evidence. It can not be said that prosecution could not prove its case by genuine and trustworthy witnesses. In the present case, evidence of P.W. 1 is corroborated with the FIR, spot map and also with the medical examination/ P.M. report of victims. The finding recorded by the trial Court in the impugned judgment and order in this regard is against the provisions of law and evidence.

42. Learned counsel for the respondents has further submitted that according to contents of FIR as well as statements of P.W. 1 and 2, the accused persons came out from the hut (Mandvi/ Chhappar) of accused Master Singh (since died). Accused Braj Raj Singh exhorted and threatened for life to deceased as well as the informant. On the above fact, learned Trial Court had concluded that there was no existence of hut (Chhappar/ Mandvi) of accused Master Singh (since died) in the village Etoria. On this point, the counsel has referred the statement of of P.W. 1 where he had stated that Master Singh (since died) has land in his village, but he could not say as to whether his name was mentioned in the voter list of village or not. He further stated that Master Singh (since died) has not purchased any land in his village nor he was given any land in Village Etoria by Gram Sabha. The witness P.W. 1 has further stated that Master Singh (since died) was a resident of District Pilibhit and his sons were living at village Berkhera. He had further stated that Chhappar of Master Singh (since died) was open and there was public pathway on the eastern and southern side of the Chhappar. In this context, learned counsel has also referred the statement of witness P.W. 2 where it has been stated by witness P.W. 2 that he did not know that Master Singh (since died) was having any land in the village or not. Master Singh (since died) was not resident of his village rather he was the resident of District Pilibhit. Taking into consideration the above part of evidence of witnesses, the Trial Court has concluded that Investigating Officer had failed to collect evidence regarding existence of property of Master Singh (since died) in village Etoria and since the witnesses P.W. 1 and 2 had admitted that the accused Master Singh (since died) was the resident of District Pilibhit, therefore, it can not be said that Chhappar, from where the accused persons came out with fire arm, belongs to accused Master Singh (since died). Since there was no hut (Mandvi / Chhappar) of Master Singh (since died), therefore the prosecution story regarding role of accused person in occurrence is false. The above argument of learned counsel for the defence is not convincing us rather it is misleading. The evidence of witnesses should be read as a whole. P.W. 1, supporting the proseuction story, has stated in his evidence that the hut (Chhappar / Mandvi), from where the armed accused persons came out to attack on victims, was of Master Singh (since died), who was the person of co-accused's favour. The witness P.W. 1 had further stated in his evidence that Master Singh (since died) had raised its Chhappar upon the land of Gram Sabha two years prior. Therefore, though he was not allotted any land from Gram Sabha yet he had

raised its Chhappar over the barren land of Gram Sabha illegally. It was an unauthorised construction existed in village Etoria, at the time of occurrence. The evidence of P.W. 1 shows that the accused persons were belonging to Chauhan Thakur. At the time of occurrence, Gram Pradhan of village was of the same community. The accused persons have supported him in his election, therefore, the probability can be presumed that the Gram Pradhan might have not taken any action against Master Singh (since died) for his unauthorised construction of the Chhappar over the Gram Sabha land. In villages, unauthorised construction over the lands of Gram Sabha are very common thing. At the stage of investigation there was no dispute regarding the existence of hut (Mandvi/Chhappar) of accused Master Singh (since died) from where accused persons came out and attacked on the victims. The Investigating Officer of the case had inspected the Chhappar of accused Master Singh (since died) during his investigation and had shown it in spot map, which was sketched by him soon after the occurrence and subsequently has given the description of Master Singh's hut (Mandvi / Chhappar) in his oral evidence. He has clearly mentioned in his statement that during investigation when he reached inside the Chhappar, there were no male persons but only females were residing under the Chhappar. It is to be noted that the Investigating Officer, who has deposed as P.W. 4 has not been cross-examined by the counsel for defence on the point of existence of the hut (Chhappar / Mandvi) of accused Master Singh (since died). Neither spot map has been challenged nor any positive evidence has been produced by defence side to substantiate their case regarding non-existence of hut (Mandvi / Chhappar) of accused Master Singh (since died) in the village in question. In the light of the above facts and evidence, it is not proved that there was no existence of hut (Chhappar/Mandvi) of accused Master Singh (since died) in the village Hence, the view taken by Trial Court in the impugned judgment and order that there was no hut (Chhappar / Mandvi) of Master Singh (since died) is based upon conjecctures and surmises. The said finding is liable to be interfered with.

43. Learned counsel for the defence further stated that the deceased had enticed away a female, namely, Dhandei from her husband's house and kept her illegally / illicitely in his house as wife, for which a person, namely, Jai Singh was having enmity with deceased and due to which Jai Singh had committed the offence in question. On the above point of argument, we find that there is no evidence, either oral or documentary, on record to establish the fact that due to any enmity of aforesaid Dhandei, the offence has been committed by Jai Singh or by any other person. Hence, finding of the Trial Court recorded in the impugned judgment and order on this point is also perverse and against the evidence and settled principle of law.

Recovery of weapon:-

44. Lastly, the counsel for the defence has submitted that there is no recovery of weapon and no motive of offence is established. The statements of witnesses P.W. 4 and 5 indicates that accused were absconding from their houses and could not be arrested despite warrant of the Court and a proceeding of Sections 82/83 Cr.P.C. was initiated against Braj Raj Singh and other. The accused persons had surrendered in the Court. It was on accused persons to facilitate the recovery of fire arms used in

the offence. On the other hand if they have not cooperated in investigation and have not facilitated the recovery of the incriminating weapons, it will not be fatal to prosecution case, particularly in the light of oral evidence of witnesses P.W. 1 and 2 as well as documentary evidence on record like recovery memo of empty cartridges and pellets, medical examination report of informant and post mortem report of deceased Buddha Singh, which have fully supported the case of prosecution. Therefore, finding of the Trial Court recorded in the impugned judgment and order on this point is also perverse and against the evidence and settled principle of law.

45. In the case of ***Gopal Singh Vs. State of Uttarakhand (2013) 7 SCC 545***, the Apex Court has held in paras 12 and 13, which reads as under:-

"12. In this context, we may refer with profit to the decision in Anwarul Haq v. State of U.P. [1] wherein it was held that solely because the knife that was used in committing the offence had not been recovered during the investigation could not be a factor to disregard the evidence of the prosecution witnesses who had deposed absolutely convincingly about the use of the weapon. That apart, the Court also referred to the evidence of the doctor which mentioned about the use of weapon It is worth noting that this Court observed that though the doctor's opinion about the weapon was theoretical, yet it cannot be totally wiped out. Regard being had to the aforesaid, this Court maintained the sentence of one year rigorous imprisonment under Section 324 IPC as imposed by the trial Court and concurred with by the High Court.

13. We may hasten to clarify that we are placing reliance on the aforesaid dictum as in the case at hand there is the doctor's evidence that the injury has been caused by the gunshot and the pellets have been recovered from the walls of the shop room of the accused appellant and no explanation for the same has been offered by the defence. What has been elicited in the cross-examination is that Prem Singh, the father of the injured, had a licensed gun. We really fail to fathom how the said elicitation would render any assistance to the defence. The learned sessions Judge, taking into consideration the nature of the injury and the weapon used, has convicted the accused under Section 324 IPC which has been accepted by the High Court. We perceive no fallacy either in the analysis or in the finding recorded on that score."

46. In the case of ***Yogesh Singh Vs. Mahabeer Singh & Others (Supra)***, the Apex Court has held in para 47, which reads as under:-

"The next line of contention taken by the learned counsel for the respondents is that the recovery evidence was false and fabricated. We feel no need to address this issue since it had already been validity discarded by the Trial court while convicting the respondents. ***In any case, it is an established proposition of law that mere non-recovery of weapon does not falsify the prosecution case where there is ample unimpeachable ocular evidence.*** [See Lakhan Sao v. State of Bihar and Anr., (2000) 9 SCC 82 : (AIR 2000 SC 2063) ; State of Rajasthan v. Arjun Singh & Ors., (2011) 9 SCC 115 : (AIR 2011 SC 3380) and Manjit Singh and Anr. v. State of Punjab, (2013) 12 SCC 746]."

Motive:-

47. The reason of occurrence / motive, which has been mentioned in the FIR as well as in the statement of witnesses of fact was that the accused persons became enimical with deceased due to the reason that he had purchased the land of accused Braj Raj Singh, which was auctioned by the Tehsildar in lieu of recovery of loan amount. This fact has been admitted by the accused persons (except accused Master Singh) (since died) in their statements recorded under Section 313 Cr.P.C. So far as the requirement to proove 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. In the case of ***Rohtash Kumar Vs. State of Haryana, Criminal Appeal No. 896 of 2011*** the Hon'ble Apex Court has held in para 21, which reads as under:-

"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)."

48. 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."

49. 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 p**ertinent 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."

50. In the case of ***Kaki Ramesh & Others Vs. State of A.P. 1994 SCC (Cri) 1214***, it has been held by the Apex Court that where parties belonging to different factions in the village, which might have provided motive for the crime, instead of false implication.

51. In fact motive always originate in the mind of accused, it cannot be fathomed by prosecution.

Discrepancy and contradictions:-

52. There is no discrepancy in the statement of witness on material points. If some deviation in narration of facts are found, those are at the fringe and same too are bound to occur due to the reason that there was time gap in recording the evidence of witnesses, the mental capacity and mentality of witnesses, who are illiterate and rustic. But despite the some minor discrepancies the witnesses have supported that FIR version substantially. Finding of the Trial Court recorded in the impugned judgment and order on this point is perverse and against the evidence and settled principle of law. In the case of ***Subodh Nath And Another Vs. State of Tripura (2013) 4 SCC 122***, the Apex Court has held in para 16, which reads as under:-

"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."*

53. 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."*

54. 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.

55. 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.

56. 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."

Common object:-

57. The medical examination report / injury report of injured Phoolan Singh S/o Malkhan Singh (informant) indicates that he had received four injuries of lacerated wounds, which were caused by pellets of fire arm. Although, three injuries, out of four injuries, were on non-vital parts of his body yet one injury of multiple lacerated wound had been found on the chest portion of victim. It was having wounds eight in numbers, which were on lower part of right chest and upper part of abdomen of informant. The accused person with proper knowldge and in a common intention and object had opened fire upon deceased Buddha Singh. The deceased had received ten gun shot entry wounds on his body, which prima facie indicates that the assailants were more than one in number with common object. The number of wounds indicates that there was meeting of mind in assailants with regard to the knowledge and object to kill Buddha Singh in which they had been succeeded. So far as the injuries of informant Phoolan Singh is concerned, three injuries have been found simple in nature but one was kept under observation by doctor. No any documentary or oral evidence has been produced by the prosecution showing any complication in injury of informant. Neither any x ray report nor any further investigation report or doctor has been produced in evidence. So far as the circumstances are concerned, the injured had received injuries at 03.00 p.m. on 29.10.1982, he lodged the FIR at 07.15 p.m. on same day in fit mental condition, then after that he was medically examined at 01.10 a.m. on 30.10.1982. In medical report no adverse report regarding vitality of patient has been mentioned. Even in his oral testimony the witness P.W. 1 has not described his injuries received in occurrence. In the occurrence since the accused Braj Raj Singh was having his enimity with Buddha Singh only, it appears that accused persons had meeting of mind with common object to kill only Buddha Singh, that is why when both persons i.e. the informant and Buddha Singh entered in the house of Phoolan Singh S/o Lakhan Singh, accused persons opened fire. Buddha Singh had received ten injuries of fire arm entry wound. On the other hand, informant had received only four injuries of pellets, out of which three were on non-vital parts of his body. The above circumstances lead to draw the inference that accused persons were not intending to cause fatal injuries to the informant,

therefore, ingredients of Section 307 IPC are not proved against accused persons, rather it can be concluded that accused persons voluntarily caused hurt to the informant Phoolan Singh. Since the record indicates that all the accused opened fire upon Phoolan Singh (informant) along with Buddha Singh, the offence under Section 324 read with Section 149 is made out against them without any shadow of doubt.

58. 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 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."

59. The occurrence took place in day light in the centre of Aabadi of village. There is nothing on record to show any reason for false implication of accused persons in place of real culprit. Mere rivalry in gram panchayat election is not sufficient cause to commit the present offence. The conclusion of trial Court that the accused persons have been implicated falsely due to old enmity or parti-bandi is based upon wrong appreciation of evidence available on record. The charges of offence under Sections 148, 302 read with Section 149 and 324 read with Section 149 IPC are found proved against the accused persons.

60. All the accused persons named in FIR were present on the spot having firearms in their hand. The occurrence is of day light. They have committed the present offence in furtherance of common object of wrongful assembly. No evidence is on record which may bifurcate the role of any of the accused from others. There is no contradiction or discrepancy in the prosecution evidence regarding role of all accused persons. The trial court has not rightly appreciated the evidence available on record and reached to a wrong conclusion holding the accused respondents to be not guilty for committing the murder of the deceased Buddha Singh. The impugned judgment and order is clearly unreasonable and it is found that the relevant and convincing materials have been unjustifiably eliminated. The conclusion / findings recorded by the trial Court in the impugned judgment and order are perverse and same are not sustainable in the eye of law.

61. Hence, 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 09.03.1984 passed by the trial Court, which is against the settled norms of law and 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.

62. Accordingly, Government Appeal is **allowed** and the impugned judgment and order of acquittal dated 9.3.1984 is set aside.

63. Since the occurrence does not come under the perview of rarest of rare cases, therefore, both the surviving accused persons, namely, Ram Chandra Singh and Omkar Singh are hereby convicted for the offence under Sections 148, 302 read with Section 149 and 324 read with Section 149 IPC. They are sentenced for three years' imprisonment for commission of offence under Section 148 IPC and for life imprisonment for commission of offence under Sections 302/149 IPC as well as fine with the tune of Rs. 50,000/- each. In default of payment of fine, they shall undergo one year's additional simple imprisonment. Apart to this, the accused persons are sentenced for three years' imprisonment for the offence under Sections 324/149 IPC. 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.

64. In case the accused persons deposit the fine, half of fine amount shall be paid to the legal heir and representative of deceased Buddha Singh forthwith.

65. The accused respondents, namely, Ram Chandra Singh and Omkar Singh are hereby directed to surrender before the Chief Judicial Magistrate concerned forthwith, who shall take them into custody and send them in jail for serving out the sentence imposed upon them by the present judgement and order. In case they fail to surrender, as directed above, the Chief Judicial Magistrate concerned is directed to take coercive action against them in this regard.

66. Let a copy of this judgment alongwith lower court record be sent forthwith to the Trial Court as well as Chief Judicial Magistrate, Bareilly for necessary compliance and further action. A compliance report be sent to this Court.

(2022)06ILR A91
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Government Appeal No. 2239 of 2009
and
Criminal Revision No. 3459 of 2008

State of U.P. ...Appellant
Versus
Shiv Narayan Singh & Anr. ...Respondents

Counsel for the Appellant:

Sri Desh Ratan Chaudhary, A.G.A., Sri R.K. Vaish

Counsel for the Respondents:
Sri Lalit Kumar Mishra, Sri Sanjay Kumar Rajput, Sri V.S. Parmar, Sri Vivek Singh, Sri Anand Priya Singh

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34, 504 & 506-Challenge to-Conviction-property dispute for putting gate-deceased had gone to house of accused to ask him to stop work till police carried out an enquiry-accused got enraged and started hurling abuses-both the accused persons had a common intention to shoot at the deceased to kill him-Even if the accused no. 2 did not himself fire the shot at the deceased, he would be vicariously liable u/s 34 IPC.(Para 1 to 65)

The appeal is allowed. (E-6)

List of Cases cited:

1. Manu Sharma Vs St. (NCT of Delhi) (2010) 6 SCC 1

2. Khekh Ram Vs St. of H.P.(2018) 1 SCC 202

3. St. of M.P. Vs Chhaakki Lal,(2019) 12 SCC 326

4. Achhar Singh Vs St. of H.P., (2021) 5 SCC 543

5. St. of U.P. Vs M.K. Anthony (1985) 1 SCC 505,

6. St. of U.P. Vs Krishna Master (2010) 12 SCC 324

7. Bhagwan Jagannath Marked Vs St. of Mah. (2016) 10 SCC 537

8. Vijayee Singh Vs St. of U.P. (1990) 3 SCC 190

9. Leela Ram Vs St. of Har.(1999) 9 SCC 525

10. Tehseen Poonawalla Vs U.O.I. (2018) 6 SCC 72,

11. Amar Singh Vs Balwinder Singh (2003) 2 SCC 518

12. Maddu Vs St. of Karn. (2014) 12 SCC 419

13. Manoj Kumar Sharma Vs St. of Chhattisgarh (2016) 9 SCC 1

14. Bimla Devi Vs Rajesh Singh (2016) 15 SCC 448

15. Yogesh Singh Vs Mahabeer Singh (2017) 11 SCC 195

16. Satpal Vs St. of Har., (2018) 6 SCC 610

17. Ravi Kumar Vs St. of Punj. (2005) 9 SCC 315

18. St. of Karn. Vs Suvarnamma (2015) 1 SCC 323,

19. Sanjeev Kumar Gupta Vs St. of U.P. (2015) 11 SCC 69

20. Kaptan Singh Vs St. of U.P. (2020) SCC OnLine All 183

21. Nankaunoo Vs St. of U.P. (2016) 1 SC Cr. R 237

22. V.K. Mishra Vs St. of U.K. (2015) 2 SC Cr.R

23. Joseph Stephen & ors. Vs Santhansamy & ors. (2022) SCC OnLine SC 90

24. Geeta Devi Vs St. of U.P. (2022) SCC OnLine SC 57

25. Guru Dutt Pathak Vs St. of U.P. (2021) 6 SCC 116

26. Ram Pal Vs St. of U.P. (2007) 15 SCC 79

27. Surendra Chauhan Vs St. of M.P. (2000) 4 SCC 110

28. Ramaswami Ayyangar Vs St. of T.N. (1976) 3 SCC 779

29. Ramesh Singh Vs St. of A.P. (2004) 11 SCC 305

30. Chhota Ahirwar Vs St. of M.P. (2020) 4 SCC 126

31. Angad Yadav Vs St. of U.P. (2021) SCC OnLine All 262

32. Sandeep Vs St. of Har. (2021) SCC OnLine SC 642

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Government Appeal No. 2239 of 2009 has been filed by the State-appellant challenging the judgment and order dated 16.09.2008 passed by the learned Additional District and Sessions Judge, Court No. 1, Hamirpur in Sessions Trial No. 137 of 2005 arising out of Case Crime No. 22 of 2005 under Sections 302/34, 504, 506 IPC, Police Station Rath, District Hamirpur whereby both the accused-respondents have been acquitted of all the charges.

2. The aforesaid judgment and order dated 16.09.2008 has been assailed by the informant of the case Shyam Singh @ Pappu also by filing Criminal Revision No. 3459 of 2008, and by means of an order dated 19-09-2011, the aforesaid Criminal Revision was connected with Govt. Appeal No. 2239 of 2009.

3. Government Appeal No. 2239 of 2009 filed by the State-appellant has been admitted by means of an order dated 04.11.2011.

4. As both the aforesaid cases have been filed challenging the judgment and order dated 16.09.2008, both the cases are being decided by a common judgment.

Prosecution Case

5. Briefly stated, the prosecution case is that on 28.01.2005, the informant Shyam Singh @ Pappu gave a written report at Police Station Rath, stating that a dispute had arisen in his village Nandana between Shiv Kumar and his brother Shiv Narayan, for fixing a gate on a land which belongs to Shiv Narayan. On 28.01.2005 at about 12:00 noon Shiv Kumar asked the Shiv Narayan that he had given an application to the Police regarding the gate put up by the latter and he should stop the work and resume the same only after the Police makes an enquiry. Upon this, Shiv Narayan (the accused-respondent No. 1) and his son Pradeep (the accused-respondent No. 2) started hurling abuses. The informant and his father, who was standing with Shiv Kumar in front of his house, forbade them from doing so. Pradeep shouted from upstairs that all the persons had come for doing a panchayat, shoot them. Upon this Shiv Narayan fired a shot from his licensed double barrel gun which hit the informant's father (Jaswant) in his chest and face. In order to save his life, the informant pulled his father inside the house of Shiv Kumar, but his father died immediately due to the gun-shot injury. The accused-respondents threatened that in case any person lodged a report or gave evidence, he would also be killed and both the accused persons ran away. Shiv Narayan was carrying a double barrel gun and Pradeep was carrying a single barrel gun. The incident was witnessed by Shyam Singh @ Pappu, Shiv Pal Singh son of Badri Prasad, Surjan Singh and the mother of Shyam Singh. Immediately after the incident, Head Constable Chandrabhan and a Constable Raj Singh had reached the village and they got engaged in search of the accused-respondents.

6. Upon the aforesaid written information, a Case Crime No. 22 of 2005 under Sections 302/34, 504, 506 IPC was registered in Police Station Rath at 12:45 p.m. on 28.01.2005.

7. A Sub-Inspector reached the spot of occurrence and prepared an inquest report (Ex.A-5), in which he recorded that the dead body had injury marks on the right side of its face and there was no other apparent injury. However, after writing the inquest report, a line has been inserted in between two lines, stating that the dead body had pellet injuries on its chest in an area of 30 c.m. x 30 c.m. The I.O. collected the clothes worn by the deceased and the samples of blood stained, as well as unstained pieces of cemented floor from inside the house of Shiv Kumar, where the dead body of the deceased was lying. He also recovered an empty cartridge which was lying near the channel gate on the upper floor of the house of the accused Shiv Narayan. The Investigating Officer prepared a site plan, conducted investigation and submitted a charge sheet in the Court, on the basis whereof the accused - respondents were tried for committing offences under Section 302/34, 504 and 506 I.P.C..

Prosecution Evidence

8. During the trial, the prosecution examined the informant Shyam Singh @ Pappu as PW-1, eye-witness Shiv Kumar as PW-2, Head Constable Chandrabhan as PW-3, Dr. R.K. Mishra as PW-4, Head Constable Suresh Kumar as PW-5, S.I. Mohan Lal and PW-6 and Sub Inspector Radhey Shayam Trivedi as PW-7.

9. PW-1 Shyam Singh (the informant) stated that on the date of the incident at about 12 noon, he was standing in front of his house, which is opposite the house of Shiv Kumar. Shiv Kumar was also standing outside his house. The informant's father was standing about 6 feet away from Shiv Kumar. The house of the accused persons Shiv Narayan and Pradeep, who are father and son, is about 6-7 steps away from the informant's home. Shiv Kumar is the brother of Shiv Narayan. There is a platform measuring about 30 ft. x 10 ft. in front of the house of Shiv Narayan. Earlier this platform was jointly owned by all the persons. About 10 years ago, a portion of the platform measuring 10 ft. x 10 ft. was given to Shiv Narayan. On the date of the incident Shiv Narayan was putting up a gate by encroaching upon an area in excess of his portion of the platform. The informant's father Jaswant and Shiv Kumar had restrained him from putting up the gate. At that time, Pradeep and Shiv Narayan were standing inside the channel gate at the first floor of their house. Referring to the informant's father and Shiv Kumar, the accused-respondent no. 2 Pradeep exhorted to the accused--respondent no. 1 Shiv Narayan that "bade panch bante hain, goli maar do" meaning that the aforesaid persons were acting as panchs (arbitrators) and he should shoot them. Upon this Shiv Narayan fired a shot from his double barrel gun aimed at the informants' father and the pellets hit his chest and the face. Pradeep was also having a single barrel gun. Upon being shot, the informant's father fell down and he was taken inside Shiv Kumar's house but as soon as he was taken inside the house, he died.

10. PW 1 further stated that information of the incident was given to P.S. Kotwali Rath through the mobile telephone of Shiv Kumar. As a written

information of an apprehended breach of peace due to the aforesaid dispute had already been given at the Police Station in the morning of the same day, Head Constable Chandra Bhan Singh (PW-3) and Constable Raj Singh reached the place of occurrence to carry out an enquiry on the aforesaid information within 5 - 7 minutes of the death of the informant's father. Afterwards, the Police went in search of the accused persons and the informant dictated a report of the incident which was scribed by Shiv Kumar.

11. In his cross-examination, PW 1 stated that Ram Sewak was his Grand-father. Maheshwari was Ram Sewak's brother. Shiv Narayan and Shiv Kumar are sons of Maheshwari. Pradeep is son of Shiv Narayan. He also stated that the accused Shiv Narayan has a pucca double storied house opposite the residential house of the witness, which is used as the guest house of Shiv Narayan. There is a public passage between the two houses, which is about 5 feet wide and thereafter he said that the passage is 6 - 7 steps wide. He also stated that he did not see as to whether any blood fell at the place where his father had received the gun-shot. He had shown to the I.O. the place where his father was shot and where he fell down. The I.O. had taken samples of plain soil and blood stained soil from that place. Prior to the incident, his family members and the members of the family of Shiv Kumar used to visit each other's home but this had stopped since about 3 - 4 months before the incident, as the relations of his father and Shiv Narayan had turned bad and they and their family members were not at talking terms.

12. PW 1 further stated in his cross examination that his father had come out of his house about half an hour before the incident, i.e., he had come out of the house at about 11:30 a.m. After having a light meal in the house, he came out and sat in the sun-light. He had got the report scribed by Shiv Kumar in the village and before scribing the report, at his instruction, Shiv Kumar had sent telephonic information of the incident to the Police Station. He had gone to the Police Station on the motor cycle of Surjan Singh and it took about 10 minutes to reach the Police Station. The I.O. and other Police persons had gone to the place of incident with the informant. The informant did not go with the I.O. inside the house of Shiv Narayan. The I.O. had entered Shiv Narayan's house accompanied by the constables and no villager had entered the house with him. The I.O. had brought an empty cartridge from Shiv Narayan's house.

13. PW 1 was confronted with his affidavit dated 27-05-2005 (Exhibit B-1) in paragraph 6 whereof it was written that "the procedure adopted by the Police in respect of empty cartridge was a step for providing benefit to the accused" and he stated that he had signed it without reading and it was not prepared under his instructions.

14. PW 1 further stated that about 10 minutes after the incident, when he was getting the report of the incident scribed, Chandra Bhan Singh and Raj Singh had come from the Police Station to the place of incident. They had come on a motor cycle, they had a look at the place of the incident, stayed there about 1 - 1½ minute and went in search of the accused persons.

15. He also stated that he, his father and Shiv Kumar were standing near each other. Shiv Narayan had fired the shot towards them, which hit his father. Only Shiv Narayan would have known as to

which of the three persons he wanted to kill.

16. PW-2 Shiv Kumar stated that on 28.01.2005 at about 10:00 a.m. he had gone from his village Nandana to Police Station Rath to give a written application regarding an iron gate being put up by the accused Shiv Narayan on the platform. He came back to his home at about 11 a.m. At about 12:00 noon he was standing outside his house. Jaswant Singh (deceased) and his son Shyam Singh were standing near PW-2. The accused-respondents Shiv Narayan and Pradeep Kumar were standing at Channel gate at "Doosri Manzil" of their house. PW-2 said to Shiv Narayan that he has given a report in the Police Station and till the Police made an enquiry, he should not raise any construction. The accused Shiv Narayan is the elder brother of PW-2 Shiv Kumar and at that time Shiv Kumar was carrying his licensed double barrel gun and Pradeep was carrying an unlicensed single barrel gun. Upon hearing about the report given by PW 2 to the Police, Shiv Narayan and Pradeep got enraged and started hurling abuses. Jaswant forbade the accused-respondents from abusing. Being annoyed by it, the accused Pradeep said to his father Shiv Narayan that these people had come to do a panchayat, shoot them. Shiv Narayan fired a shot from the gun being carried by him and the pellets from the gun-shot hit the chest and lips of Jaswant. Jaswant was taken inside the house of PW-2 with the intention to save him but upon being taken inside, they came to know that Jaswant had died immediately upon being shot. The incident of Jaswant being shot by Shiv Narayan was witnessed by Jaswant's wife Gyan Devi, his brother Shivpal Singh, Jaswant's nephew Surjan Singh and some other persons. The accused persons came out of their house through the stairs and they walked away threatening that in case any person lodged a report or gave evidence, he will also be killed. PW 2 stated that he had scribed the report upon dictation of PW-1 Shyam Singh.

17. In his cross examination, PW-2 stated that his residential house in the village has two entrances - one towards the East and the other towards the South. Eastern entrance faces the disputed platform. The distance between the platform and this entrance is about 4-5 steps. This distance in between is in the form of a public passage. Two days before the incident, father of PW-2 and Jaswant had forbidden Shiv Narayan from putting up a gate on the platform. He stated that in front of his house there is a double storied "*Baithaka*" (Guest House) of Shiv Narayan, which was given to Shiv Narayan in partition. In the South of this guest house and towards the East of Jaswant's house there is the residential house of the accused persons. Shiv Narayan does not have any other residential house in the village. At the time of the incident, PW-2 was standing 4-5 steps away from the main door of his house, towards the North, on the platform. This is the main entrance of the house and it faces the East. The disputed platform is about 5-6 steps away from this platform. Jaswant was standing 4-5 steps away from PW-2 in the passage, below the platform. He was hit by the gun-shot at the place where he was standing and upon being hit, he fell down at the same place. The Investigating Officer did not collect any blood sample from the place where Jaswant had fallen down, as he could not find any blood there. He had collected samples of blood stained flooring and plain flooring from inside the house.

18. PW-2 further stated that after the incident, he had made a phone call to the Police Station and had informed that Shiv

Narayan had shot Jaswant and the person who had received the call at the Police Station, said that Police had already left for the place and that he would give this information to the Station House Officer. Thereafter he started writing the report. When Chandra Bhan and Raj Singh came there, he was writing the report and before he could complete the report, they had gone away in search of the accused persons. The Deputy Inspector General of Police and Superintendent of Police came to the place of the incident at about 3:00 p.m. and at that time the dead body was still there and the inquest report was being prepared.

19. PW-3, Head Constable Chandra Bhan Singh stated that on 28.01.2005 he was posted in Police Station Rath and on that day Shiv Kumar had given an application to the Station House Officer in his presence and the Inspector-in-charge had directed him to visit the spot in village Nandana, carry out an enquiry and submit a report regarding the application. When he reached the spot he found that Jaswant Singh has been killed and the persons present there had informed that the accused persons had ran away towards the fields. He also went towards the fields to search and arrest the accused persons. He returned to the village at about 1:30 p.m. as he could not find the accused persons. When he reached back the village, the then Station House Officer, Sri Trivedi had already reached there, along with the Police force. Upon instructions of the Station House Officer he had gone towards village Chilli in search of the accused persons. When he could not find the accused persons, he went back to the Police Station in the evening.

20. PW-4, Dr. R. K. Misra, who had conducted the post mortem examination of the dead body of Jaswant Singh, stated that the dead body had various injury marks due to entry of pellets from gun-shot on the front of his chest in an area of 30 cm X 30 cm. These were mainly in the central portion of the chest. There was a lacerated wound on the face at the lower lip. Left lung and heart were found to be torn and one pellet was found in the lung and two pellets were found in the heart. About 1½ litres coagulated as well as liquid blood was present inside the chest. There was about 150 gms. semi digested food in the stomach. As per his opinion, the deceased died on 28.01.2005 at about 12:00 noon because of haemorrhage and shock due to anti mortem injuries. From the condition of food at the time of the inquest, it appeared that the deceased had his meal about four hours before his death. He said that he could not give any opinion as to whether the fire was shot in a direction parallel to the earth or not. It would have taken about 20-25 minutes for the 1½ litres blood found in the chest cavity of the dead body to bleed. Bleeding continues till the heart beats and a person is taken to be dead only upon the heart beat stops. In his opinion, the deceased would have been able to breathe for five to ten minutes after being hit by the gun shot.

21. PW-5, Head Constable Suresh Kumar Singh proved the chik report (Ex.3) which had been prepared by him.

22. PW-6, Assistant Inspector Mohan Lal stated that he had prepared the inquest report as per the instructions of the Inspector-in-charge P.S. Kotwali Rath and he had arrested the accused respondent Shiv Narayan on 02.02.2005 at about 12:15 hours and had recovered the double barrel licensed gun along with the license and four live cartridges from Shiv Narayan. He stated that in the inquest report (Ex.A-5)

initially he had written that the dead body had a blood stained injury on the right side of the face and no other injury was visible but immediately thereafter he suspected that this injury could not have caused death and then he had lifted the Kurta and vest of the dead body and had seen the wounds on his chest and had inserted this in the inquest report.

23. PW-6 was recalled by the Court and upon being recalled, he proved recovery of the double barrel gun, three cartridges, the blood stained and unstained pieces of cemented floor taken from the place inside the house of the Shiv Kumar where the dead body was lying. He said that he did not find any blood outside the house of Shiv Kumar.

24. PW-7 Sub Inspector Radhey Shyam Tiwari said that on 28.01.2005 he was posted as the Inspector-in-charge of Police Station Rath and he had inspected the place of occurrence and had prepared the site plan (Ex. A-9). He stated that the inquest report (Ex.A-5) and other forms for carrying out the post mortem examination (Ex. A-6 and A-7) were prepared by Head Constable Mohan Lal under his instructions. During his cross examination, he stated that before the incident, Shiv Kumar had given a complaint letter (Ex.1) regarding the dispute between Shiv Narayan and Shiv Kumar in relation to the gate. A phone call was received in the Police Station giving information about Jaswant's death. The phone call was received by Head Constable Suresh Kumar and immediately after receiving the call, he had given its information to PW-7.

25. He said that the entrance of Shiv Kumar's house faces the East. This door is in front of the Channel gate which is at "*Doosri Manzil*".

Defence Evidence:-

26. In his statement recorded under Section 313 Cr.P.C., the accused respondent No.1 - Shiv Narayan denied the prosecution case and stated that PW-1 Shyam Singh and Shiv Kumar had given false evidence in order to grab his property. He stated that on the day following the date of the incident, the Investigating Officer had come to his house and had taken away hisgun, which was out of order, and the empty cartridges kept in a cupboard and he had also taken away accused respondent no.1. Similar statements were given by the accused-respondent no.2 Pradeep Kumar in his statement recorded under Section 313 Cr.P.C.

27. The defence produced a copy of an affidavit of PW-1 (Paper No. 11 B) marked as Exhibit B-1, in which PW-1 had stated that he knew that the accused Shiv Narayan had already made some negotiations with the local Police prior to his arrest and the procedure adopted by the Police regarding the empty cartridges was a step in aid of the accused-respondents, which has benefitted them. Exhibit B-2 was the General Diary and Exhibit B-3 produced by the defence was a copy of the application dated 28-01-2005 given by Shiv Kumar to the Police regarding the gate forcibly affixed by the accused-respondent no. 1 Shiv Kumar on the platform in front of his House.

28. Although both the accused persons had stated that they would lead evidence in their defence, none of them appeared as a witness to defend themselves

and no other person was produced as defence witness.

Findings Of The Trial Court: -

29. The learned court below held that it is stated in the inquest report (Ex. A-5) that there were pellet injuries in the chest in an area of about 30 cm X 30 cm and although this has been inserted afterpreparation of the inquest report, there are no initials on it. In his statement, PW-6 stated that after writing in the inquest report that there was an injury on the side of the face below the lip and there was no other apparent injury, he suspected that this injury could not have caused death and then he lifted the Kurta and vest of the dead body and saw the injuries on his chest and thereafter he inserted this fact in the report.

30. The learned Trial Court further held that in reply to a question put by the Court, PW-6 stated that there were no marks of entry of the pellets on the Kurta and the vest worn by the deceased and had he been wearing the same Kurta and vest before his death, entry marks of pellets ought to have been there on his cloths. From this statement of PW-6 it is clear that the prosecution story is not trustworthy.

31. The learned court below held that PW-1 had stated that the Investigating Officer had collected samples of blood stained soil as well as plain soil from the place of the incident whereas PW 2 and PW-6 has stated that the samples were taken from the place where the dead body was lying and this indicates that the incident did not occur in the manner in which it has been described.

32. The learned court below further held that in the written report there is no mention of the place from where Shiv Narayan had fired the shot whereas PW-1 and PW-2 have stated that the shot was fired from inside the Channel Gate on the upper floor. However, from the contradiction between the statement of PW-1 and his affidavit dated 27.05.2005, it becomes doubtful that he had witnessed the incident.

33. The learned court below further held that the Doctor, who had conducted the Post Mortem examination of the deceased, did not mention the direction of entry of the pellets in the body and due to this omission, the prosecution story that the shot was fired from the upper floor is not fortified.

34. For the aforesaid reasons, the learned court below came to a conclusion that the prosecution has failed to prove that the incident took place in the manner stated by the prosecution and the accused persons are entitled to be given benefit of doubt. Accordingly, the learned court below passed an order acquitting the accused persons of all the charges.

Submissions of the State-Appellant

35. We have heard submissions of Shri Ratan Singh, the learned A.G.A., appearing for the State-Appellant, Sri R.K. Vaish, Advocate, the learned counsel for the informant-Revisionist in Criminal Revision No. 3459 of 2008.

36. The learned A.G.A. has taken us through the statements of the prosecution witnesses and he has submitted that PW 1 had categorically and unequivocally stated that at the exhortation of the accused-respondent no. 2, the accused respondent no. 1 had fired a gun-shot from his double

barrel gun at his father, the pellets from the gun-shot hit his father and his father died immediately. His statement was fully corroborated by the statement of PW-2 - the other eye-witness of the incident and that of PW-4 - the doctor who had conducted the post mortem examination. He has submitted that the learned Court below has not examined the statements of the prosecution witnesses properly and it's finding that the prosecution has failed to establish the guilt of the accused-respondents beyond reasonable doubt, is perverse. He has submitted that the judgment of the learned Court below acquitting the accused - respondents is liable to be set aside and reversed and the accused-respondents are liable to be convicted and sentenced.

Submissions on behalf of the Accused-Respondents

37. While trying to defend the judgment and order of acquittal passed by the learned Court below, Sri Anand Priy Singh, the learned Counsel for accused-respondents has submitted that there are several discrepancies in the prosecution case which make the same doubtful. His first submission is that in the inquest report (Ex. A-5) a line has been inserted stating that there were pellet injuries in the chest in an area of about 30 cm X 30 cm and although this line has been inserted afterpreparation of the inquest report, no person has put his signatures to authenticate it. He next submitted that the clothes worn by the deceased at the time of the incident had been produced before the Court below and the same had been marked as Exhibit A-2. Had the deceased been wearing the same Kurta and vest at the time of the incident, there would have been marks of the entry of pellets on the Kurta and the vest, but there were no such marks and this makes the incident doubtful.

38. The learned Counsel for the accused-respondents next submitted that PW-1 had stated that the Investigating Officer had collected samples of blood stained soil as well as unstained soil from the place of the incident whereas PW 2 and PW-6 has stated that the samples were taken from the place where the dead body was lying and this indicates that the incident did not occur in the manner in which it has been described.

39. Sri. Anand Priy Singh, the learned Counsel for the accused-respondents, has laid much emphasis on the discrepancy in the words used by the witnesses - PW-1, PW-2 and PW-7 in describing the place from where the gun-shot was fired. PW-1 has stated that the accused persons were standing on the first floor of their house, where there is a channel gate. However, PW-2 has stated that the accused persons were standing near the channel gate on "doosree manzil" (the second floor) of their house. Similarly, PW-7 S.I. Radhe Shyam Trivedi has also stated that the channel gate is on "doosree manzil" (the second floor). He has submitted that this discrepancy in description of the place, from which the gun-shot was allegedly fired, makes the presence of PW-1 and PW-2 at the time and place of the incident doubtful.

40. The learned Counsel for the accused - respondents has also submitted that PW-2 had stated in his cross examination the dispute regarding the gate had been settled way back in the year 1992 and the accused - respondent no. 1 Shiv Narayan had been given his share in the platform. This indicates that there remained no dispute between the parties regarding

the platform and, therefore, there was no motive for the accused - respondents to kill the deceased.

Scope Of Interference In Appeal Against Acquittal

41. In **Manu Sharma v. State (NCT of Delhi)**, (2010) 6 SCC 1, the Hon'ble Supreme Court formulated the following principles to be kept in mind by the appellate Court while dealing with appeals against acquittal: -

"27.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.

(ii) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iv) 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 set aside the judgment of acquittal.

(v) 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.

(vi) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether 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 reappraise the evidence to arrive at its own conclusion.

(vii) 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."

2. In **Khekh Ram v. State of H.P., (2018) 1 SCC 202** the Hon'ble Supreme Court held that: -

"25. The elaboration of the facts in the decisions cited at the Bar has been to underline the factual setting in which reversal of the orders of acquittal had been interfered with by this Court. Though it is no longer res integra that an order of acquittal, if appealed against, ought not to be lightly interfered with, it is trite as well that the appellate court is fully empowered to review, reappreciate and reconsider the evidence on record and to reach its own conclusions both on questions of fact and on law. As a corollary, the appellate court would be within its jurisdiction and authority to dislodge an acquittal on sound, cogent and persuasive reasons based on the recorded facts and the law applicable. If only when the view taken by the trial court in ordering acquittal is an equally plausible and reasonable one that the appellate court would not readily substitute the same by another view available to it, on its independent appraisal of the materials on

record. This legally acknowledged restraint on the power of the appellate court would get attracted only if the two views are equally plausible and reasonable and not otherwise. ***If the view taken by the trial court is a possible but not a reasonable one when tested on the evidence on record and the legal principles applied, unquestionably it can and ought to be displaced by a plausible and reasonable view by the appellate court in furtherance of the ultimate cause of justice. Though no innocent ought to be punished, it is equally imperative that a guilty ought not to be let off casually lest justice is a casualty."***

(Emphasis supplied)

3. **State of M.P. v. Chhaakki Lal**, (2019) 12 SCC 326, the Hon'ble Supreme Court held that: -

"36. We are conscious that in an appeal against acquittal, the appellate court would not ordinarily interfere with the order of acquittal. But where the approach of the High Court suffers from serious infirmity, this Court can reappreciate the evidence and reasonings upon which the order of acquittal is based. ***A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of the innocent.*** *Upon reappreciation of the evidence and the reasonings of the trial court and the High Court, in our considered view, the judgment of the High Court suffers from serious infirmity. The High Court erred in doubting the version of PW 1, the sole eyewitness whose evidence is corroborated by the medical evidence and the evidence of the ballistic expert. The High Court did not appreciate the evidence of PW 1 in proper perspective and erred in disbelieving her version on the contradictions which are not material. The High Court erred in rejecting the credible evidence of Kesar Bai (PW 1), which in our considered view resulted in serious miscarriage of justice, where four persons were murdered."*

(Emphasis supplied)

4. In **Achhar Singh v. State of H.P., (2021) 5 SCC 543,** the Hon'ble Supreme Court explained the scope of powers of the High Court in appeals against acquittal in the following manner: -

"16. It is thus a well-crystalized principle that if two views are possible, the High Court ought not to interfere with the trial court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 Cr.P.C. are limited to seeing whether or not the trial court's view was impossible. It is equally well settled that there is no bar on the High Court's power to re-appreciate evidence in an appeal against acquittal. This Court has held in a catena of decisions (including Chandrappa v. State of Karnataka, State of A.P. v. M. Madhusudhan Rao and Raveen Kumar v. State of H.P.) that the Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate court is free to consider on both fact and law, despite the self-restraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused."

5. The Hon'ble Supreme Court further held that "***homicidal deaths cannot be left to judicium dei. The court in its quest to reach the truth ought to make earnest efforts to extract gold out of the heap of***

black sand. The solemn duty is to dig out the authenticity. It is only when the court, despite its best efforts, fails to reach a firm conclusion that the benefit of doubt is extended."

6. The principles which emerge from the aforesaid decisions are that the scope of appeal against acquittal under Section 378 Cr.P.C is not limited to scrutinize whether or not the trial court's view is a possible view. The High Court has to appreciate the evidence in an appeal against acquittal in the same manner as it would do in an appeal against conviction. However, while adjudicating an appeal against acquittal, the High Court has to keep into consideration that the accused having been acquitted in trial, there is a double presumption of innocence of the accused.

Manner of Scrutiny of Evidence

7. Before proceeding to examine the evidence in the case in order to ascertain as to whether the judgment and order of the learned Court below needs any interference, it would be appropriate to refer to the law on the subject as propounded by the Hon'ble Supreme Court by certain judgments on the issue. While deciding an appeal against an order of acquittal passed by the High Court, the Hon'ble Supreme Court has held in **State of U.P. v. M.K. Anthony, (1985) 1 SCC 505,** that: -

*"**10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth**. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and **unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer....."***

(Emphasis supplied)

8. In **State of U.P. v. Krishna Master, (2010) 12 SCC 324** the Hon'ble Supreme Court explained the manner in which the Court should examine the statement of witnesses, in the following words: -

"15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria

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

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the Police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. ***The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.***

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. *It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."*

(Emphasis supplied)

9. In **Bhagwan Jagannath Markad v. State of Maharashtra**, (2016) 10 SCC 537, the Hon'ble Supreme Court held that: -

"18. It is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. ***The prosecution has to***

prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt. The reasonable doubt is one which occurs to a prudent and reasonable man. *Section 3 of the Evidence Act refers to two conditions--(i) when a person feels absolutely certain of a fact--"believes it to exist", and (ii) when he is not absolutely certain and thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence.* ***The doubt which the law contemplates is not of a confused mind but of prudent man who is assumed to possess the capacity to "separate the chaff from the grain". The degree of proof need not reach certainty but must carry a high degree of probability*** *(Vijayee Singh versus State of U.P., (1990) 3 SCC 190).*

19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. ***It is not every discrepancy which affects the creditworthiness and the trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted*** *[Leela Ram versus State of Haryana, (1999) 9 SCC 525]. Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a "partisan" or "interested" witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability [Gangadhar Behera versus State of Orissa (2002) 8 SCC 381 On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.*

20. Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is

punished but also to see that guilty does not escape [Gangadhar Behera (2002) 8 SCC 381]."

(Emphasis supplied)

10. The principles which emerge from the aforesaid decisions are that there are always some discrepancies in the statements of witnesses, but while examining the evidence, the Court should consider that whether the evidence, taken as a whole, appears to have a ring of truth. The Court must examine whether those discrepancies go to the root of the matter or not. In the former case, the Appellate Court may have to uphold the order of acquittal passed by the trial Court. In the latter case, the appellate court is competent to reverse the decision of the trial court depending on the materials placed the Court. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt, but a reasonable doubt is one which occurs to a prudent and reasonable man. The doubt which the law contemplates is not of a confused mind but of prudent man who is assumed to possess the capacity to "separate the chaff from the grain". The degree of proof need not reach certainty but must carry a high degree of probability. Exaggerated stress upon the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape. Though no innocent ought to be punished, it is equally imperative that a guilty ought not to be let off casually lest justice is a casualty. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of the innocent. If the view taken by the trial court is a possible but not a reasonable one when tested on the evidence on record and the legal principles applied, unquestionably it can and ought to be displaced by a plausible and reasonable view by the appellate court in furtherance of the ultimate cause of justice.

11. In the light of these principles, this Court will have to determine whether the evidence of the witnesses examined in this case proves the prosecution case.

Scrutiny Of Prosecution Evidence

12. PW-1, who is the son of the deceased (Jaswant Singh) and is the informant of the case, has stated that he was standing in front of his house in the village Nandana. The house of Shiv Kumar is opposite his house. Shiv Kumar was also standing in front of his house. The informant's father was standing near Shiv Kumar, approximately 6 feet away from him. The house of the accused-respondents is about 6-7 steps away from the informant's house. Shiv Kumar is the brother of accused-respondent No. 1 Shiv Narayan. There is a platform measuring 30 x 10 feet in front of the house of Shiv Narayan which previously belonged to the accused and the informant's father Jaswant jointly. About 10 years prior to the incident, a portion of the platform measuring about 10 x 10 feet had been given to the accused-respondent No. 1 under a mutual settlement. On the date of the incident, Shiv Narayan was putting up a gate by encroaching upon an area in excess of his area of 10 x 10 feet. The informant's father and Shiv Kumar forbade him from putting up the gate. At that time, the accused-respondents were standing upon the roof at the first floor of the house where a channel gate is fixed. They were inside the channel gate. The respondent No. 2 had stated from

inside the channel gate that "bade aaye panchayat karne wale, goli mar do". Shiv Narayan fired a gun-shot from his double barrel licensed gun, which hit his father on the chest and face. His father fell down and to save him, the informant and other persons took his father inside house of Shiv Kumar. Soon after he was taken inside, he died. Pradeep was also carrying a single barrel gun in his hand. Thus it appears that PW-1 has described the incident in unequivocal terms.

13. PW-1 has further stated that a written report of the apprehended breach of peace in relation to the dispute had already been given at the Police Station in the morning and information of this incident was given to the Police Station through mobile phone of Shiv Kumar immediately. Pursuant to the written report sent in the morning, Head Constable Chandrabhan Singh and Constable Raj Singh had come to conduct an enquiry within 5-6 minutes of the death of the informant's father. The aforesaid Police personnel went in search of the accused and meanwhile PW-1 got a report of the incident scribed by Shiv Kumar. He had gone to the Police Station on the motor cycle of Surjan Singh and it took about 10 minutes to reach the Police Station. The report of the incident said to have taken place at about 12:00 noon was lodged in the Police Station promptly at 12:45 p.m.

14. PW-2 Shiv Kumar, who is the real brother of the accused-respondent no. 1 Shiv Kumar and uncle of the accused-respondent no. 2 Pradeep, stated that on 28.01.2005 at about 10:00 a.m. he had gone to the Police Station Rath to give a written application regarding an iron gate being put up by the accused Shiv Narayan. He came back to his home at about 11 a.m. At about 12:00 noon he was standing outside his house. Jaswant Singh (deceased) and his son Shyam Singh were standing near the witness. The accused-respondents Shiv Narayan and Pradeep Kumar were standing at Channel gate at "Doosri Manzil" of their home. PW-2 said to Shiv Narayan that he has given a report in the Police Station and till the Police carries out an enquiry, he should not raise any construction. The accused Shiv Narayan is the elder brother of PW-2 and at that time he was carrying his licensed double barrel gun and Pradeep was carrying an unlicensed single barrel gun. Upon hearing about the report given by PW 2 to the Police, Shiv Narayan and Pradeep got annoyed and started hurling abuses. Jaswant forbade the accused-respondents from abusing. Being enraged by it, the accused Pradeep said to his father Shiv Narayan that these people have come to do a panchayat, shoot them. Shiv Narayan fired a shot from the gun being carried by him and the pellets from the shot hit the chest and lips of Jaswant. Jaswant was taken inside the house of PW-2 with the intention to save him but upon being taken inside, they found that Jaswant had died immediately upon being shot. PW 2 stated that he had scribed the report upon dictation of PW-1 Shyam Singh.

15. In his cross examination, PW-2 stated that two days prior to the incident, father of PW-2 (who was the father of the accused-respondent no. 1 Shiv Narayan also) and Jaswant had forbidden Shiv Narayan from putting a gate on the platform. He stated that in front of his house there is a double storied "Baithaka" (Guest House) of Shiv Narayan, which was given to Shiv Narayan in partition. At the time of the incident, PW-2 was standing 4-5 steps away from the main door of his house, towards the North, on the platform.

Jaswant was standing 4-5 steps away from PW-2 in the passage, below the platform. He was hit by the gun shot at the place where he was standing and upon being hit, he fell down at the same place. PW-2 further stated that after the incident, he had made a phone call to the Police Station and had informed that Shiv Narayan had shot Jaswant and the person who had received the call at the Police Station, had said that Police had already left for the place and that he would give this information to the Station House Officer. Thereafter he started writing the report. When Head Constable Chandra Bhan and Raj Singh reached there, he was writing the report and before he could complete writing the report, they had gone away in search of the accused persons.

16. PW-3, Head Constable Chandra Bhan Singh stated that on 28.01.2005 he was posted in Police Station Rath and on that day Shiv Kumar (PW-2) had given an application to the Station House Officer in his presence and the Inspector-in-charge had directed him to visit the spot in village Nandana, carry out an enquiry and submit a report regarding the application. When he reached the spot he found that Jaswant Singh has been killed and the persons present there had informed that the accused persons had ran away towards the fields. He had gone towards the fields to search and arrest the accused persons but he could not find them and he returned to the village at about 1:30 p.m. Thus his statement fully corroborates the statements of PW-1 and PW-2 that written information had been given at the Police Station regarding the apprehended breach of peace due to the dispute between the parties and that the Police personnel had reached the place of the incident soon after the incident.

17. PW-7 Sub Inspector Radhey Shyam Tiwari stated that on 28.01.2005 he was posted as the Inspector- in-charge of Police Station Rath and he had inspect the place of occurrence and had prepared the site plan (Ex. A-9). During his cross examination, he stated that before the incident, Shiv Kumar had given a complaint letter (Ex.1) regarding the dispute between Shiv Narayan and Shiv Kumar in relation to the gate. A phone call was received in the Police Station giving information about Jaswant's death. The phone call was received by Head Constable Suresh Kumar and immediately after receiving the call he had informed it to PW-7. Thus his statement also corroborates the statements of PW-1 and PW-2.

18. PW-4, Dr. R. K. Misra, who had conducted the post mortem examination of the dead body of Jaswant Singh, stated that the dead body had various injury marks due to entry of pellets from gun-shot on the front of his chest in an area of 30 cm X 30 cm. These were mainly in the central portion of the chest. There was a lacerated wound on the face at the lower lip. Left lung and heart were found to be torn and one pellet was recovered from the lung and two pellets were found from the heart. About 1½ litres coagulated as well as liquid blood was present inside the chest. It would have taken about 20-25 minutes for the 1½ litres blood found in the chest cavity of the dead body to bleed. Bleeding continues till the heart-beats continue and a person is taken to be dead only upon the heart beat stops. In his opinion, the deceased would have been able to breathe for five to ten minutes after being hit by the gun shot. As per his opinion, the deceased died on 28.01.2005 at about 12:00 noon because of haemorrhage and shock due to the anti mortem injuries. The statement of PW-4

fully corroborates the statements of PW-1 and PW-2 and there is nothing in his statement, which contradicts the statements of eye-witnesses PW-1 and PW-2.

19. PW 1 stated in his cross examination that his father had a light meal and afterwards, he came out of the house and sat in the sun-light, about half an hour before the incident, i.e., at about 11:30 a.m. PW-4 stated that there was about 150 gms. semi-digested food in the stomach. This also corroborates the statement of PW-1.

20. From a thorough scrutiny of the statements of the witnesses, we find that there is a platform in front of the house of the accused-respondent no. 1 Shiv Narayan. Earlier this platform was jointly owned by all the persons and about 10 years ago, a portion of the platform measuring 10 ft. x 10 ft. was given to Shiv Narayan. Shiv Narayan was putting up a gate by encroaching upon an area in excess of his portion of the platform. Written information of an apprehended breach of peace due to the aforesaid dispute had already been given in the Police Station at about 10:00 a.m. on the date of the incident. The informant's father Jaswant and PW-2 Shiv Kumar had forbidden the accused-respondent no. 1 from putting up the gate. Upon this, Shiv Narayan (the accused-respondent No. 1) and his son Pradeep (the accused-respondent No. 2) started hurling abuses. The informant and his father, who was standing with Shiv Kumar in front of his house, forbade them from doing so. At that time, Pradeep and Shiv Narayan were standing inside the channel gate at the first floor of their house. The accused-respondent no. 1 was carrying a licensed double barrel gun and the accused-respondent no. 2 was carrying an unlicensed single barrel gun. Referring to the informant's father and Shiv Kumar, the accused-respondent no. 2 Pradeep said to the accused--respondent no. 1 Shiv Narayan that "bade panch bante hain, goli maar do" meaning that the aforesaid persons were acting as panchs (arbitrators) and he should shoot them. Upon the exhortation of the accused-respondent no. 2 Pradeep, the accused respondent no. 1 Shiv Narayan fired a gun-shot killing Jaswant - the father of the informant.

21. PW-2 Shiv Kumar, who is the real brother of the accused-respondent no. 1 Shiv Narayan, has given the same narration of the incident of the deceased Jaswant being shot dead by the accused-respondent no. 1 Shiv Narayan at the exhortation of the accused-respondent no. 2 Pradeep, as was given by PW-1 and the statements of PW-1 and PW-2 do not contain any discrepancy regarding any material fact relating to the incident. Their statements are fully corroborated by the statements of PW-3, PW-4 and PW-7.

22. From the F.I.R. and the statements of witnesses, it is established that the incident took place in broad day-light at 12:00 noon, on the public passage between the house of the accused-respondents and that of PW-2. F.I.R. of the incident was lodged promptly at 12:45 p.m. The statements of the eyewitnesses are quite cogent and consistent with the earliest version recorded in the form of the First Information Report. At the time of the incident, the accused-respondent no. 1 Shiv Narayan was carrying a double barrel gun and the accused-respondent no. 2 Pradeep was carrying a single barrel gun and the deceased and all the other persons present with him were not carrying any weapon. The accused-respondent no. 1 had fired the gun-shot at the exhortation of the accused-

respondent no. 2, at the first opportunity, without there being any provocation or any overt act on the part of the deceased or any other person accompanying him.

Analysis Of Findings Of The Trial Court In Light Of Prosecution Evidence

23. The learned Court below has held that it is stated in the inquest report (Ex. A-5) that there were pellet injuries in the chest of the dead body in an area of about 30 cm X 30 cm and although this has been inserted afterpreparation of the inquest report, no person has put his signatures to authenticate the same. In reply to a question put by the Court, PW-6 had stated that there were no marks of entry of the pellets on the Kurta and the vest worn by the deceased and had he been wearing the same Kurta and vest before his death, entry marks of the pellets ought to have been there on his clothes.

24. The legal position regarding an Inquest Report prepared under Section 174 of the Criminal Procedure Code has been explained by the Hon'ble Supreme Court in the case of **Tehseen Poonawalla v. Union of India**, (2018) 6 SCC 72, in the following words: -

"38. Section 174 deals with a situation where information is received by an officer in charge of a Police Station of a person having committed suicide, or having been killed (i) by another; or (ii) by an animal; or (iii) by machinery; or (iv) by an accident or of having died under circumstances raising a reasonable suspicion that some other person has committed an offence. In any of these situations, the Police officer is required to furnish intimation immediately to the nearest Executive Magistrate who is empowered to hold inquests. He is required to proceed to the place where the body is situated and in the presence of two witnesses to make an investigation and draw up a report of the apparent cause of death. The report would describe the wounds including marks of injury which are found on the body and in what manner or by what weapon or instrument if any they appear to have been inflicted.

39. The purpose of holding an inquest is limited. The inquest report does not constitute substantive evidence. Hence matters relating to how the deceased was assaulted or who assaulted him and under what circumstances are beyond the scope of the report. The report of inquest is primarily intended to ascertain the nature of the injuries and the apparent cause of death. On the other hand, it is the doctor who conducts a post-mortem examination who examines the body from a medico-legal perspective. Hence it is the post-mortem report that is expected to contain the details of the injuries through a scientific examination.

40. The scope of an inquiry under Section 174 Cr.P.C has been considered in several decisions of this Court. In Pedda Narayana v. State of A.P. [(1975) 4 SCC 153] this Court explained that the limited scope of such an inquiry is to ascertain whether a person has died in suspicious circumstances or an unnatural death and, if this was the case, the apparent cause of death. The Court observed: (SCC pp. 157-58, paras 10 & 11)

The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances

he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the Police to mention those details in the inquest report.

This principle was reiterated in Amar Singh v. Balwinder Singh [(2003) 2 SCC 518] where the Court observed thus: (SCC p. 529, para 12)

"12. ... The requirement of the section is that the Police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. ***The section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery, etc."***

41. The view in Pedda Narayana has been approved by a three-Judge Bench in Khujji v. State of M.P.[(1991) 3 SCC 627]. Hence in Radha Mohan Singh v. State of U.P.[(2006) 2 SCC 450]a Bench of three learned Judges formulated the principle in the following terms: (Radha Mohan case, SCC pp. 462-63, para 15)

"15. ... Thus, it is well settled by a catena of decisions of this Court that the purpose of holding an inquest is very limited viz. to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. *There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eyewitnesses or the gist of their statements, nor is it required to be signed by any eyewitness."*

A Bench of two learned Judges of this Court in Madhu v. State of Karnataka [(2014) 12 SCC 419] has observed that ***an inquest report is not substantive evidence.***

42. In Manoj Kumar Sharma v. State of Chhattisgarh, [(2016) 9 SCC 1] a Bench of two learned Judges held that the purpose of an "inquest" in cases of accidental or suspicious deaths under Sections 174 and 175 is distinct from the "investigation" under Section 157 of the Code under which if an officer in charge of a Police Station has reason to suspect the commission of an offence which he is empowered to investigate, he shall proceed in person to the spot to investigate the facts and circumstances of the case. Reiterating this principle, a two-Judge Bench in Bimla Devi v. Rajesh Singh [(2016) 15 SCC 448] explained the scope of the provisions of Section 174 in the following observations: (Bimla Devi case, SCC pp. 453-54, para 10)

"10. ... The scope of the section is investigation by the Police in cases of unnatural or suspicious death. However, the scope is very limited and aimed at ascertaining the first apparent signs of the death. Apart from this, the Police officer has to investigate the place wherefrom the dead body is recovered, describe wounds, fractures, bruises and other marks of injury as may be found on the body, stating in what manner or by what weapon or instrument, such injuries appear to have been inflicted. From the above, it thus becomes clear, that the section aims at preserving the first look at the recovered body and it need not contain every detail. Mere overwriting in the name of the

informant would not affect the proceedings."

43. The same position has been laid down in a more recent decision of a two-Judge Bench in Yogesh Singh v. Mahabeer Singh: [(2017) 11 SCC 195]: (SCC p. 217, para 41)

"41. Further, the evidentiary value of the inquest report prepared under Section 174 Cr.P.C has also been long settled through a series of judicial pronouncements of this Court. It is well established that inquest report is not a substantive piece of evidence and can only be looked into for testing the veracity of the witnesses of inquest. The object of preparing such report is merely to ascertain the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or caused by animals or machinery, etc. and stating in what manner, or by what weapon or instrument, the injuries on the body appear to have been inflicted."

(Emphasis supplied)

25. Keeping in view aforesaid legal position, since the inquest report is not a substantive evidence, any discrepancy in the narration in the inquest report would not override the overwhelming substantive evidence on record in the shape of the statements of the eye-witnesses PW-1 and PW-2 and the medical evidence in the shape of the Post Mortem Report, which was proved by PW-4 - the doctor who had conducted the post mortem examination.

26. So far as the insertion of a line in the inquest report mentioning the injuries on the chest is concerned, the same had been explained by PW-6 by stating that after writing in the inquest report that there was an injury on the side of the face below the lip and there was no other apparent injury, he suspected that this injury could not have caused death and then he lifted the Kurta and vest of the dead body and saw the injuries on his chest and thereafter he inserted this fact in the report. We may reiterate that as the inquest report is not a substantive evidence, this interpolation in the report would not vitiate the prosecution case when the statements of the eye-witnesses is fully corroborated by the medical evidence in the case.

27. The learned trial Court has held that PW-6 had stated in his cross examination that there were no marks of entry of the pellets on the Kurta and the vest worn by the deceased and had he been wearing the same Kurta and vest before his death, entry marks of the pellets ought to have been there on his clothes and from this statement of PW-6 it is clear that the prosecution story is not trustworthy. Although the learned Counsel for the accused-respondents has contended that the clothes worn by the deceased at the time of the incident had been produced before the Court below and the same had been marked as Exhibit A-2, but we have examined the record that found that Exhibit A-2 is the post mortem examination report of the dead body and it merely contains an endorsement that the Kurta, pyjama, vest, inner and a ring of white metal were recovered from the dead body and the same were handed over to the constable concerned. Therefore, the contention of the learned Counsel for the accused-respondents that the clothes worn by the deceased were produced before the Court below as Exhibit A-2 is misconceived and we find that the Kurta and the other clothes worn by the deceased at the time of the incident had not been produced before the Court.

28. We find that the learned Court below has given undue importance to the statements of witnesses regarding absence

of marks on the Kurta and vest, particularly when the clothes had not been produced before the Court and, more particularly, when the incident had otherwise been fully proved by the statements of the eye-witnesses, which were corroborated by the statements of PW-3, PW-4 and PW-7 and there was no discrepancy in the statements of the witnesses in describing any material facts relating to the incident. As we have already observed in the preceding paragraphs, there are always some discrepancies in the statements of witnesses, but while examining the evidence, the Court should consider that whether the evidence, taken as a whole, appears to have a ring of truth. Examining the entire evidence of the case, we find that the finding of the Court below that absence of injury marks on the Kurta makes the incident doubtful, is against the overwhelming evidence of the eye-witnesses, which was corroborated by the statements of PW-3, PW-4 and PW-7, and the finding being against the weight of the evidence on record, is certainly perverse and it cannot be sustained.

29. The learned Counsel has held that PW-1 had stated that the Investigating Officer had collected samples of blood stained soil as well as plain soil from the place of the incident whereas PW-2 and PW-6 had stated that the samples were taken from the place where the dead body was lying and this indicates that the incident did not occur in the manner in which it has been described. In this regard, we may state that we have perused the recovery memo (Exhibit A-12), which contains the signatures of Shiv Kumar (PW-2) and one Mulayam Singh as witnesses. The recovery memo, which was prepared on the date of the incident itself, states that samples of blood stained cemented floor and unstained cemented floor were dug out from inside the house of Shiv Kumar, where the dead body was lying. The recovery has been proved by the statements of PW 2 and PW 6.

30. PW-1 was not a witness to the recovery of the articles and the discrepancy in the statement of PW-1 regarding the place from where the soil was recovered, may be for various reasons. As held in Krishna Master (Supra), there are always some discrepancies in the deposition of witnesses, howsoever honest and truthful they may be. We may notice here that the father of PW-1 had been killed by his cousin and the inquest report was prepared and the samples of the floor were collected on the same date a short while after the murder of his father, when PW-1 surely would have been in a mental state of shock and horror. In such circumstances, some discrepancies in his statement are bound to occur. We find that the inconsistency in the statement regarding the place from where the sample of soil was collected after the incident, does not go to the root of the matter, as it does not relate to the occurrence of the incident. The inconsistency concerning a peripheral matter would not vitiate the prosecution case.

31. In light of the aforesaid discussion, we find that the learned Court below has erred in holding that the discrepancy in the statement of PW-1 and the statements of PW-2 and PW-6 regarding the place from where the blood-stained and un-stained pieces of flooring were collected creates doubt in the manner in which the incident occurred and this finding too is against the weight of evidence on record and is perverse.

32. The learned Counsel has assailed the prosecution case also on ground that in the written report there is no mention of the place from where Shiv Narayan had fired the shot. In this regard, we may state that in the present case, the FIR was lodged promptly, within 45 minutes of the incident and it was not written after a gap of some time enabling the informant to think over the averments that were made by him in the FIR. It is settled law that an FIR is not an encyclopedia and it need not mention every minute detail of the occurrence. Reference in this regard may be had to a decision of the Hon'ble Supreme Court in the case of **Satpal v. State of Haryana**, (2018) 6 SCC 610.

33. In **Ravi Kumar v. State of Punjab**, (2005) 9 SCC 315, the Hon'ble Supreme Court was pleased to explain that: -

*"It has been held time and again that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Evidence Act, 1872 (in short "the Evidence Act") or to contradict him under Section 145 of that Act. It can neither be used as evidence against the maker at the trial if he himself becomes an accused nor to corroborate or contradict other witnesses. I**t is not the requirement of law that the minute details be recorded in the FIR lodged immediately after the occurrence. The fact of the state of mental agony of the person making the FIR who generally is the victim himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be kept in mind.**"*

(Emphasis supplied)

34. Therefore, we are of the considered opinion that non-mention in the FIR of the place from where Shiv Narayan had fired the gun-shot would not vitiate the prosecution case and the finding of the Court below in this regard being against the settled law, cannot be sustained.

35. The learned Court below has doubted the prosecution case for another reason, that the Doctor conducting the Post Mortem examination did not mention the direction of entry of the pellets in the body and due to this omission, the prosecution story that the shot was fired from the upper floor is not fortified. In this regard we may state that the doctor conducting the post mortem examination is not under any obligation to mention in the report the angle of entry of pellets in the body. Even if there was any such duty, the mere failure of the Doctor to mention the angle of entry of the pellets would not demolish the prosecution case when the eye-witnesses have categorically stated that the accused-respondent no. 1 had fired the gun-shot from the upper floor of his house.

36. The learned Court below has doubted the statement of PW-1 on the ground that it is inconsistent with his affidavit dated 27.05.2005. In the aforesaid affidavit dated 27.05.2005, PW-1 had merely stated that that the accused Shiv Narayan had already made some negotiations with the local Police prior to his arrest and the procedure adopted by the Police regarding the empty cartridges was a step in aid of the accused-respondents, which has benefitted them. There is no discrepancy in the statements made in the affidavit and those made in the deposition before the Court. On the contrary, the affidavit expresses an apprehension in the mind of the PW-1 that the accused Shiv

Narayan had already made some negotiations with the local Police prior to his arrest and for this reason the Police was helping the accused persons. The finding of the learned Court below in this regard appears to have been recorded without a proper reading of the affidavit dated 27-05-2005 and the statement of PW-1 and, therefore, the same is also perverse and unsustainable.

37. Here it would be relevant to notice that although both the accused persons had stated that they would lead evidence in their defence, none of them appeared as a witness to defend themselves and no other person was produced as defence witness. Although in a criminal case the prosecution has to prove its case and the accused persons cannot be convicted merely for their failure to lead evidence to defend themselves, but at the same time, in a case like the present one, where prosecution has proved its case by leading sufficient evidence, failure of the accused-respondents to lead evidence to defend themselves and to appear as witnesses and offer themselves for being cross-examined by the prosecution, becomes relevant and this conduct of the accused-respondent goes against them and it supports the prosecution case.

Analysis of the Submissions made on behalf of the Accused-Respondents

38. The learned Counsel for the accused-respondents Sri. Anand Priy Singh has submitted that there are serious contradictions in the statements of PW-1 and PW-6 regarding recovery of the gun in as much as during his cross-examination, PW-1 stated that the Sub-Inspector had entered the house of the accused Shiv Narayan along with his constables and no person from the village had entered with him and he had brought the cartridges from his house whereas PW-6, after being recalled, stated that under the orders of the I.O., he had gone to inside the house of the accused-respondents alongwith witnesses, for recovering the cartridge. Upon scrutiny of the aforesaid statements of PW-1 and PW-6, we find that PW-1 had stated that PW-6 had entered the house with constables whereas PW-6 had stated that he had entered the house with witnesses. Nobody had said that PW-6 had entered Shiv Narayan's house alone and it appears that the constables who had accompanied him inside the house of the accused-respondents, have been referred by PW-6 as the witnesses. Therefore, there is no discrepancy in the statements of PW-1 and PW-6 regarding any material fact or circumstance regarding recovery of the cartridge from the house of the accused-respondents. Moreover, this does not relate to the occurrence of the incident and, therefore, it would not affect the prosecution case adversely.

39. The learned Counsel for the accused-respondents has next submitted that no pellets were recovered from the place of the incident and the pellets were not sent for forensic examination, which makes the prosecution case doubtful. Although it would have been more appropriate for the prosecution to recover the pellets and to send those pellets, as well as the pellets recovered from the dead body, for forensic examination, but when the incident has been fully proved by the statement of the eye-witness PW-1 and PW-2 and their statements have been corroborated by the other witnesses PW-3, PW-4 and PW-7, we are of the considered opinion that it was not necessary for the prosecution to have recovered the pellets

and to have sent the same for forensic examination and mere non-recovery of pellets does not make the prosecution case doubtful.

40. In **State of Karnataka versus Suvarnamma**, (2015) 1 SCC 323, the Hon'ble Supreme Court held that it is well settled that "***though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence."***

41. In **Sanjeev Kumar Gupta v. State of U.P**., (2015) 11 SCC 69, the Hon'ble Supreme Court, while dealing with a case of defective investigation, held that : -

"31. We do note that the investigation suffers from certain flaws such as non-recovery of the weapon used by the appellant-accused and recovery of the bloodstained shirt after six days of the date of the incident. However, merely on the basis of these circumstances the entire case of the prosecution cannot be brushed aside when it has been proved by medical evidence corroborated by testimonies of the prosecution witnesses that the deceased died a homicidal death. This Court has held in Manjit Singh v. State of Punjab (2013) 12 SCC 746, that when there is ample unimpeachable ocular evidence and the same has received corroboration from medical evidence, non-recovery of bloodstained clothes or even the murder weapon does not affect the prosecution case.

(Emphasis Supplied)

42. In a recent decision in **Kaptan Singh versus State of U.P.** reported in 2020 SCC OnLine All 183, a co-ordinate Bench of this Court reiterated and explained the legal position in this regard as follows: -

"91.It is further argued that misfired cartridges and fired cartridges were not sent to the Ballistic Expert, Forensic Science Laboratory and the firearm weapon used by the appellants were never seized.

92.The said lapses on the part of the investigating officer would not necessarily prove fatal to the case of the prosecution where the direct testimony of the two prosecution witnesses is on record.

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98.Such omissions or lapses in the investigation cannot be a ground to discard the prosecution case which is otherwise credible and cogent.

99.InNankaunoov.State of U.P.; 2016 (1) SC Cr.R 237 it was held as under:

"Any omission on the part of the investigating officer cannot go against the prosecution case. Story of the prosecution is to be examined dehors such omission by the investigating agency. Otherwise it would shake the confidence of the people not merely in the law enforcing agency, but also in the administration of justice."

100.InV.K. Mishrav.State of Uttrakhand; 2015 (2) SC Cr.R it was held as under:

*"The investigating officer is not obliged to anticipate all possible defences and investigate in that angle. I**n any event any omission on the part of the investigating officer cannot go against the prosecution. The interest of justice demands that such acts or omissions of the investigating officer should not be taken in favour of the accused or otherwise. It would amount to placing a premium upon such omissions."***

(Emphasis Supplied)

43. Keeping in consideration the fact that in the present case, the incident has been clearly proved by the statements of the eye-witnesses PW-1 and PW-2 and their testimony has been corroborated by the medical evidence in the form of the post-mortem examination report and the statement of PW-4 - the Doctor who had conducted the post-mortem examination of the deceased, we find that the prosecution has been successful in proving its case by clinching direct evidence and in such a case the accused-respondents cannot get any benefit of any defect in the investigation carried out by the prosecution.

44. Sri. Anand Priy Singh, the learned Counsel for the accused-respondents, has laid much emphasis on the discrepancy in the words used by the witnesses - PW-1, PW-2 and PW-7 in describing the place from where the gun-shot was fired. PW-1 has stated that the accused persons were standing on the first floor of their house, where there is a channel gate. However, PW-2 has stated that the accused persons were standing near the channel gate on "*doosree manzil*", which would literally mean the second floor of their house. Similarly, PW-7 S.I. Radhe Shyam Trivedi has also stated that the channel gate is on "*doosree manzil*". He has submitted that this discrepancy in description of the place, from which the gun-shot was allegedly fired, makes the presence of PW-1 and PW-2 at the time and place of the incident doubtful.

45. In this regard, we may state that although in English, the floors of a double storied house are referred to as the Ground floor and the First floor and in Hindi also, the same are referred to as "*Bhoo-tal*' and "*Pratham-tal*' but in the present case, all the witnesses come from rural background and in common parlance, such persons refer a double-storied house as a "*do manzila makaan'* and the upper floor of the house is commonly referred to as "*doosree manzil*'. A perusal of the site-plan indicates that the house of the accused-respondent no. 1 Shiv Kumar has been shown to be double storied and the Ground floor has described by the phrase "*neeche ka bhaag*' and the First floor has been described as "*doosree manzil*', which would literally mean the lower portion and the second floor but, that literal meaning would not describe the phrases appropriately, as there is no second floor in the house of the accused-respondents. Therefore, the phrase "*doosree manzil*' refers to the only floor above the Ground floor, which is actually the first floor and the channel gate has been shown in the site plan on this floor and has been marked by the letter "A'. The description given to illustrate the map narrates that "A' is the place on the upper floor of the house, above the veranda on the ground floor, from where the accused fired the gun-shot.

46. In view of the aforesaid discussion, we reject the contention of the learned Counsel for the accused-respondents that the reference to "*doosree manzil*" makes the presence of PW-1 and PW-2 at the time and place of the incident doubtful.

47. Sri. Singh has next contended that PW-1 has stated that he, his father and Shiv Kumar were standing near each other, Shiv Narayan had fired the shot towards them, which hit his father and only Shiv Narayan would have known as to which of the three persons he wanted to kill and this indicate that the accused Shiv Narayan did not intend to kill the deceased Jaswant. In our considered opinion, when PW-1 and PW-2 both have stated that PW-2 and the

deceased were standing near each other, both of them had forbidden the accused-respondent no. 1 Shiv Kumar from putting up the gate, the accused-respondent no. 2 Pradeep had said that those persons were acting as panchs (arbitrators) and had exhorted the accused-respondent no. 1 Shiv Narayan to shoot them and the gun-shot fired by the accused-respondent no. 1 had hit and killed one of them, it is established that the accused-respondent no. 2 had exhorted the accused-respondent no. 1 to kill them and the accused-respondent no. 1 had fired the shot with intention to kill them. Therefore, merely because the PW-1 said that only Shiv Narayan would have known as to which of the three persons he wanted to kill, would not prove that the accused Shiv Narayan did not intend to kill the deceased Jaswant.

48. The learned Counsel for the accused - respondents next contended that PW-1 had himself stated that the dispute regarding the gate has been settled in the year 1992 and, therefore, there was no dispute between the parties and the accused-respondents had no motive to kill the deceased. However, from the evidence on record, we find that the accused-respondents have themselves brought on record the application dated 28-01-2005 that had been given by PW-2 at the Police Station regarding the gate put up by the accused-respondent no. 1 on the platform in front of his house. PW-3 Head Constable Chandra Bhan Singh has stated about the application and that the Inspector-in-charge had directed him to go to the village, carry out an enquiry and submit a report and when he reached the village, he found that Jaswant Singh had been killed. Therefore, it cannot be said that the accused-respondents had no motive to commit murder of the deceased Jaswant Singh and this contention of the learned Counsel for the accused-respondents is rejected. In any case, when ample direct evidence is available to prove the guilt of the accused-respondents, the existence of motive looses significance.

49. The learned Counsel for the accused-respondent has placed reliance upon a recent decision of the Hon'ble Supreme Court in **Joseph Stephen and others versus Santhanasamy and others**, 2022 Scc OnLine SC 90, wherein the Supreme Court has decided the question whether while dealing with the question whether the High Court in exercise of its revisional jurisdiction under Section 401 Cr.P.C., can set aside an order of acquittal and convict the accused by converting the finding of acquittal into one of conviction. While deciding this question, the Hon'ble Supreme Court referred to numerous precedents on the point and has held that: -

"20.Applying the law laid down by this Court in the aforesaid decisions and on a plain reading of sub-section (3) of Section 401 Cr.P.C., it has to be held that sub-section (3) of Section 401 Cr.P.C. prohibits/bars the High Court to convert a finding of acquittal into one of conviction. Though and as observed hereinabove, the High Court has revisional power to examine whether there is manifest error of law or procedure etc., however, after giving its own findings on the findings recorded by the court acquitting the accused and after setting aside the order of acquittal, the High Court has to remit the matter to the trial Court and/or the first appellate Court, as the case may be...."

50. However, in the present case, although the informant has challenged the judgment of the learned Court below by filing a revision under Section 401 Cr.P.C., as till

the filing of the revision, the Act No. 5 of 2009 had not been enacted by which a Proviso was inserted in Section 372 conferring an unfettered right of appeal upon a victim of an offence, the same judgment is under challenge in an appeal filed by the State under Section 372 of Cr.P.C. and, therefore, this Court is not bound by the limitations of a revision under Section 401 of the Code.

51. The learned Counsel for the accused-respondents next cited another recent judgment of the Hon'ble Supreme Court in the case of **Geeta Devi versus State of U.P**., 2022 Scc OnLine SC 57. This was an appeal against an order passed by this High Court dismissing an appeal filed against an order of acquittal passed by the trial Court. The Hon'ble Supreme Court set aside the judgment of the High Court on the ground that *"the High Court has not at all discussed and/or re-appreciated the entire evidence on record. In fact, the High Court has only made the general observations on the deposition of the witnesses examined. However, there is no re-appreciation of entire evidence on record in detail, which ought to have been done by the High Court, being a first appellate court." The Hon'ble Supreme Court held that "The High Court ought to have re-appreciated the entire evidence on record as it was dealing with a first appeal. Being the first appellate court, the High Court was required to re-appreciate the entire evidence on record and also the reasoning given by the learned Trial Court."*

We fail to understand, how this judgment helps the accused-respondents.

52. The learned Counsel for the accused-respondent has next placed reliance upon another judgment of the Hon'ble Supreme Court in **Guru Dutt Pathak v. State of U.P**., (2021) 6 SCC 116, wherein the Hon'ble Supreme Court was dealing with an appeal filed against a judgment passed by the High Court, reversing an order of acquittal passed by the trial Court. The Hon'ble Supreme Court upheld the order of the High Court and dismissed the appeal, holding that: -

"33. Considering the aforesaid facts and circumstances of the case and on reappreciation of the evidence, when the High Court has come to the conclusion that the findings recorded by the learned trial court while acquitting the accused were perverse and even contrary to the evidence on record and/or misreading of the evidence, the High Court has rightly interfered with the judgment and order of acquittal passed by the learned trial court and has rightly convicted the accused. In the present case, the appellant-original Accused 4 was specifically named right from the very beginning in the FIR. He has been attributed the specific role. The same has been established and proved from the evidence of PW 4 (even if the deposition of PW 2 is for the time being ignored). No error has been committed by the High Court in interfering with the judgment and order of acquittal passed by the learned trial court."

This judgment also does not help the accused-respondents in any manner.

53. The learned Counsel for the accused-respondents next relied upon the decision in of the Hon'ble Supreme Court in **Ram Pal versus State of U.P.,** (2007) 15 SCC 79, in which case also, the parties are very closely related and on account of the dispute relating to some property, the relations between them were extremely

strained. After a through scrutiny of the evidence on record, the High Court had set aside and reversed the order of acquittal passed by the trial Court. The Hon'ble Supreme Court held that the fate of the appeal would primarily rest on the statements of the eyewitnesses and it upheld the order of the High Court and affirmed the conviction order passed in appeal against acquittal. This decision also does not help the accused-respondent in any manner.

54. Thus in view of the aforesaid discussion, we hold that the prosecution has been successful in establishing that at the exhortation of the accused-respondent no. 2 Pradeep, the accused-respondent no. 1 Shiv Narayan fired a gun-shot from his double barrel gun towards the deceased Jaswant with the intention to cause his death and he died due to the injuries suffered due to the gun-shot. The offence was committed at about 12:00 noon, in broad daylight, and the deceased and the other persons accompanying him were unarmed and the deceased and PW-2 had merely asked the accused-respondent no. 1 not to put up a gate on the disputed platform till the Police carried out an enquiry on the application given by PW-2 in this regard at about 10:00 a.m. on the day of the incident. There was no provocation made by the deceased or any other person accompanying him. Therefore, the accused-respondent no. 1 is held guilty of committing the offence of murder of the deceased Jaswant Singh.

55. Now we proceed to examine the criminal liability of the accused-respondent no. 2 for the offence of murder committed by the accused-respondent no. 1. Section 34 of the Indian Penal Code provides as follows: -

*"**34. Acts done by several persons in furtherance of common intention.**--When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

56. In **Surendra Chauhan v. State of M.P.**, (2000) 4 SCC 110, the Hon'ble Supreme Court summarized the essential conditions to attract the applicability of Section 34 of I.P.C. in the following words: -

*"**11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result.** Such consensus can be developed at the spot and thereby intended by all of them. [Ramaswami Ayyangar v. State of T.N. (1976) 3 SCC 779] The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. **For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases.** The common intention can develop even during the course of an occurrence. [Rajesh Govind Jagesha v. State of Maharashtra (1999) 8 SCC 428] **To apply Section 34 IPC apart from the fact that***

there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability *but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."*

(Emphasis supplied)

57. Again, in **Ramesh Singh v. State of A.P.,** (2004) 11 SCC 305, the Hon'ble Supreme Court held that: -

"12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Penal Code, 1860. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention."

(Emphasis supplied)

58. In **Chhota Ahirwarv.State of Madhya Pradesh**, (2020) 4 SCC 126, the Hon'ble Supreme Court reiterated that: -

"26. To attract Section 34 of the Penal Code, no overt act is needed on the part of the accused if they share common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention [seeAsoke Basak[Asoke Basakv.State of Maharashtra,(2010) 10 SCC 660:(2011) 1 SCC (Cri) 85], SCC p. 669]. To quote from the judgment of the Privy Council in the famous case ofBarendra Kumar Ghosh[Barendra Kumar Ghoshv.King Emperor,1924 SCC OnLine PC 49:(1924-25) 52 IA 40:AIR 1925 PC 1], "they also serve who stand and wait".

59. In the judgment in the case of **Angad Yadav versus State of U.P.**, 2021 Scc OnLine All 262, a coordinate Bench of this Court summarized the law regarding criminal liability for an act done in furtherance of a common intention, in the following words: -

"56.The essence of joint liability in doing a criminal act is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. If the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove it. Hence, in most cases it has to be inferred from the conduct of the accused

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

60. Here the accused-respondent no. 2 is the son of the accused-respondent no. 1. The deceased was a cousin (uncle's son) of the accused-respondent no. 1. There was a dispute regarding some family property going on. At the time of the incident, the accused-respondent no. 1 was carrying a double barrel gun and the accused-respondent no. 2 was carrying a single barrel gun. The deceased and all the other persons present there from his side were not carrying any weapon. When the deceased and the PW-2 said to the accused-respondent no. 1 that he should not proceed with the work of putting up a gate at the disputed platform till the Police carried out an enquiry pursuant to an application given by PW-2 to the Police in the morning of the date of the incident, the accused-respondent no. 2 was standing with the accused-respondent no. 1 and he exhorted to the latter "bade panch bante hain. Goli maar do" meaning that the persons were trying to act as the arbitrators, and the accused-respondent no. 1 should shoot them and at his exhortation, the accused-respondent no. 1 shot and killed the deceased. This shows that at the time when the gun-shot was fired, the accused-respondent no. 2 was physically present with the accused-respondent no. 2 at the place of the incident, he exhorted the accused-respondent no. 1 to shoot at the deceased and he thereby promoted the offence and both the accused persons had a common intention to shoot at the deceased to kill him. In these circumstances, even if the accused-respondent no. 2 did not himself fire the shot at the deceased, he would be vicariously liable under Section 34 of the Penal Code for the offence of murder committed by the accused-respondent no. 1.

61. Our view is supported by a recent decision of the Hon'ble Supreme Court in **Sandeep versus State of**

Haryana 2021, Scc OnLine SC 642, wherein one of the accused persons Sandeep had given an exhortation immediately before the shot was fired. Sandeep was convicted for the offence under Section 302 read with Section 34 IPC and his conviction was confirmed by the High Court. The Hon'ble Supreme Court dismissed the Appeal filed by the accused Sandeep and affirmed his conviction.

62. Now we proceed to examine as to whether the accused-respondents have committed the offences punishable under Sections 504 and 506 IPC. It is proved from the statements of PW-1 and PW-2 that there was a property dispute going on between the parties and PW-2 and the deceased had gone to the house of the accused-respondents to ask him to stop the work till the Police carried out an enquiry. Upon hearing about the report given by PW 2 to the Police, the accused-respondents Shiv Narayan and Pradeep got enraged and started hurling abuses. Jaswant forbade the accused-respondents from abusing. Being annoyed by it, the accused-respondent no. 2 Pradeep exhorted to his father accused-respondent no. 1 Shiv Narayan that "b*ade panch bante hain, goli maar do*". Keeping in view all the facts and circumstances of the case, this would amount to criminal intimidation and insult with intent to provoke breach of peace and, therefore, the accused-respondents no. 1 and 2 are liable to be convicted and sentenced under Section 504 and 506 IPC also.

63. Lastly, the learned Counsel for the accused-respondents submitted that the accused-respondent no. 1 is presently aged about 70 years and he has remained in Jail for about 3 years and, therefore, keeping in view the aforesaid facts, this Court should take a lenient view towards him.

Order

64. In view of the aforesaid discussion, the instant appeal stands **allowed**. The judgment and order dated 16-09-2008 passed by the learned Additional District and Sessions Judge (Court No. 1), Hamirpur in Sessions Trial No. 137 of 2005 under Sections 302/34, 504, 506 IPC, Police Station Rath, District Hamirpur, acquitting the accused-respondents is set aside and reversed. The accused-respondents no. 1 and 2 are held to be guilty of committing offences punishable under Sections 302/34, 504 and 506 IPC, in Case Crime No. 22 of 2005, Police Station Rath, District Hamirpur.

65. Keeping in view the fact that the incident occurred on 28-01-2005 and a period of more than 17 years has elapsed since the incident, as also the fact that presently the accused respondent no. 1 Shiv Narayan is aged about 70 years, the accused-respondents are awarded the following sentences: -

(i) For the offence under Section 302/34 I.P.C., the accused-respondent no. 1 Shiv Narayan son of Maheshwari Prasad is sentenced to undergo simple imprisonment for life and the accused-respondent no. 2 Pradeep son of Shiv Narayan is sentenced to undergo rigorous imprisonment for life and further, both the accused-respondents are sentenced to pay a fine of Rupees Twenty Thousand Only (Rs. 20,000/-) each and if they fail to pay the amount of fine, they shall have to undergo simple imprisonment for a further period of six months in lieu thereof.

(ii) For the offence under Sections 504 IPC, the accused-respondent no. 1 Shiv Narayan son of Maheshwari Prasad and the accused-respondent no. 2 Pradeep son of

Shiv Narayan are sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rupees Two Thousand Only (Rs. 2,000/-) and if they fail to pay the amount of fine, they shall have to undergo imprisonment for a further period of one month in lieu thereof.

(iii) For the offence under Sections 506 IPC, the accused-respondent no. 1 Shiv Narayan son of Maheshwari Prasad and the accused-respondent no. 2 Pradeep son of Shiv Narayan are sentenced to undergo simple imprisonment for a period of three years and to pay a fine of Rupees Five Thousand Only (Rs. 5,000/-) and if they fail to pay the amount of fine, they shall have to undergo imprisonment for a further period of two months in lieu thereof.

(iv) All the aforesaid sentences will run concurrently.

66. The accused-respondent no. 1 - Shiv Narayan son of Maheshwari Prasad and the accused-respondent no. 2 - Pradeep son of Shiv Narayan are directed to surrender before the learned Chief Judicial Magistrate, Hamirpur within a period of 15 days from the date of this order to serve out the sentences awarded to them. In case they do not surrender within the stipulated time, learned Chief Judicial Magistrate, Hamirpur shall commit them to custody as per law.

67. As the judgment and order dated 16-09-2008 passed by the learned Additional District and Sessions Judge (Court No. 1), Hamirpur in Sessions Trial No. 137 of 2005 under Sections 302/34, 504, 506 IPC, Police Station Rath, District Hamirpur, has been set aside in Government Appeal No. 2239 of 2009, there is no need to pass any order in Criminal Revision No. 3459 of 2008 filed against the same judgment and order as the revision has become infructuous.

68. Let a certified copy of this judgment and order be sent to the Court concerned.

(2022)06ILR A124
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PRAKASH PADIA, J.

PIL No. 767 of 2022

Bhaskar Rai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellnts:
Petitioner(In Person)

Counsel for the Respondents:
Sri Ankit Gaur (State Law Officer), Sri Shubhash Chandra Yadav

A. Constitution of India, 1950-Article 226-PIL-petition filed claiming to be public interest that the authorities concerned be directed to investigate the issue regarding corruption in allotment of fair price shop in favour of respondent no.3-A criminal writ was already filed regarding the same-It is well settled that a litigant, who attempts to pollute the stream of justice is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim supressio veri, expression faisi i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted.(Para 1 to 15)

The petition is dismissed. (E-6)

List of Cases cited:

1. Abhyudya Sanstha Vs U.O.I. (2011) 6 SCC 145

2. Hari Narain Vs Badri Das (1963) AIR SC 1558

3. G.Narayanswamy Reddy Vs Govt. of Karna. (1991) 3 SCC 261

4. Dalip Singh Vs St. of U.P., (2010) 2 SCC 114

5. Moti lal Songara Vs Prem Prakash @ Pappu & anr. (2013) 9 SCC 199

6. Amar Singh Vs U.O.I. & ors. (2011) 7 SCC 69

7. Kishore Samrite Vs St. of U. P. & ors. (2013) 2 SCC 398

8. ABCD Vs U.O.I. & ors. (2020) 2 SCC 52

9. Chandra Shashi Vs Anil Kumar Verma(1995) 1 SCC 421

10. K.D. Sharma Vs SAIL & ors. (2008) 12 SCC 481

11. Dhananjay Sharma Vs St. of Har. & ors. (1995) 3 SCC 757

(Delivered by Hon'ble Rajesh Bindal, C.J., & Hon'ble Prakash Padia, J.)

1. The present petition has been filed, claiming to be in public interest, with a prayer that the second cancelled fair price shop be allotted to someone else and the authorities concerned be directed to investigate the issue regarding corruption in allotment of fair price shop in favour of respondent No.3.

2. The petitioner, who appears in person, claims that he is a Software Engineer, based at Hyderabad, however, his parents and other family members reside in village. He is arguing his case through VC from Hyderabad.

3. At the very outset, learned counsel for the respondents submitted that the petitioner had earlier filed Criminal Writ - Public Interest Litigation No.1 of 2022 raising the issue regarding the same fair price shop. The same was dismissed by this Court vide order dated January 18, 2022. It was further submitted that there is one FIR registered against the petitioner on the complaint filed by respondent No.3 as Case Crime No. 131 of 2021, under Sections 323, 504, 506 and 308 IPC at Police Station Bardah, District Azamgarh in which even charge sheet has been filed.

4. The submission is that the aforesaid facts have not been disclosed in the present petition.

5. He further submitted that the petitioner has not disclosed his credentials in terms of sub-rule (3-A) of Rule 1 of Chapter XXII of the High Court Rules.

6. The petitioner, who appeared in person (through VC), in response to the submissions so advanced, submitted that he is not required to disclose the filing of earlier writ petitions as the same do not relate to the cause of action in question. Regarding criminal case registered against him on the complaint of respondent No.3, he submitted that the said information was also not required to be furnished as, in the PIL, relief was claimed against the State and not against respondent No.3.

7. After hearing the petitioner, who appeared in person and learned counsel for the respondents, in our opinion, the present petition deserves to be dismissed on account of concealment of material facts from this Court and also for non-disclosure of his credentials as required in terms of the High Court Rules. Further, respondent No.3 has been impleaded as a party against whom there are specific allegations made

by the petitioner. Even a prayer has also been made for a direction to the authorities to investigate the allegation of corruption in allotment of fair price shop in favour of respondent No.3 but, still, the fact that FIR got registered by respondent No.3 against the petitioner in which even a charge sheet has also been filed, has not been disclosed in the present petition. Further, as submitted by the petitioner, the fact that a cross-case bearing Case Crime No.132 of 2021 was also registered against respondent No.3 on a complaint made by him, has also not been disclosed in the present petition.

8. The issue regarding approaching the Court by concealing the facts has been examined by Hon'ble the Supreme Court on number of occasions and it has been opined that the same is polluting the stream of justice.

9. In **Abhyudya Sanstha Vs. Union of India, (2011) 6 SCC 145**, Hon'ble the Supreme Court, while declining relief to the petitioners therein, who did not approach the court with clean hands, opined as under :-

"18. ... In our view, the appellants deserve to be non suited because they have not approached the Court with clean hands. The plea of inadvertent mistake put forward by the learned senior counsel for the appellants and their submission that the Court may take lenient view and order regularisation of the admissions already made sounds attractive but does not merit acceptance. Each of the appellants consciously made a statement that it had been granted recognition by the NCTE, which necessarily implies that recognition was granted in terms of Section 14 of the Act read with Regulations 7 and 8 of the 2007 Regulations. Those managing the affairs of the appellants do not belong to the category of innocent, illiterate/uneducated persons, who are not conversant with the relevant statutory provisions and the court process. The very fact that each of the appellants had submitted LPASW No. 82/2019 Page 7 application in terms of Regulation 7 and made itself available for inspection by the team constituted by WRC, Bhopal shows that they were fully aware of the fact that they can get recognition only after fulfilling the conditions specified in the Act and the Regulations and that WRC, Bhopal had not granted recognition to them. Notwithstanding this, they made bold statement that they had been granted recognition by the competent authority and thereby succeeded in persuading this Court to entertain the special leave petitions and pass interim orders. The minimum, which can be said about the appellants is that they have not approached the Court with clean hands and succeeded in polluting the stream of justice by making patently false statement. Therefore, they are not entitled to relief under Article 136 of the Constitution. This view finds support from plethora of precedents.

19. In **Hari Narain v. Badri Das AIR 1963 SC 1558, G. Narayanaswamy Reddy v. Govt. of Karnataka (1991) 3 SCC 261** and large number of other cases, this Court denied relief to the petitioner/appellant on the ground that he had not approached the Court with clean hands. In **Hari Narain v. Badri Das (supra)**, the Court revoked the leave granted to the appellant and observed:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate,

untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it LPASW No. 82/2019 Page 8 would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

20. In **G. Narayanaswamy Reddy v. Govt. of Karnataka's** case (supra), the Court while noticing the fact regarding the stay order passed by the High Court which prevented passing of the award by the Land Acquisition Officer within the prescribed time period was concealed and in the aforesaid context, it observed that:

"2. ... Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter- affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

21. In **Dalip Singh v. State of U.P., (2010) 2 SCC 114,** Hon'ble the Supreme Court noticed the progressive decline in the values of life and observed:

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahinsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice- delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to

any relief, interim or final." (emphasis supplied)

10. In **Moti Lal Songara Vs. Prem Prakash @ Pappu and another (2013) 9 SCC 199**, Hon'ble the Supreme Court, considering the issue regarding concealment of facts before the Court, while observing that "court is not a laboratory where children come to play", opined as under:

"19. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi , i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused- respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum.

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand." (emphasis supplied)

11. Similar view has been expressed in **Amar Singh v. Union of India and others, (2011)7 SCC 69** and **Kishore Samrite v. State of Uttar Pradesh and others, (2013)2 SCC 398.**

12. In a recent judgment in **ABCD Vs. Union of India and others (2020) 2 SCC 52,** Hon'ble the Supreme Court in the matter where material facts had been concealed, while issuing notice to the petitioner therein, exercising its suo-motu contempt power, observed as under :

"15. Making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 of the IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said Section. In respect of matters coming under Section 195(1)(b)(i) of the Code, in Pushpadevi M. Jatia v. M.L. Wadhawan etc., (1987) 3 SCC 367 prosecution was directed to be launched after prima facie satisfaction was recorded by this Court.

16. It has also been laid down by this Court in **Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421** that a person who makes an attempt to deceive the court, interferes with the administration of justice and can be held guilty of contempt of court. In that case a husband who had filed a fabricated document to oppose the prayer of his wife seeking transfer of matrimonial

proceedings was found guilty of contempt of court and sentenced to two weeks imprisonment. It was observed as under:

"1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.

2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

* * *

14. The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large. Anil Kumar is, therefore, guilty of contempt."

17. In **K.D. Sharma Vs. Steel Authority of India Limited and others (2008) 12 SCC 481** it was observed:

"39. If the primary object as highlighted in Kensington Income Tax Commrs., (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA) is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

18. In Dhananjay Sharma Vs. State of Haryana and others (1995) 3 SCC 757 filing of a false affidavit was the basis for initiation of action in contempt jurisdiction and the concerned persons were punished."

13. It was held in the judgments referred to above that one of the two cherished basic values by Indian society for centuries is "satya" (truth) and the same has been put under the carpet by the petitioner. Truth constituted an integral part of the justice-delivery system in the pre-Independence era, however, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, the values

have gone down and now a litigants can go to any extent to mislead the court. They have no respect for the truth. The principle has been evolved to meet the challenge posed by this new breed of litigants. Now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim supressio veri, expression faisi, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted.

14. Further, perusal of the order dated January 18, 2022 passed in Criminal Writ-PIL No. 1 of 2022 shows that the prayer made therein was for a direction to the authorities to investigate the violation of law in allotment of fair price shop and charges of corruption against the officials involved. The relief prayed herein is similar.

15. For the reasons mentioned above, in our opinion, the present petition deserves to be dismissed with cost of ?25,000/-.

16. Ordered accordingly.

17. The amount of cost shall be deposited by the petitioner with U.P. State Legal Services Authority, Lucknow within a period of four weeks from today.

(2022)06ILR A130
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

P.I.L. No. 2020 of 2021

Ved Prakash & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Mishra, Sri Krishna Mishra

Counsel for the Respondents:
C.S.C., Sri Pankaj Shukla

A. Constitution of India, 1950-Article 226-PIL-petitiner prayed for diversion of the power line/high tension memorandum wire between the abadi area of the village so that the abadi area, schools, agricultural fields may be unaffected-alignment is not decided by individual but the same is a result of collective efforts of experts-A decision to mark route for electric line is highly specialized and technical. the route may be running into hundreds of kilometers passing through land owned by different owners and it may not be possible to offer hearing to all the owners, as only right to use small-small portions of land on which towers or occupiers of the land on the route to suggest alternates. if that process is adopted, the project will never be completed as any such decision would be subject to judicial review and the State and its functionaries may not be able to provide infrastructure. only right available to landowners is to receive compensation and damages-Application filed by the corporation deserves to be allowed.(Para 1 to 15)

The petition is dismissed. (E-6)

List of Cases cited:

1. Vivek Brajendra Singh Vs St. of Govt. of Mah. & ors. (2012) 4 BCR 116

2. G.V.S Rama Krishna & ors. Vs A.P Transco & ors. (2009) AIR AP 158

3. Power Grid Corp. of India Ltd Vs Century Textiles & Ind. Ltd & ors. (2017) AIR SC 1141

4. Gulam Ahmad Bhat Vs U.O.I. & ors. , OWP No 1950 of 2018

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of the instant Public Interest Litigation, the petitioner has prayed for following, amongst other, relief:-

"I. Issue a writ, order or direction in the nature of mandamus directing the respondent No. 3 not to raise the construction of line tower for running the electricity wire in Village Bhamai Husamganj, Post Deewanganj, District Prayagraj between the abadi side and further restrained respondents not to raise any construction from the land of the land owners without complying the provisions provided under The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013."

2. Learned counsel for the petitioner submits that Uttar Pradesh Power Transmission Corporation Limited, i.e., the respondent no. 3, is laying high tension memorandum wire between the abadi side of the village, for which various electricity supply towers are being constructed. He further submits that area from where the high tension memorandum wire is going to be laid, there exists schools, agricultural fields and village abadi. Therefore, the same may not be allowed to be laid. In other words, he wants that the said high tension line may be diverted or the alignment may be altered so that the abadi area, schools, agricultural fields, etc. may be unaffected.

3. Learned counsel for the respondents submits that the relief claimed by the petitioner cannot be granted as the alignment of the high tension line cannot be changed to benefit some of the petitioners as alignment is not decided by any individual; rather, the same is a result of collective efforts of experts. He further submits that it is a prestigious project for the State to transmit power and the entire exercise has been done after due approval from the competent authorities. Before planning to erect the transmission line, not only the topography of the area, but even the soil is also tested to ensure that the same can sustain the load. He prays for dismissal of the petition.

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

5. The facts, which are not in dispute, are that the Corporation got permission to lay high tension transmission line. The lines are to be drawn, which pass through the land of Village - Bhamai Husamganj, Post - Deewanganj, District - Prayagraj. The plea raised in the petition is that alignment of the Transmission Line be changed so that the schools, agricultural fields, abadi, etc. are saved. The Transmission Line is proposed in a straight line passing through the land of the village in question, change of alignment of which may not be possible, considering the fact that it is the job of the experts as to which route is to be adopted for erection of high power Transmission Lines. The petitioners have not challenged any notification, which empowers the respondents to lay the transmission line, as the Indian Telegraph Act, 1885 (hereinafter referred to as, '**the Act**') empowers the State to issue notification mentioning details of the area through which transmission line will pass through.

6. Section 10 of the Act authorizes the authority to place and maintain a telegraph line under, over, along, or across, and posts

in or upon any immovable property. Proviso (b) to Section 10 of the Act makes it abundantly clear that while erecting lines, the authority does not acquire any right other than that of user in the property, which is subject to payment of compensation. Further argument of the counsel for the petitioners that neither any information nor opportunity was granted to file objection before approval/notification notifying the laying of the power transmission line so that a detailed objection could be filed requesting beneath the alignment, there are schools, agricultural fields, abadi, etc. is totally misconceived.

7. As has been observed in a judgment by the Division bench of Nagpur Bench of Bombay High Court in **Vivek Brajendra Singh v. State of Government of Maharashtra and ors** 2012 (4) BCR 116, there is no hearing contemplated against laying of lines. A decision to mark route for laying electric line is a highly specialized and technical. The route may be running into hundreds of kilometers passing through land owned by different owners and it may not be possible to offer hearing to all the owners, as only right to use small-small of portions of land on which towers or occupiers of the land on the route to suggest alternates. If that process is adopted, the project will never be completed as any such decision would be subject to judicial review and the State or its functionaries may not be able to provide infrastructure. Andhra Pradesh High Court in **G.V.S. Rama Krishna and ors v. A. P. Transco and others**, AIR 2009 AP 158, clearly laid down that the only right available to landowners is to receive compensation and damages, if any, sustained by them, as neither there is acquisition of land nor there is any need of consent of the owners or occupiers. Even in **Power Grid Corporation of India Limited v. Century Textiles & Industries Limited and others**, AIR 2017 SC, 1141, Hon'ble the Supreme Court had not interfered in the process of laying of power lines.

8. Hon'ble the Supreme Court has time and again opined that projects of public importance should not be halted as the same would be against the larger public interest and the constitutional courts should weigh public interest vis-à-vis private interest while exercising its discretion.

9. In **Gulam Ahmad Bhat Vs. Union of India and others** (OWP No. 1950 of 2018, dated 20.12.2018), the Jammu & Kashmir High Court at Srinagar, while holding that transmission of line and alignment cannot be changed at the behest of some of the petitioners, has observed as under:-

"11. The facts which are not in dispute are that the Corporation got permission to lay 220 KV D/C Kishenganga to T-point at Amargarh and 220 KV D/C Amargarh (Sopore) and from Amargarh (Sopore) to Wagoora (Budgam) under the Scheme known as Transmission System Associated with Kishenganga HEP for transmission of power from the upcoming 330 MW HEP of NHPC. As stated by the learned counsel for the Corporation, entire work is over. Only the lines are to be drawn to connect Tower No. 40/6 and 41/0, which pass through the land owned by the petitioner. Beneath the alignment, there is a constructed house of the petitioner. The petitioner claims that it was constructed before issuance of notification dated 18.06.2015 proposing erection of Transmission Line whereas the stand of the Corporation is that house was

constructed after the notification had already been iss12. Section 10 of the Act authorizes the authority to place and maintain a telegraph line under, over, along, or across, and posts in or upon any immovable property. Proviso (b) to Section 10 of the Act makes it abundantly clear that while erecting lines, the authority does not acquire any right other than that of user in the property, which is subject to payment of compensation. In the case in hand as well, notification dated 18.06.2015 has been issued for laying transmission line on the route as mentioned hereinued. The plea raised in the writ petition is that alignment of the Transmission Line be changed so that the house of the petitioner is saved. There is a site plan produced on record by the petitioner himself which shows that the Transmission Line is proposed in a straight line passing through the land of the petitioner. Change of alignment of which may not be possible at this stage, considering the fact that Towers on both sides have been erected and further it is the job of the experts especially in hilly terrains as to which route is to be adopted for erection of high power Transmission Lines.

12. Section 10 of the Act authorizes the authority to place and maintain a telegraph line under, over, along, or across, and posts in or upon any immovable property. Proviso (b) to Section 10 of the Act makes it abundantly clear that while erecting lines, the authority does not acquire any right other than that of user in the property, which is subject to payment of compensation. In the case in hand as well, notification dated 18.06.2015 has been issued for laying transmission line on the route as mentioned herein.

13. As has been observed in a judgment by the Division bench of Nagpur Bench of Bombay High Court in Vivek Brajendra Singh v. State of Government of Maharashtra and ors 2012 (4) BCR 116, there is no hearing contemplated against laying of lines. A decision to mark route for laying electric line is a highly specialized and technical. The route may be running into hundreds of kilometers passing through land owned by different owners and it may not be possible to offer hearing to all the owners, as only right to use small-small of portions of land on which towers or occupiers of the land on the route to suggest alternates. If that process is adopted, the project will never be completed as any such decision would be subject to judicial review and the State or its functionaries may not be avle to provide infrastructure. Andhra Pradesh High Court in G.V.S. Rama Krishna and ors v. A. P. Transco and others, AIR 2009 AP 158, clearly laid down that the only right available to landowners is to receive compensation and damages, if any, sustained by them, as neither there is acquisition of land nor there is any need of consent of the owners or occupiers. Even in Power Grid Corporation of India Limited v. Century Textiles & Industries Limited and others, AIR 2017 SC, 1141 Hon'ble the Supreme Court had not interfered in the process of laying of power lines.

14. For the reasons stated above, in my opinion the application filed by the Corporation deserves to be allowed. The application is, accordingly, allowed. The interim stay granted on 15.10.2018 is vacated.

10. For the reasons stated above and the law laid down by Hon'ble the Supreme Court, in our opinion, the present PIL is devoid of merit. The same is, accordingly, dismissed.

(2022)06ILR A134
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 23 of 2022

Smt. Kaisar Jahan & Ors. ...Revisionists
Versus
Pashupati Colonizer Pvt. Ltd. ...Respondent

Counsel for the Revisionists:
Sri Amit Krishna, Sri Tejasvi Misra

Counsel for the Respondents:
Sri Hanuman Kinkar, Sri Shashi Kumar Dwivedi, Sri Atul Dayal

(A) Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act , 1972 - Section 30 - The post office Act,1898 - section 27 - gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post , Indian Evidence Act, 1872 - Section 114 - enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee , Code of Civil Procedure ,1908 - Order XV Rule 5 - Striking off defence for failure to deposit admitted rent, etc. (Para -24)

Revisionists-defendants challenged judgment and decree - on four grounds - maintainability of suit, rate of rent, no proper notice and communication of sale deed.**(Para -3)**

(B) Civil Law - maintainability of suit - Court record findings only on the issues which are part of the pleadings - on which parties are contesting the case - Resolution of Board of Director has been passed or not, is the question of fact and can only be replied if it is raised in the pleadings - held - without pleadings revisionists-defendants cannot take benefit of maintainability of the SCC suit. (Para - 19)

(C) Civil Law - rate of rent - acceptance of change of landlordship and continuation of tenancy with new landlord - impliedly said that applicant was having full knowledge about the enhanced rent at the rate of Rs. 6600/- per month – held - It is nothing, but an attempt to any how continue the tenancy by getting the SCC suit prolonged or dismissed on a frivolous ground. (Para -22)

(D) Civil Law - service of notice and examination of postman in court - held - once the requirement of Section 27 of the Post Office Act has been complied with and endorsement has been made by the postman with regard to service of notice - there is no requirement to examine the postman in Court. (Para -25)

(E) Civil Law - Improper communication of sale deed - notice properly served - revisionists-defendants accepted change of landlordship in their written statements - payment of Rs. 32/- per month under Section 30 Act - clearly shows that they are having full knowledge of change of landlordship after receiving the notice - admitted the same in their written statements - held - Once they have knowledge of change of landlordship, that cannot be without having knowledge of sale deed.(Para -26)

HELD:-No good ground/reason for interference in the impugned judgement and order. **(Para - 27)**

S.C.C. Revision dismissed. (E-7)

List of Cases cited:-

1. M/s. Dale & Carrington Invt. (P) Ltd. & anr. Vs P.K. Prathapan & ors., 2005 0 AIR (SC)

2. Shri Saurav Jain & anr. Vs M/s A.B.P. Design & anr. , Civil Appeal No. 4448 of 2021

3. Shivaji Balaram Haibatti Vs Avinash Maruthi Pawar, (2018) 11 SCC 652

4. Smt. Kalawati Vs Deen Dayal Sharma, 2018 (1) ARC 464

5. Dharam Pal Vs Harbans Singh, (2006) 9 SCC 216

6. Ajeet Seeds Ltd. Vs K. Gopala Krishnaiah, (2014) 12 SCC 685 P.T.

7. Thomas Vs Thomas Job, (2005) 6 SCC 478

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Tejasvi Misra, learned counsel for the revisionists-defendants and Sri Atul Dayal, learned senior counsel assisted by Sri Hanuman Kinkar, learned counsel for the respondent-plaintiff.

2. Present revision has been filed challenging the impugned judgment and order dated 18.12.2021 passed by Additional District and Sessions Judge, (Anti-Corruption), Court No. 5, Gorakhpur in SCC Suit No. 15/2011 (Pashupati Colonizer Private Limited Vs. Smt. Kaisar Jahan and 11 others).

3. Learned counsel for the revisionists-defendants has challenged the judgment and decree basically on four grounds i.e. maintainability of suit, rate of rent, no proper notice and communication of sale deed.

4. So far as maintainability of suit is concerned, he submitted that respondent-plaintiff is a Private Limited Company, therefore, to initiate any legal proceeding, resolution of Board of Director of Company is necessarily required. In the cross examination, Director of the Company, namely, Sri Awadhesh Kumar Srivastava, who has filed SCC Suit has accepted that he has not filed any resolution of Company as it was not required. There is no meeting of Board of Directors before filing the case. He next submitted that once there is no resolution, an individual Director cannot file SCC Suit for eviction against the revisionists-defendants. In support of his contention, he has placed reliance upon the judgement of Apex Court in the matter of ***M/s. Dale & Carrington Invt. (P) Ltd. & Another Vs. P.K. Prathapan & others; 2005 0 AIR (SC)***, in which Apex Court has observed that individual Director has no power to act on behalf of the Company.

5. Learned counsel for the revisionists-defendants submitted that it is a question of law, which goes to the root of the case, therefore, it can be raised at any stage of proceeding. In support of his contention, he placed reliance upon the judgement of Apex Court in the matter of ***Shri Saurav Jain & Another Vs. M/s A.B.P. Design & Another*** passed in ***Civil Appeal No. 4448 of 2021 arising out of SLP (C) No. 29868 of 2018***.

6. He next submitted that respondent-plaintiff is claiming the rent at the rate of Rs. 6600/- per month, but at no point of time, it has been proved and according to the revisionists-defendants, rent was Rs. 32/- per month, which has been deposited till the decision of suit under Section 30 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act , 1972 (*hereinafter referred to as U.P. Act No. 13 of 1972*). He next submitted that there is no specific finding as to how, amount of rent is Rs. 6600/- per month.

7. He further submitted that no proper notice has been given to them as notices are returned back with endorsement of postman as "बार बार जाने पर भी मकान पर ताला बंद रहता है" (Baar Baar Jaane Par Bhi Makaan Par

Taala Band Rehta Hai). He next submitted that it is required on the part of plaintiff-respondent to examine the postman in Court to prove the service of notice for which no application had ever been filed by the plaintiff-respondent. Under such facts of the case, notice may not be treated to be sufficient and further postman has to be examined.

8. Lastly, he submitted that information of sale deed has never been provided to them, therefore, impugned order is bad and liable to be set aside.

9. Learned counsel for respondent-plaintiff submitted that so far as first contention with regard to maintainability of suit is concerned, it is necessarily required to raise this issue in plaint and should have been part of pleading, which has never been raised. Further, there is only vague assertion based upon the cross examinations not supported by any documentary evidence, therefore, cannot be accepted. He next submitted that it is required on the part of revisionists-defendants to have specific pleading to this effect and in lack of pleading, Court may not travel beyond that. In support of his contention, he placed reliance upon the judgement of Apex Court in the matter of ***Shivaji Balaram Haibatti Vs. Avinash Maruthi Pawar; (2018) 11 SCC 652.***

10. So far as rate of rent is concerned, he submitted that admitted rent by the revisionists-defendants was Rs. 32/- per month and they deposited the same under Section 30 of U.P. Act No. 13 of 1972 before the Court till the conclusion of this proceeding whereas as per Order XV Rule 5 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC, 1908"), after first appearance, it is required on the part of revisionists-defendants to deposit the amount before the Court concerned, where the suit is pending. Not only this, they have admitted the tenancy in a written statement with effect from 2011, but even though they have never deposited any amount of rent before SCC Court and they continuously deposited the amount of rent under Section 30 of U.P. Act No. 13 of 1972 before another Court. This fact is never disputed by the revisionists-defendants. Therefore, in all eventuality, they are defaulter of payment of rent either it is at the rate of Rs. 32/- per month or Rs. 6600/- per month. In support of his contention, he placed reliance upon the judgement of this Court in the matter of ***Smt. Kalawati Vs. Deen Dayal Sharma; 2018 (1) ARC 464.***

11. About the service of notice upon the revisionists-defendants is concerned, he submitted that there is no dispute on the point that notice has been sent to the revisionists-defendants on the correct address, which was returned back with remark "बार बार जाने पर भी मकान पर ताला बंद रहता है" (Baar Baar Jaane Par Bhi Makaan Par Taala Band Rehta Hai). He next submitted that once notice has been sent on the correct address and returned back with endorsement of postman with aforesaid remark, same shall be treated to be sufficient. In support of his contention, he placed reliance upon the judgement of Apex Court in the matters of ***Dharam Pal Vs. Harbans Singh; (2006) 9 SCC 216***.

12. Further, he also placed reliance upon the judgement of Apex Court in the matters of ***Ajeet Seeds Limited Vs. K. Gopala Krishnaiah; (2014) 12 SCC 685***.

13. The issue of examination of postman in Court is having no force. He

submitted that once notice has been sent upon the correct address, there is no requirement to examine the postman. In support of his contention, he placed reliance upon the judgement of Apex Court in the matters of ***P.T. Thomas Vs. Thomas Job; (2005) 6 SCC 478***.

14. So far as communication of sale deed is concerned, once notice has been served, which is mentioned in plaint and also accepted by revisionists-defendants in their written statement that they are having knowledge of change of landlordship of respondent- plaintiff and paid rent at the rate of Rs. 32/- per month. It would be deemed that they are having knowledge of sale deed. Lastly, he submitted that once, they have never deposited any amount before SCC Court, admitted or not admitted, they are defaulter and liable to be vacate the house in question. Under such facts and circumstances, there is no illegality in the impugned judgment and order and same is liable to be set aside.

15. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgments placed by the learned counsel for the parties.

16. The first issue which was raised by the learned counsel for the revisionists-defendants about the maintainability of the suit in lack of resolution or authorization from the Board of Director and whether this question can be raised for the first time before this Court or not.

17. Learned counsel for the revisionists-defendants has placed reliance upon the judgement of the Apex Court in the matter of ***M/s Dale & Carrington Invt. (P) Ltd. (supra)***, which says that individual Director has no power to act on behalf of the Company. Relevant paragraph is quoted hereinbelow;

"At this stage it may be appropriate to consider the legal position of Directors of companies registered under the Companies Act. A company is a juristic person and it acts though its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the Company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. They are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company. In a limited sense they are also trustees for the shareholders of the company. To the extent the power of the Directors are delineated in the Memorandum and Articles of Association of the company, the Directors are bound to act accordingly. As agents of the company they must act within the scope of their authority and must disclose that they are acting on behalf of the company. The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important

matters relating to the company. It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though Section 81 of the Companies Act which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Non-applicability of Section 81 of the Companies Act in case of private limited companies casts a heavier burden on its directors. Private limited companies are normally closely held i.e. the share capital is held within members of a family or within a close knit group of friends. This brings in considerations akin to those applied in cases of partnership where the partners owe a duty to act with utmost good faith towards each other. Non-applicability of Section 81 of the Act to private companies does not mean that the directors have absolute freedom in the matter of management of affairs of the company."

18. Further in light of judgment of Apex Court in the matter of ***Shri Saurav Jain (supra),*** he submitted that it is a question of law, which can be raised at any stage as it goes to the root of the case. Relevant paragraph of the aforesaid judgment is quoted hereinbelow;-

"Based on the position of law, we find it just to allow the appellant to raise the ground of jurisdiction before us. Allowing the ground to be raised would not require the submission of additional evidence since it is a pure question of law and strikes at the heart of the matter. We shall now turn to the merits of this argument."

19. There is no dispute on the point that Director may not proceed alone on behalf of the Company. It is also undisputed that it is required on the part of revisionists-defendants to have specific pleading to this effect to provide opportunity to other side to rebut the same. In present case, undisputedly this issue has never been pleaded or raised before the Court below. The Apex Court in the matter of ***Shivaji Balaram Haibatti (supra)*** has considered this fact and clearly held that Court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Resolution of Board of Director has been passed or not, is the question of fact and can only be replied if it is raised in the pleadings. In the present case, this issue is based upon the cross examination of the plaintiff-respondent not supported by any documentary evidence, therefore, without pleadings revisionists-defendants cannot take benefit of maintainability of the SCC suit. Apex Court in the matter of ***Shivaji Balaram Haibatti (supra)*** has also taken the same view. Relevant paragraph of the said judgment is quoted hereinbelow;

"It is these issues, which were gone into by the two Courts and were concurrently decided by them against the respondent. These issues, in our opinion, should have been examined by the High Court with a view to find out as to whether these findings contain any legal error so as

to call for any interference in second appeal. The High Court, however, did not undertake this exercise and rather affirmed these findings when it did not consider it proper to frame any substantial question of law. It is a settled principle of law that the parties to the suit cannot travel beyond the pleadings so also the Court cannot record any finding on the issues which are not part of pleadings. In other words, the Court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Any finding recorded on an issue de hors the pleadings is without jurisdiction. Such is the case here."

20. So far as judgment of ***Shri Saurav Jain (supra)*** is concerned, same is not applicable in the present case for the reason that revisionists-defendants have not raised any legal issue, but factual issue based upon the cross examination of plaintiff-respondent, which cannot be accepted without pleading in written statements as it was held by the Apex Court in the matter of ***Shivaji Balaram Haibatti (supra).***

21. The second issue is about the rate of rent. The case of revisionists-defendants are that rent was Rs. 32/- per month, which they have deposited till the decision of the suit under Section 30 of U.P. Act No. 13 of 1972. If it is treated to be correct even though as provided under Order XV Rule 5 CPC after first appearance before the Court concerned or SCC Court, it is required on the part of revisionists-defendants to deposit the amount before this Court where the suit is pending, but it is admitted position that revisionists-defendants have never deposited any amount before the SCC Court, but continuously deposited the same before the Court provided under Section 30 of U.P. Act No. 13 of 1972. Therefore, in light of judgment of Apex Court in the matter of ***Smt. Kalawati (supra)***, no advantage can be given to the revisionists-defendants for the very simple reason that in all eventuality after appearance in suit proceedings, current rent has to be deposited by the revisionists-defendants before the Court where the suit is pending. Relevant paragraphs of the aforesaid judgment is quoted hereinbelow;-

"Similar view has been expressed by a Bench of this Court in the case of Madhu Mittal (Smt.) Vs. Additional District Judge, Ghaziabad and others, 2004 (2) ARC 326 wherein following the law laid down by the full Bench, the court held as under;

"4. The tenant started depositing rent under Section 30 of U.P. Act N. 13 of 1972 with effect from 01.07.1993 and continued to deposit the rent under Section 30 till 30.06.1995. Defendant admitted that meanwhile he received two registered notices from the landlord dated 27/30 January 1994 demanding the rent. In spite of the said notices, defendant continued to deposit the rent under Section 30 of the Act. The defendant did not deposit any rent in the suit. The suit was ultimately decreed on 30.01.1996 by J.S.C.C. Tenant-respondent no. 2 filed a revision against the judgment and decree passed by the trial court under Section 25 P.S.C.C. Act being S.C.C. Revision No. 60 of 1996. Vth Addl. District Judge, Ghaziabad through judgment and decree dated 19.03.1997, allowed the revision, set aside the judgment and decree passed by the trial court and dismissed the suit. The Revisional Court placing reliance upon, 1986 All. C.J. 782 (Gyanendra Lal and another Vs. Vishnu Narain Mishra) held that even after filing of the suit for ejectment tenant had two options, one deposit of rent under Section 30 of the Act and second; deposit of rent in court where

suit for ejectment was filed. The writ petition is directed against the aforesaid judgment and order of revisional court.

5. It has been held in Full Bench Authority of this Court reported in 2000 (1) ARC 653, that deposit of rent under Section 30 of Act, after receiving notice of demand, is not permissible and any such deposit, if made, will not be of any benefit of the tenant. The tenant will have to be treated defaulter in payment of rent for the period subsequent to the receipt of notice given by landlord intimating his intention to receive the rent directly.

6. Accordingly, I hold deposit of rent made by the tenant after receipt of notice dated 27/30 January 1994 was not permissible and the said deposit cannot be said to be payment to the landlord. The tenant was defaulter when the suit was filed and the trial court rightly decreed the suit. In view of the above, I hold that the judgment passed by the revisional court is patently erroneous in law."

(Emphasis supplied by me)

Thus, the deposit of rent under Section 30 of the Act after receiving of notice of demand, is not permissible and any such deposit, if made will not be of any benefit to the tenant. The tenant will have to be treated as defaulter in payment of rent for the period subsequent to the receipt of notice given by the landlord intimating his intention to receive the rent directly.

A careful reading of Section 20(4) of the Act/ Rule 5 of Order XV shows that in any suit by a lessor for the eviction of a lessee after the determination of the lease and for recovery of rent or compensation for use and occupation, the defendant is required to deposit at or before the first hearing of suit, the entire amount admitted by him to be due together with interest thereon at the rate of 9% per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly, deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2) strike off his defence. The expression "entire amount admitted to be due" means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, deposited in any Court under Section 30 of the U.P. Act No.13 of 1972. As per Explanation 3, the expression "monthly amount due" means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account. The admitted rate of rent is Rs.200/- per month which was payable to the plaintiff-respondent. The petitioner-defendant was liable to deposit the entire amount at the first hearing and was also liable to continue to deposit the monthly rent in time from month to month. The aforesaid provision is a beneficial provision and if the petitioner defendant wanted to take its advantage then he must have strictly complied with the requirement of the aforesaid provision.

A clear cut statutory provisions of Section 20(4) of the Act leads to an inescapable and irresistible conclusion that the petitioner-defendant/ tenant was under statutory obligation to deposit the entire amount of rent and damages for use and occupation of the building due from him

together with interest thereon @ 9% per annum and landlord's costs of the suit in respect thereof, at first date of hearing of the suit, after deducting there from any amount already deposited by him under Section 30(1) of the Act, if he desired to take benefit of the beneficial provisions of Section 20(4) of the Act. The tenant can deduct the amount deposited under Section 30 of the Act but the deposits of the monthly amount after the first hearing and throughout the continuation of the suit must be made in the court where the suit has been filed for eviction and recovery of rent or compensation for use and occupation. Amount, if any, deposited by petitioner-defendant/tenant under Section 30 of the after the first hearing of the suit cannot be deducted for the purposes of benefit of the provisions of Section 20(4) of the Act. If the defendant wishes to take advantage of the beneficial provisions of Section 20(4) of the Act, he must strictly comply with the requirements and if any condition precedent is to be fulfilled before the benefit can be claimed, he must comply with that condition, failing which, he cannot take advantage of the benefit conferred by the provisions of Section 20(4) of the Act.

If the tenant wishes to take advantage of the beneficial provisions of the Rent Control Act, he must strictly comply with the requirements and if any condition precedent is to be fulfilled before the benefit can be claimed, he must strictly comply with the condition failing which, he can not take advantage of the benefit conferred by such a provision. It has been further emphasized that the rent must be deposited in the court where it is required to be deposited under the Rent Control Act and if it is deposited somewhere else, it shall not be treated as a valid payment/tender of the rent and consequently, the tenant must be held to be in default."

22. It is undisputed that applicant is having full knowledge of change of landlordship and it cannot be believed that second purchaser (respondent-plaintiff) after a very long time shall maintain the same rent, which was earlier fixed by the previous landlord i.e. Rs. 32/- per month. The acceptance of change of landlordship and continuation of tenancy with new landlord impliedly said that applicant was also having full knowledge about the enhanced rent at the rate of Rs. 6600/- per month. It is nothing, but an attempt to any how continue the tenancy by getting the SCC suit prolonged or dismissed on a frivolous ground.

23. So far as issue with regard to service of notice and examination of postman in court are concerned, there is no dispute on the point that notice has been returned back with the remark as "बार बार जाने पर भी मकान पर ताला बंद रहता है" (Baar Baar Jaane Par Bhi Makaan Par Taala Band Rehta Hai). In light of judgment of Apex Court in the matter of ***Dharam Pal (supra) & Ajeet Seeds Limited (supra),*** it is settled proposition of law that in such circumstances notice has to be treated sufficient and this cannot be ground for which benefit may be given to the revisionists-defendants. In the matter of ***Dharam Pal (supra)***, Apex Court has taken the same view and relevant paragraph of the same is quoted hereinbelow;-

"Learned counsel for the appellant submits that none of the two recitals contained in the notice can fulfill the requirement of Section 106 of the Transfer of Property Act. One recital in the notice terminates the tenancy from the date of

issue of notice. The other one requires the tenant to vacate the premises within 15 days from the date of the receipt of the notice. Both are bad in the light of the requirements spelled out by the Section 106 of the Transfer of Property Act. The learned counsel seems to be right in urging the pleas. However, still we feel that the appellant cannot be allowed relief. Law is well settled that an objection as to the invalidity or insufficiency of notice under Section 106 of the Transfer of Property Act should be specifically raised in the written statement failing which it will be deemed to have been waived. In the present case, the only objection taken in the written statement is that the notice issued by the plaintiff was "illegal, null and void and ineffective upon the right of the defendant". The thrust of the plea raised by the defendant-appellant in his written statement was that the notice was issued by the person who did not have the authority from the landlord to give the notice. The plea so taken has been found devoid of merit by the High Court and the courts below. The plea that the notice was insufficient in the sense and it did not give 15 clear days to the tenant to vacate or that the notice did not terminate the tenancy with the expiry of the month of the tenancy, has not been taken in the written statement."

24. Again, Apex Court in the matter of ***Ajeet Seeds Limited (supra)***, reiterated the same view and relevant paragraph of the same is quoted hereinbelow;-

"This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under:

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

"27. Meaning of service by post.- Where any Central Act or regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve' or either of the expressions "give' or "send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter

containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused' or "not available in the house' or "house locked' or "shop closed' or "addressee not in station', due service has to be presumed. [Vide Jagdish Singh Vs. Natthu Singh (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors. (1996) 7 SCC 523 and V.Raja Kumari Vs. P.Subbarama Naidu & Anr. (2004) 8 SCC 74] It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

25. Revisionists-defendants have raised issue about the examination of postman regarding the notice has been served at the correct address or not. This issue has also been considered by the Apex Court in the matter of ***P.T. Thomas (supra)***, which has held that under such circumstances once the requirement of Section 27 of the Post Office Act has been complied with and endorsement has been made by the postman with regard to service of notice, there is no requirement to examine the postman in Court. Relevant paragraph of the aforesaid judgment is quoted below;-

"The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act. The requirement of Section has been complied with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the Postman has made the endorsement. This presumption is correct in law. He had given notice and intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the Postman as assumed by the High Court. The presumption under Section 114 of the Evidence Act operates apart from that under the Post Office Act, 1898. "

26. The last issue raised by the revisionists-defendants is improper communication of sale deed. This cannot be accepted for the reason that notice has properly been served, revisionists-defendants have accepted the change of landlordship in their written statements and also payment of Rs. 32/- per month under Section 30 of U.P. Act No. 13 of 1972. It clearly shows that they are having full knowledge of change of landlordship after receiving the notice and admitted the same in their written statements. Once they have knowledge of change of landlordship, that cannot be without having knowledge of sale deed, therefore, this cannot also be ground for interference by this Court.

27. Therefore, under such facts of the case and law laid down by the Courts, I found no good reason to interfere in the impugned judgment and order. Revision lacks merit and is accordingly, **dismissed.** No order as to costs.

(2022)06ILR A144
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.05.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 378 No. 3 of 2022

Lal Chandra Shukla ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Rama Pati Shukla

Counsel for the Respondents:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 254, 256, 262, 263, 264, 265 and 378(4) - Indian Negotiable Instrument Act, 1881 - Section 138, 143, 145: - Application to grant 'Special Leave to Appeal' – Rejection of a Complaint case in a summery trial by invoking provisions of Summon trial – Court below travelled beyond its jurisdiction – Application allowed – impugned judgment & order set aside - Trial court directed to proceed accordingly. (Para – 15, 17, 18, 19, 21)

Application (U/s 378) is allowed, judgment and order of Trial court is set aside. (E-11)

List of Cases cited: -

1. Suo Moto WP (Criminal) No. 2/2020 Decided on 16.04.2021,

2. Pooja Sharma Vs Suresh Kumar, Criminal Appeal No. 469 of 2018 decided on 04.01.2019

3. C.K. Sivaraman Achari Vs D.K. Agarwall & ors., 1978 CriLJ 1376

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Rama Pati Shukla, learned counsel for the applicant/appellant, Sri Anirudh Kumar Singh, learned A.G.A.-I for the State, and perused the record.

2. This application has been filed with the prayer to grant Special Leave to Appeal, which is sought to be preferred against the order dated 23rd of December 2021 passed by the Additional Court, Faizabad whereby the Complaint Case No. 222 of 2021 filed by the complainant under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the N.I. Act'), Police Station Kotwali Ayodhya, District Faizabad was rejected.

3. Learned counsel for the applicant submits that legal question is involved in

the matter as to whether the Magistrate, while invoking the provision under Section 138 and 143 of the N.I. Act can proceed matter as a summon trial. Further whether Section 256 of the Indian Penal Code can be invoked without assigning reasons while proceeding with the summary trial under Section 143 of the N.I. Act.

4. Learned counsel for the applicant submits that the Court cannot proceed under Section 256 as the order impugned dated 23rd of December 2021 has been passed invoking the jurisdiction under Section 256 of the I.P.C. whereas the matter is to proceed as summary trial and the same will proceed as per the provisions of Section 262 to 265 of the Criminal Procedure Code.

5. Considering the aforesaid provisions as well as going through the record, it is evident that a pure legal question is involved in this matter and, prima facie, it seems that the Magistrate has wrongly invoked the jurisdiction under Section 256 of the Cr.P.C. In such view of the matter, the application of the applicant with the prayer to grant leave to appeal under Section 378 (4) of the Cr.P.C. is hereby allowed.

6. Leave to appeal is granted.

7. The factual matrix of the case is that Complaint Case No. 222 of 2021, Lal Chandra Shukla Vs. Rajdev, under Section 138 of the N.I. Act was filed on the ground that in the month of January 2015, an amount of Rs.20 lakhs was taken by the accused-respondent no.2 as debt and respondent no.2 promised that he will return the aforesaid debt amount within a period of one year. The said amount was not returned to the appellant within the time as was promised by the respondent no.2.

8. The appellant, when asked about repayment of the aforesaid debt, the respondent no.2 issued two cheques (bearing nos. 666167 and 666168) each for an amount of Rs.10 lakhs of his Account No.10294106494 of State Bank of India, Branch Faizabad, District Faizabad (now Ayodhya). On receiving the aforesaid cheques, the appellant presented the same on 1st/2nd of February 2017 in his bank account of Bank of Baroda, U.P. Gramin Bank, Ayodhya. On the aforesaid presentation of the cheques, the bank informed the appellant on 4th of February 2017 that those cheques issued by the respondent no.2 were dishonoured due to insufficient fund in the account of the respondent no.2. On receiving the aforesaid information, the appellant sent notice under Section 138 of the N.I. Act to the respondent no.2, which he has refused to receive.

9. In the aforesaid circumstances, the appellant presented the appeal before the Chief Judicial Magistrate, District Faizabad, which was transferred for hearing to the Additional Court.

10. After the institution of the aforesaid case, the learned trial court taking the recourse as provided under Chapter XV of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Cr.P.C.') issued summons and, after the service of summons, when the respondent no.2 did not appear before the trial court, bailable warrants were issued and, in case of non-compliance of the same, non-bailable warrants were also issued against the respondent no.2. After issuance of the aforesaid non-bailable warrant, the respondent no.2 appeared before the trial court on 7th of January 2020 and applied for bail. On such application for bail of the

accused/respondent, the trial court released the respondent no.2 on bail.

11. The respondent no.2 submitted evidence by way of invoking the provision of Section 254 of the Cr.P.C. on 14th of October 2020 and, thereafter, the case was fixed on 18.11.2020 for his cross-examination. The evidence was taken on affidavit by the trial court under the provision of Section 145 of the N.I. Act.

12. Learned counsel for the appellant further submits that after release on bail, the respondent no.2 again remained absent adopting dilly dallying tactics and he did not appear on several dates, which were fixed for cross-examination. On 23rd of February 2021, non-bailable warrant was again issued and personal bond was forfeited. Later on, furnishing the personal bond on 16th of September 2021, non-bailable warrant was cancelled and the case was fixed for 28th of October 2021 wherein the respondent no.2 had again moved an application for exemption of his personal appearance.

13. He submits that it is evident from the order sheet that on 28th of October 2021, the case was directed to be listed on 16th of September 2021 which prima facie is impossible. On 16th of September 2021, there is an order that the personal appearance of the respondent no.2 is exempted and the appellant has been shown as absent on that date, and the case was posted for 23rd of September 2021 on which date the respondent no.2 and the appellant both have been shown absent though the presence of the respondent no.2 was exempted through his advocate. He added that the order sheet reveals that the appellant remained present on each and every date when the case was fixed by the trial court but, at the same time, it is also evident that the respondent no.2 remained absent on many of the dates and he could appear only when the non-bailable warrant was issued and then again he absented himself.

14. He argued that in fact it seems that something has been played by the Reader of the trial court behind the back while fixing the date so as to make an illusion to the appellant. He submits that the case was fixed for cross-examination of the appellant on 28th of October 2021 on which date the appellant could not appear as wrong date was told by the Reader of the trial court, who did not show his paper book. The next date was fixed for 9th of December 2021 and the appellant could not appear on 9th of December 2021 as the same was not informed and on 9th of December 2021, date was fixed for 23rd of December 2021 when the complaint filed by the appellant was dismissed.

15. He further submits that the matter pertains to N.I. Act and in Section 143 of the N.I. Act, it has been provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the said Code shall, as far as may be, apply to such trials. He submits that in such view of the matter, the proceeding under the N.I. Act goes as per the procedure provided for summary trial. He further added that there is specific mention in the provision that if Magistrate has to alter the trial from summary trial to summon trial, he has to provide opportunity to the parties and has to record reasons. As instant case has not been converted from summary trial to summon trial, therefore, the provisions of

Section 256 of the Cr.P.C. shall not attract in the instant matter. As such, the trial court has invoked the provision of the summon trial and has gone against the mandatory provision of the Act. He also added that the Section 256 of the Code provides the procedure with regard to the trial of summon cases and this could not have been invoked in case of a summary trial. He submits that since the Additional Court, Faizabad has passed the order against the procedure prescribed under the law and, as such, the same assails illegality and infirmity. In support of his submissions, learned counsel for the appellant has placed reliance on the Judgment of Apex Court in **Suo Motu Writ Petition (Crl.) No. 2 of 2020 decided on April 16, 2021**; Judgment dated 4.1.2019 passed by the High Court of Himachal Pradesh, Shimla in **Criminal Appeal No. 469 of 2018, Pooja Sharma Vs. Suresh Kumar;** and Judgment of Kerala High Court in **C.K. Sivaraman Achari Vs. D.K. Agarwall and others, 1978 CriLJ 1376.**

16. On the other hand, learned counsel for the State has very vehemently opposed the contention aforesaid and submits that the order passed by the Additional Court does not assail any illegality or infirmity. He submits that it seems that the appellant did not appear on several dates like 28th of October 2021, 9th of December 2021 and 13th of December 2021 and, as such, the trial court has rejected the complaint of the appellant. Learned counsel for the State has also added that in fact the Additional Court has rightly invoked the provisions of Section 256 of the Cr.P.C. as the same envisages the provision with regard to the non-appearance or death of the complainant. Section 256 of the Cr.P.C. are quoted hereunder:-

"256. Non-appearance or death of complainant.-(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

17. Referring the aforesaid provisions, he submits that in case of non-appearance of the complainant, if the Magistrate thinks it fit, he may acquit the accused and reject the complaint. He further submits that it is wisdom of the trial court concerned to proceed in the matter as summon trial. He submits that admittedly, there is a provision in case of complaint submitted under Section 138 of the N.I. Act that the proceeding shall be carried out as per the provisions of summary trial envisaged under Section 262 to 265 of the Criminal Procedure Code but here, the trial court has passed the order dated 23rd of December 2021 invoking the provision of Section 256 of Cr.P.C. as the Section 143 of the N.I. Act itself speaks like that. He submitted that there is a proviso clause of Section 143 (1) of the N.I. Act which says that provided that when at the commencement of, or in the course of, a summary trial in this

section, it appears to the Magistrate that the nature of the case is such that sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall proceed in a manner provided in this Code. Referring the aforesaid, he submits that in fact in case of non-appearance of the appellant, the trial court has come to the conclusion to invoke jurisdiction under Section 256 of the Cr.P.C. and, as such, he has rightly proceeded to pass the impugned order dated 23rd of December 2021.

18. Having heard learned counsel for the parties and after perusal of the record, I find that there is a procedure prescribed under Section 143 of the N.I. Act for proceeding in the matter as a summary trial. Further the argument, which has been raised by the learned counsel for the State that the Magistrate has invoked his jurisdiction under Section 256 of the Cr.P.C., is unsustainable as from proviso of sub Clause 1 of Section 143 of the N.I. Act, it is itself evident that the same can be invoked. The trial court shall, after hearing the parties, record an order to that effect and, in such view, the Magistrate can proceed under Section 256 of the Cr.P.C. from summary trial to summon trial.

169 It is evident from the order dated 23.12.2021 that neither the parties were heard nor any reason was recorded by the Magistrate while dismissing the complaint filed by the appellant. Further there seems to be no any provision which enables the trial court to proceed in the matter under Section 256 of the Cr.P.C. Thus, the Additional Court has travelled beyond its jurisdiction as it has invoked provisions under Section 256 while passing the order dated 23rd of December 2021.

20. This Court has also noticed the conduct of the appellant and the respondent no.2 wherein it is evident that the appellant appeared on almost all the dates fixed by the trial court whereas the respondent no.2 kept on deviating in appearance and on several occasions, when non-bailable warrants were issued against him, he appeared and thereafter again absented. It is also evident from the order dated 23rd of December 2021 that the respondent no.2 was also not present before the trial court on the date fixed.

21. Considering the aforesaid facts and circumstances and the law settled by the Apex Court as well as the provision envisaged under the N.I. Act as well as the Cr.P.C., I am of the view that the learned Additional Court while passing the order dated 23rd of Decmeber 2021 has travelled beyond its jurisdiction.

22. Thus, the appeal is allowed and the Judgment and order dated 23rd of December 2021 is hereby set aside.

23. The learned Trial Court is directed to proceed accordingly.

(2022)06ILR A148
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Writ C No. 1404 of 2022

Dr. Virendra Singh & Ors. ...Petitioners
Versus
Addl. City Magistrate Lko. & Ors. ...Respondents

Counsel for the Petitioners:

Ashok Kumar Singh

Counsel for the Respondents:
C.S.C., Ajai Kumar Rai, Mohit Jauhari, Namit Sharma, Narsingh Pal Verma, Shubham Tripathi

A. Tenancy Law – UP Public Premises (Eviction of Unauthorized Occupants) Act, 1972 – Section 2(e) – Eviction proceeding initiated by the K.G.M. University – It's maintainability challenged on the ground of its being not coming within definition of local authority – State Govt. has control over the fund of University – Effect – Held, under Section 11 of K.G.M.U. Act, 2002 sufficient power is provided to the K.G.M.U. for raising funds by way of fees, charges etc. other than the funds provided by the State Government – K.G.M. University fulfils all the pre-requisites of the local authority as prescribed by the Supreme Court in R. C. Jain's case – It is covered by the term local authority and, therefore, provisions of U.P. Public Premises Act are applicable upon the same. (Para 15 and 17)

Writ petition dismissed (E-1)

List of Cases cited :-

1. U.O.I. & ors. Vs Sri R.C. Jain & ors. (1981) 2 SCC 308

2. Kashi Vidya Peeth Vs Motilal & ors. (1996) 10 SCC 456

3. Veermati (Smt.) Vs St. of Uttrakhand; 2008 (3) ARC 369

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Sri Prashant Chandra, learned Senior Advocate assisted by Sri Anshuman Singh, advocate for the petitioner, Sri Ajay Kumar Rai, along with Sri Shubham Tripathi, advocate for the respondent University, Ms. Priyanka Singh, Advocate holding brief of Sri Namit Sharma, advocate for respondent Nagar Nigam and learned Standing Counsel for the State.

2. This writ petition is filed by four petitioners challenging orders dated 21.01.2022 passed by respondent no.1 Additional City Magistrate/prescribed authority, Lucknow under the U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972 in four separate proceedings initiated against them. Orders worded same are filed collectively as annexure no. 1 to the writ petition.

3. By the impugned orders respondent no.1 has decided one of the preliminary objections raised by the petitioners before respondent no.1 with regard to maintainability of the proceedings.

4. The facts put simply are that respondent no.2 King George's Medical University (K.G.M.U.) has initiated proceedings under the U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972 (hereinafter referred to as Public Premises Act) for eviction of the petitioners from certain shops occupied by them since long. Petitioners raised number of objections in their reply, one of them being that the proceedings under Public Premises Act are not maintainable as K.G.M.U. has no right to initiate the proceedings. The said preliminary objection is rejected by respondent no.1 holding that property held by K.G.M.U. is a public premise, hence, proceedings are maintainable. There are certain other issues also raised by the petitioner in their reply submitted before prescribed authority but since the same are not yet decided by respondent no.1, hence, are not being referred to.

5. Learned Senior Advocate for the petitioners submits that in the impugned order does not contain any reason and thus also impugned order appears to be without any application of mind. He further submits

that the University is not a local body and, hence, would not be covered by Section 2(e) of the Public Premises Act, and, therefore, the property held by it is not public premises. Thus, provisions of Public Premises Act would not cover it. For the said purposes, he refers to Section 4(25) of General Clauses Act 1904 as well as to the judgment of Supreme Court passed in case of "***Union of India and Others Vs. Sri R.C. Jain and Others' [(1981) 2 SCC 308].***

6. Opposing the same learned counsel for respondents University submits that K.G.M.U. is a local authority and, hence, procedure provided under the Public Premises Act would be applicable. He also places reliance upon the same judgment of ***R.C. Jain case (supra)*** and also upon "***Kashi Vidya Peeth Vs. Motilal and Others'*** reported in ***[(1996) 10 SCC 456]*** and judgment of Uttrakhand High Court passed in case of "***Veermati (Smt.) Vs. State of Uttrakhand'*** reported in [***2008 (3) ARC 369***].

7. I have considered the submission of counsel for parties and perused the record with their assistance.

Section 2(e) of the U.P. Public Premises Act read as follow:-

"2(e) -"(e) "public premises" means any premises belonging to or taken on lease or requisitioned by or on behalf of the State Government, and includes any premises belonging to or taken on lease by or on behalf of -

(i) any company as defined in Section 3 of the Companies Act, 1956, in which not less than fifty-one per cent of the paid-up share capitals held by the State Government: or

(ii) any local authority; or

(iii) any Corporation (not being a company as defined in Section 3 of the Companies Act, 1956 or a local authority) owned or controlled by the State Government: or

(iv) any society registered under the Societies Registration Act, 1860, the governing body whereof consists, under the rules or regulations of the society, wholly of public officers or nominees of the State Government or both:

and also includes, -

(i) Nazul land or any other premises entrusted to the management of local authority (including any building built with Government funds on land belonging to the State Government after the entrustment of the land to that local authority, not being land vested in or entrusted to the management of a Gaon Sabha or any other local authority, under any law relating to land tenures):

(ii) any premises acquired under the Land Acquisition Act, 1894 with the consent of the State Government for a company (as defined in that Act) and held by that company under an agreement executed under Section 41 of that Act providing for re-entry by the State Government in certain conditions:"

8. The sole dispute raised before this Court is whether K.G.M.U. would be covered within the definition of local authority under Section 2(e) (ii) of Public Premises Act. Admittedly, K.G.M.U. is a University created under the King George's Medical University Act, 2002 (U.P. Act No.8 of 2002) (K.G.M.U. Act, 2002). The term "local authority' is explained under Section 4(25) of the U.P. General Clauses Act, 1904 which reads a follow:-

"Section 4(25): "local authority" shall mean a municipal board or Nagarpalik,

Nagar Mahapalika, Notified Area Committee, Town Area Committee, Zila Parishad, Cantonment Board, Kshettra Samiti, Gaon Sabha or any other authority constituted for the purpose of Local Self-Government or village administration or legally entitled to or entrusted by the State Government with the control or management of municipal or local fund;"

9. For explaining the term "local authority' both parties have relied upon the ***'R.C. Jain' case***. In the said case question raised was whether Delhi Development Authority would be a Local Authority for purposes of Payment of Pensions Act. Learned counsel for the petitioner has relied upon the following portion of Paragraph -1 of the judgment which reads:-

"The expression "local authority" is not defined in the Payment of Bonus Act. One must, therefore, turn to the General Clauses Act to ascertain the meaning of the expression. Section 3(31) defines Local Authority as follows:

""Local Authority'" shall mean a Municipal Committee, District Board, Body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

"Local fund" is again not defined in the General Clauses Act. Though the expression appears to have received treatment in the Fundamental Rules and the Treasury Code, we refrain from borrowing the meaning attributed to the expression in those Rules as it is not a sound rule of interpretation to seek the meaning of words used in an Act, in the definition clause of other statutes. The definition of an expression in one Act must not be imported into another. "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone" (per Loreburn, L.C. in Macbeth & Co. v. Chislett [1910 AC 220 : 102 LT 82]). For the same reason we refrain from borrowing upon the definition of "local authority" in enactments such as the Cattle Trespass Act, 1871 etc. as the High Court has done."

10. Relying upon the same, learned Senior Advocate for petitioners submits that the term "local authority' cannot be borrowed or read from another act as the same has to be interpreted in reference to a particular act. However, term "local authority' including its distinctive attributes and characteristics are detailed by the Supreme Court in the "***R.C. Jain***' case only. Paragraph-2, 3 and 4 of the same read:-

"2. Let us, therefore, concentrate and confine our attention and enquiry to the definition of "local authority" in Section 3(31) of the General Clauses Act. A proper and careful scrutiny of the language of Section 3(31) suggests that an authority, in order to be a local authority, must be of like nature and character as a Municipal Committee, District Board or Body of Port Commissioners, possessing, therefore, many, if not all, of the distinctive attributes and characteristics of a Municipal Committee, District Board, or Body of Port Commissioners, but, possessing one essential feature, namely, that it is legally entitled to or entrusted by the government with, the control and management of a municipal or local fund. What then are the distinctive attributes and characteristics, all or many of which a Municipal Committee, District Board or Body of Port Commissioners shares with any other local

authority? First, the authorities must have separate legal existence as corporate bodies. They must not be mere governmental agencies but must be legally independent entities. Next, they must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. Next, they must enjoy a certain degree of autonomy, with freedom to decide for themselves questions of policy affecting the area administered by them. The autonomy may not be complete and the degree of the dependence may vary considerably but, an appreciable measure of autonomy there must be. Next, they must be entrusted by statute with such governmental functions and duties as are usually entrusted to municipal bodies, such as those connected with providing amenities to the inhabitants of the locality, like health and education services, water and sewerage, town planning and development, roads, markets, transportation, social welfare services etc. etc. Broadly we may say that they may be entrusted with the performance of civic duties and functions which would. otherwise be governmental duties and functions. Finally, they must have the power to raise funds for the furtherance of their activities and the fulfilment of their projects by levying taxes, rates, charges, or fees. This may be in addition to moneys provided by government or obtained by borrowing or otherwise. What is essential is that control or management of the fund must vest in the authority.

3. In Municipal Corporation of Delhi v. Birla Cotton Mills [AIR 1968 SC 1232 : (1968) 3 SCR 251, 288] Hidayatullah, J., described some of the attributes of local bodies in this manner:

"Local bodies are subordinate branches of governmental activity. They are democratic institutions managed by the representatives of the people. They function for public purposes and take away a part of the government affairs in local areas. They are political subdivisions and agencies which exercise a part of State functions. As they are intended to carry on local self-government the power of taxation is a necessary adjunct to their other powers. They function under the supervision of the government.

4. In Valjibhai Muljibhai Soneji v. State of Bombay [AIR 1963 SC 1890 : (1964) 3 SCR 686] one of the questions was whether the State Trading Corporation was a local authority as defined by Section 3(31) of the General Clauses Act, 1897. It was held that it was not, because it was not an authority legally entitled to or entrusted by the government with, control or management of a local fund. It was observed that though the corporation was furnished with funds by the government for commencing its business that would not make the funds of the corporation "local funds"."

11. A reading of the aforesaid judgment shows that a local authority would be an authority which first of all must be legally entitled or entrusted by the Government with the control and management of municipal or local fund. The other distinctive attributes and characteristics detailed in the said judgment are that the authority should have a separate independent existence and must not be a mere government agency: they must function in a defined area; they must enjoy a certain degree of autonomy i.e. it should be in a position to decide for themselves question of policy affecting the area administered by them; they must be entrusted by statute such government functions and duties as are usually entrusted to local bodies such as health,

education, water sewerage, town planning and development of road, markets, transportation, social welfare etc. Broadly speaking, they must be entrusted to perform civic duties and functions which would otherwise be government duties and functions. Also, they must have the power to raise funds which may be in addition to the funds provided by the government by fees, taxes, charges or otherwise.

12. Whether a state University is having a local fund is an issue considered by the Supreme Court in case of "***Kashi Vidya Peeth Vs. Motilal and Others'; [(1996) 10 SCC 456]***. In the said case, the Supreme Court was considering whether Kashi Vidya Peeth would be covered by the term local authority and its fund as local fund. Paragraph-4 to 8 relevant for our purposes reads:-

"4. It is not in dispute that the establishment of university and construction of the buildings including staff quarters, hostels, playground etc. is a public purpose provided if it is done by an authority within the meaning of Section 3(31) of General Clauses Act. The main emphasis of Shri Chowdhary is that unless the authority is one that is analogous to the one like municipality, it would not be a local authority. The State has the control over the local fund held by the municipalities etc. but the funds held or controlled by the university are not under the control of the State Government and that, therefore, unless the procedure prescribed in Chapter VII of the Act is followed, it is not public purpose. We do not find the contention to be acceptable.

5. Section 4(3)(i) of the Universities Act postulates thus:

"4. (3) As from the date appointed under sub-section (2)--

(i) the society known as the Kashi Vidyapith, Varanasi shall be dissolved, and all property moveable and immovable, and rights, powers and privileges of the society shall be transferred to and vest in the University and shall be applied to the objects and purposes for which the University is established;"

6. Section 8 of the Act envisages the inspection and control over the universities and it postulates, among other things, that the State Government shall have the right to cause an inspection made by such person or persons as it may direct, of the university or any constituent college or any institute maintained by the university, including its buildings etc. to cause an enquiry made in the like manner in respect of any matters connected with the administration and finances of the university.

7. Section 33 gives power of control over the provident fund etc. of the teaching staff. Section 55(3) obligates the university to prepare annual accounts and the balance sheet duly audited which shall together with the copies of the report be submitted by the Executive Council to the court and to the State Government. Section 55(8) gives control to the State Government over the finances as well. Section 55-A gives power to impose surcharge and to take action against the erring Vice-Chancellor. It also gives power to have the control over the grants made by the State Government, Government of India or the University Grants Commission or any international organisation or any other fund by the funding authorities. It would thus be clear that the State Government has financial control over the university.

8. It is true that the university is supposed to be autonomous in its management. But the limited question that arises for consideration is whether the

State has control over the funds of the university? As seen from the above provisions, the State has sufficient control over the funds to be expended by the university. Though the expenditure is to be made by the university, the funds come from the contributions made by various authorities. Under those circumstances, it is a local fund."

13. So far as the K.G.M.U. is concerned Section 25(i), 25(iv) of K.G.M.U. Act, 2002 are parallel to the Universities Act referred to in the ***Kashi Vidya Peeth case (supra)*** which reads as:-

"25- Powers and duties of Executive Council (1) The Executive Council shall be the principal executive body of the university and subject to the provisions of this Act, have the following powers, namely:

(i) to hold control of the property and funds of the University;

(iv) to administer any funds placed at the disposal of the University for specific purpose;"

14. Sections 47(2) and 47(3) of K.G.M.U. Act, 2002 provide:-

"47 (2) A copy of the annual accounts and the balance-sheet shall be submitted to the State Government which shall cause the same to be audited.

47 (3)The annual accounts and the balance sheet audited shall be printed and copies thereof shall, together with copies of the audit report, be submitted by the Executive Council to the Court and the State Government."

Therefore State Government also has control over the fund of the University. Thus, the law settled in ***Kashi Vidya Peeth case (supra)*** is squarely applicable to KG.M.U. and it can be safely held that the fund held by the K.G.M.U. is local fund.

15. So far as other attributes of local body are concerned, Section 11 of K.G.M.U. Act, 2002 confers all powers with regard to teaching, research and advancement and dissemination of knowledge, admitting students and awarding them degrees, diplomas, certificates etc. and other similar and connected activities including to fix and collect fees and other charges as well as power for management and treatment of the patient in its hospitals and all other incidental things to their power in the field specified. Both Education and health are services required to be provided by the local authority. Therefore, the K.G.M.U. is providing essential civil duties and functions required to be provided by the Government through local authorities. Under Section 11 of K.G.M.U. Act sufficient power is also provided to the K.G.M.U. for raising funds by way of fees, charges etc. other than the funds provided by the State Government. As discussed above it can safely be said that K.G.M.U. fulfils all the pre-requisites of the local authority as prescribed by the Supreme Court in the case of ***R.C. Jain (supra)***.

16. In ***Veermati (Smt.) case (supra) reported in [(2008) 3 ARC 369]***, the same issue, i.e., whether the University is a local authority or not with regard to U.P. Public Premises Act, 1972 came up for consideration before Uttarakhand high court. The court after a detailed discussion held that:-

"11. In view of the discussion above, I hold that the approach of the learned

District Judge that the University is a local authority and the premises in question owned by Kumaon University are the public premises is correct. The contention of the learned Counsel for the petitioner that the provisions of the Act are not applicable to the case at hand is not acceptable. To my mind the case law, (1998) 3 SCC 530: (AIR 1998 SC 1125), does not help the petitioner. The findings recorded by the learned District Judge on this score do not call for any interference in writ jurisdiction by this Court."

17. In view thereof, it is held that K.G.M.U. is covered by the term local authority and, therefore, provisions of U.P. Public Premises Act are applicable upon the same.

18. Therefore, no interference with the impugned order is called for.

19. The writ petition lacks on merits and the same is ***dismissed.***

(2022)06ILR A155
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2022

BEFORE

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

Writ-C No. 4529 of 2021
with Writ-C No. 5265 of 2021

Ms. Suneeta Bharti & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjeev Singh, Sri Suresh Bahadur Singh

Counsel for the Respondents:
C.S.C., Sri Rohit Pandey

A. Education Law – University Grant Commission Act, 1956 – UGC (Minimum Standards and Procedure for Award of M.Phill./Ph.D. Degrees) Regulations, 2016 – Research Eligibility Test – Applicability of Regulation on State Universities – Regulations outlined by the University Grants Commission are obligatory upon all the State Universities and Institution through the Republic – However, in view of the decree of the Apex Court in the case of Kalyani Mathivanan, it is vibrant that unless or until, any procedures enclosed by the UGC are espoused and instigated by the State Legislation, the same will be relatively mandatory and will be comparatively directory. (Para 24)

B. Education Law – UGC (Minimum Standards and Procedure for Award of M.Phill./Ph.D. Degrees) Regulations, 2016 – Deen Dayal Upadhya, Gorakhpur University Research Ordinance 2018 – Cancellation of admission on the ground of non-fulfillment of Clause 3.1 (b), which provide that only those candidates will be qualified for admission in Ph.D. Course, who fortified second division marks in undergraduate course – Legality of clause 3.1 (b) challenged – Held, Clause 3.1 (b) being in consonance with the regulations framed by the UGC and not in violation of the same, is not foist or incompatible to the regulations outlined by the UGC – University has not committed any illicitness or aberration in cancelling the admission of the petitioners. (Para 24, 25 and 27)

C. Education Law – Cancellation of admission – Doctrine of estoppels – Applicability – Held, question of application of estoppel against Statute/Public Policy does not arise, as the Ordinance, 2018 outlined by the respondent-University has a statutory dynamism and the respondent-University cannot be constrained to take admission of a student against the qualifications prescribed in statutes. (Para 29)

D. Jurisprudence – Rule of equity – Applicability – Role of the court – Equity

can supplement to but cannot supplant the statutory provisions and if any room is given for impartiality or compassion, the recruitment rules would become nugatory and field would be left open for nepotism. Thus, it is not permissible to bend the law for adjusting equity – The Courts and Tribunals, while dealing with the statutory provisions, should not be channelled with altruistic contemplation and emotional appeal for the reason that if Courts advance on these basis, it would amount to fluctuating or modifying the statutory provisions or necessities of law (Para 32)

Writ petition disposed of (E-1)

List of Cases cited :-

1. Ran Vijay Singh & ors. Vs St. of U.P. & ors.; (2018) 2 SCC 357

2. Tridip Kumar Dingal & ors. Vs St. of W.B. & ors.; (2009) 1 SCC 768

3. Rajesh Kumar Daria Vs Rajasthan Public Service Commission; (2007) 8 SCC 785;

4. Rajesh Kumar & ors. etc. Vs St. of Bihar & ors. etc.; (2013) 4 SCC 690

5. Vikas Pratap Singh & ors. Vs St.of Chhattishgarh & ors. (2013) 14 SCC 494; and

6. Ram Naresh Singh & ors.Vs St. of U.P. & ors. (2018) 3 UPLBEC 2134.

7. Amrit Prasad Vs St. of U.P.; 2016(1) ADJ 690

8. Civil Appeal No. 2103 of 2020; Ramjit Singh Kardam & ors. Vs Sanjeev Kumar & ors.

9. Ashok Kumar & anr. Vs St. of Bihar & ors. (2017) 4 SCC 357

10. Madras Institute of Development studies & anr. Vs K. Sivasubramaniyan & ors. (2016) 1 SCC 454

11. R. Chitralekha Vs St. of Mysore & ors. AIR 1964 SC 1823

12. Bharathidasan University & anr. Vs All India Council for Technical Education & ors. (2001) 8 SCC 676

13. St. of T.N. & anr. Vs S.Vs Bratheep (Minor) & ors. (2004) 4 SCC 513

14. Visveswaraiah Technical University & anr. Vs Krishnenedu Halder & ors.; (2011) 4 SCC 606

15. A.P.J. Abdul Kalam Technological University & anr. Vs Jai Bharath College of Management and Engineering Technology & ors.; (2021) 2 SCC 564

16. Registrar, Chhatrapati Shahuji Maharaj University Vs Vinay Gupta & ors.; 2009 (3) ADJ 263

17. Civil Writ Petition No. 4294 of 1987; Shamsher Singh Tyagi Vs St. of Har.

18. SWP No. 1558 of 2017; Tanveer Ahmad Vs Skuast & ors.

19. St. of Raj. & ors. Vs Lata Arun; JT 2002 (5) SC 210

20. A.P. Christians Medical Educational Society Vs Government of A.P.; (1986) 2 SCC 667

21. Gurdeep Singh Vs St. of J. & K. & ors.; (1986) 2 SCC 667

22. Rajasthan State Industrial Development Vs Subhash Sindhi; (2013) 5 SCC 427

23. U.O.I. Vs Godfrcy Philips Pvt. Ltd.; (1985) 4 SCC 369

24. Civil Appeal No. 6015-6027/2011; St. of T.N. Vs K. Shyam Sundar

25. Civil Appeal No. 2103 of 2020; Ramjit Singh Kardam Vs Sanjeev Kumar & ors.

26. Osmania University Teacher's Assc. Vs St. of Andhra Pradesh & anr. (1987) 4 SCC 671

27. S. Satyapal Reddy & ors. Vs Government of A.P. & ors.; (1994) 4 SCC 391

28. Brahmo Samaj Education Society & ors. Vs St. of W.B. & ors.; (2004) 6 SCC 224

29. Chandra Prakash Tiwari Vs Shantanu Shukla; (2002) 6 SCC 127

30. U.O.I. Vs S. Vinodh Kumar; (2007) 8 SCC 100

31. Vijendra Kumar Verma Vs Public Service Commission; (2011) 1 SCC 150

32. Chandigarh Administration Vs Jasmine Kaur; (2014) 10 SCC 521

33. Pradeep Kumar Rai Vs Dinesh Kumar Pandey; (2015) 11 SCC 493

34. Madras Institute of Development Studies & anr. Vs Sivasubramaniyam & ors.; (2016) 1 SCC 454

35. Ashok Kumar & anr. Vs St. of Bihar & ors.; (2017) 4 SCC 357

36. Delhi Development Authority Vs Ravindra Mohan Aggarwal & ors.; (1999) 3 SCC 172

37. M.I. Builders Pvt. Ltd. Vs Radhey Shyam Sahu & ors.; (1999) 6 SCC 464

38. Union of India & ors. Vs Kirloskar Pneumatic Co. Ltd.; (1996) 4 SCC 453

39. St.of U.P. & ors. Vs Harish Chandra & ors.; (1996) 9 SCC 309

40. Vice Chancellor, University of Allahabad & ors. Vs Dr. Anand Prakash Mishra & ors.; (1997) 10 SCC 264

41. Shish Ram & ors. Vs St. of Hary. & ors.; (2000) 6 SCC 84

42. Dr. H.S. Rikhy etc. Vs The New Delhi Municipal Committee; AIR 1962 SC 554

43. Bengal Iron Corporation Vs Commercial Taxes Officer & ors.; AIR 1993 SC 2414

44. S. Saktivel Vs M. Venugopal Pillai; (2000) 7 SCC 104

45. Chandra Prakash Tiwari Vs Shakuntala Shukla; (2002) 6 SCC 127

46. I.T.C. Ltd. Vs Person Incharge, AMC, Kakinada & ors.; (2004) AIR SCW 792.

47. A.C. Jose Vs Sivan Pillai; AIR 1984 SC 921

48. Union of India & ors. Vs Godfrey Philips India Ltd.; (1985) 4 SCC 369

49. Ashok Chand Singhvi Vs University of Jodhpur & ors.; 1989 Supreme (SC) 38

50. Dr. Pawan Kumar Agarwal & Etc. Vs The University of Calcutta And Anr.; AIR 1998 Cal 105

51. Rajendra Prasad Mathur Vs Karnataka University & Another; 1986 (Supp) SCC 740

52. Abha George & ors. Vs All India Institute of Medical; 2022 SCC Online Del 366

53. Madamanchi Ramappa & anr. Vs Muthaluru Bojjappas; AIR 1963 SC 1633

54. Gauri Shanker Gaur Vs St. of U.P.; AIR 1994 SC 169

55. Ahmedabad Municipal Corporation Vs Virendra Kumar Patel; (1997) 7 SCC 650

56. Smt. Rampati Jaiswal Vs St. of U.P. & ors.; AIR 1997 All. 170

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

1. Heard Mr. Sanjeev Singh and Mr. Suresh Bahadur Singh, learned counsel for the petitioners, Mr. Rohit Pandey, learned counsel for the respondent-University and Dr. Amar Nath Singh, learned Standing Counsel for the State-respondents.

2. Primarily this writ petition has been filed by the petitioners for the ensuing relief:

"(a). Issue a writ, order or direction in the nature of certiorari calling for the records and quashing the impugned decision dated 15.01.2021 taken by the High Level Deans Advisory Committee as well as the impugned notification dated 16.01.2021 issued by the respondent nos. 2 and 3 (Annexure No. 7 to the writ petition);

(b). Issue a writ order or direction in the nature of mandamus commanding the respondent University to allow the petitioners to continue with their Ph.D. Course Programme in view of their admissions already granted;

(c). to issue such other and further appropriate writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case;

(d). to award the cost of petition in favour of the petitioner."

3. Consequently, an amendment application has been filed on behalf of the

petitioners in the contemporaneous writ petition for pursuing auxiliary relief, on which following order was passed by the Court on 5th August, 2021:-

*"**Re: C.M. Amendment Application No.02 of 2021***

Heard.

Amendment application is allowed.

Learned counsel for the petitioners is directed to carry out necessary amendment within three days.

Re: Writ Petition

As per the amendment, vires of Clause 3.1 (b) of Deen Dayal Upadhyay, Gorakhpur University Research Ordinance, 2018 (Minimum Criteria and Procedure for Research Degree-P.hd.) has been challenged, learned counsel for University as well as learned Standing Counsel representing the State are granted three weeks' time to file counter affidavit. Rejoinder affidavit, if any, may be filed within one week thereafter.

List this matter after four weeks."

Pursuant to the above order, learned counsel for the petitioners has sought following prayer:

"ia). to issue a writ, order or direction that Clause 3.1 (b) of Deen Dayal Upadhyaya Gorakhpur University Research Ordinance, 2018 (Minimum Criteria and Procedure for Research Degree Ph.D) be declared, as ultra-vires and for the same reasons, be quashed only to the extent that it prescribes the minimum marks of second division under graduate degree for becoming eligible to qualify admission to its Ph.D. Course (Annexure-8 to the writ petition)."

4. As the rudimentary realities and the permissible facets intricate are indistinguishable in both the writ petitions, they have been amalgamated and heard together and are being decided by this conjoint verdict. The particulars chronicled in Writ -C No. - 4529 of 2021 (Ms. Suneeta Bharti and 3 Others Versus State Of U.P. And 2 Others) are being canned to be the leading case.

5. According to the petitioners, the realistic milieu of the case is as follows:

Petitioners belong to District Gorakhpur. They being prospective candidates were pursuing admission in Pre-Ph.D. Course for the Session 2019-2020 of which advertisement/news item was issued by the Deen Dayal Upadhyay University, Gorakhpur (for short "respondent-University"). The said news item/advertisement contained the broad-spectrum rules and directives issued by the University with regard to the Research Eligibility Test (RET) for the session 2018-2019, in which some conditions existed for the Session 2019-2020 as well. The said general rule and instructions were issued in light of the Ordinance-2018 issued by the respondent-University orchestrated under its first Statutes. The said general rules and instructions also enclosed the examination schedule for the Pre Ph.D. course for which, time schedule for online application being filled up, was from 4th January, 2019 and the same was to come to an end on 25th January, 2019. The examination was to be held in the second and third week of month of February, 2019. The academic minutiae are mirrored in the application forms of the petitioners, which encompasses the percentage obtained in undergraduate and post-graduate examinations. Petitioner no.1 had applied for the Pre Ph.D. course in the subject of Hindi, petitioner no.2 in the subject of Mathematics, petitioner no.3 in the subject of Commerce and petitioner no.4 in the subject of Sanskrit, respectively.

Clause 5 B (ब) of the general rule and instructions lays down that a candidate seeking admission in the Ph.D. Course will be eligible only if he/she has notched second division marks in undergraduate course 'or' the appropriateness laid by the University Grants Commission (hereinafter referred to in short, 'UGC') issued from time to time, which thus, makes a candidate eligible for the said course, who accomplishes either of the same.

It is the case of the petitioners that since they satisfied the minimum eligibility laid by the UGC in its notifications dated 5th May, 2016 and 28th August, 2018 known as "University Grants Commission (Minimum Standards and Procedure for Award of M.Phil/Ph.D Degrees), Regulations, 2016 (herein after referred to as the "Regulations, 2016") and its (1st Amendment) Regulations, 2018, were, thus, eligible as per its qualifications.

Clause-3 of the Regulations, 2016 lays down the eligibility benchmarks for admission to Ph.D programme.

Clause 2 of the Regulations, 2016 read with first amendment, 2018 lays down that a candidate is eligible for admission to Ph.D. programme, if he/she scores second division marks in post-graduate level, as such, if he or she has scored less than 2nd division marks in undergraduate course then also is eligible for admission in the course.

Further, it is the case of the petitioners that in view of the eligibility laid down by the UGC vide their Regulations, the petitioners were settled admission in the Ph.D. Course on the metier of their having attained second division marks in post-graduate course, as they had not scored second division marks in their undergraduate course. The UGC Regulations, which was amended in 2018, exist as on date, as per the superlative acquaintance/information of the petitioners to stipulate the eligibility of the candidate seeking admission in Ph.D. Programme Course to possess second division marks in undergraduate course, which limits the same having scored only in post graduate course itself and not otherwise. The examination for the pre Ph.D. Course to be held by the University could not be held in the month of February, 2019 and the same was held in the first week of March, 2019. After result being avowed in the month of May, 2019, interviews were held in the month of July and August, 2019 for each and every department individually, as per their expediency. After the result of the interview, on deposit of the requisite fees, which, in the facts of the present case, were deposited by the petitioners in the month of February, 2020, the candidates including the petitioners were granted admission, and the curriculums started subsequently. The copies of the eligibility certificates and attendance sheets have been enclosed as Annexure-4 to the writ petition.

According to the petitioners, the Pre-Ph.D. Course Examination was scheduled to be held in the month of March-April, 2021 and the students, who pass the said examination, would have been granted admission in regular Ph.D. Course, which is of approximately 3 to 4 years. However, due to the Pandemic (Covid-19), the course was disordered and the same recommenced in the third quarter of year 2020. Further vide office order dated 24.11.2020 issued by the Registrar, on the application of the Ph.D. Course students and also in view of the order of the Vice-Chancellor dated 10.11.2020, a committee of four members was established under the Chairmanship of Professor Dwarika Nath, Head of Philosophy Department along with 3 other members. The said committee acquiesced its report dated

03.12.2020 with unblemished endorsement that the UGC Regulations, 2016 should be made germane, taking into contemplation the interest of the students as well as the prosperity of the area, society and the University as a whole. However, flouting the recommendation of the Committee dated 03.12.2020 (without any reasons recorded), the Vice-Chancellor, under his Chairmanship, held a meeting on 15.01.2021 of the High Level Deans Advisory Committee, in which a pronouncement was taken that the students having enrolled in the Ph.D. Programme Course, in defilement of the Ordinance-2018, their admissions stand negated, without affording any opportunity to them. The said impugned pronouncement of the High Level Deans Advisory Committee dated 15.01.2021, has not been provided to the petitioners, as such, the same has not been conveyed on record before this Court. In the said meeting of the High Level Deans Advisory Committee dated 15.01.2021, it was also determined that the prospective students, seeking admission in the Ph.D. Programme Course and who do not possess the minimum eligibility, as per the Ordinance-2018, should not be granted admission, in the said course, if not granted till date. Further, it was also resolved that persons accountable, for such admissions, should be held answerable and explanation and clarification should be sought from them. In light of the decision of the High Level Deans Advisory Committee dated 15.01.2021, the impugned notification dated 16.01.2021 has been issued by the Registrar, after which, the admissions granted to the petitioners stood cancelled, a copy of which has been enclosed as Annexure No. 7 to the writ petition.

6. It is appurtenant to remark here that the general rules and instructions mentioned in the news item/advertisement, which was issued by the respondent-University for Pre Ph.D. Course for the Session-2019-2020 pursuant to which the petitioners applied with regard to Research Eligibility Test of the session 2018-2019, are in light of the Deen Dayal Upadhyay Gorakhpur University Research Ordinance, 2018 and also in light of the report of a Four Members' Committee of the respondent-University dated 3rd December, 2020, which was instituted under the Chairmanship of Professor Dwarika Nath, Head of Philosophy Department, by the order of the Vice-Chancellor of the respondent-University dated 10th November, 2020. The said four Members' Committee in the said report has recommended that the UGC Regulations, which are relevant and instigated, should be made applicable taking into consideration the interest of the students. The copies of the order of the Vice-Chancellor and the report of the said Committee have been enclosed as Annexure Nos. 5 and 6 to the writ petition.

7. It would be efficacious to reproduce relevant paragraphs of the report of the said Committee, which read as follows:

"1. यह कि, की विश्वविद्यालय में लागू वर्तमान शोध अध्यादेश 2018 (पी.एच.डी. शोध उपाधि के लिये न्यूनतम मापदंड एवं प्रक्रिया) के बिंदु संख्या 3.1 ब में उल्लेखित है "स्नातक स्तर पर द्वितीय श्रेणी अथवा विश्वविद्यालय अनुदान आयोग द्वारा समय.समय पर लागू नियमों के अनुसार प्राप्तांक होना आवश्यक होगा।" (प्रतिलिपि संलग्न)-01

2. यह कि, की इसी संदर्भ में विश्वविद्यालय अनुदान आयोग ने पत्रांक मि०स०1-22/2020 (सू०क०अ०/वेतनमान) दिनांक 19 फरवरी 2020 में स्पष्ट है कि विश्वविद्यालय अनुदान आयोग आयोग द्वारा लागू विनियम सभी

शैक्षणिक संस्थानों के लिये बिना किसी बदलाव के अनिवार्य रूप से बाध्यकारी है। (प्रतिलिपि संलग्न)-02

3. यह कि, की विश्वविद्यालय अनुदान आयोग के इसी विनियम को स्वीकार करते हुए उ०प्र० सरकार के पत्रांक 7/2018/266/ सत्तर1-2018-16(74)/2011, दिनांक 24 अगस्त 2018 द्वारा सम्यक विचोरापरांत उत्तर प्रदेश राज्य विश्वविद्यालय अधिनियम, 1973 की धारा 66(क) के अंतर्गत राज्य सरकार को प्राप्त शक्तियों के अधीन उच्च शिक्षा विभाग, उत्तर प्रदेश के अंतर्गत राज्य विश्वविद्यालयों में एम.फिल/पी.एच्.डी. उपाधि प्रदान करने हेतु विश्वविद्यालय अनुदान आयोग (एम.फिल/पी-एच्.डी. उपाधि प्रदान करने हेतु न्यूनतम मापदंड एवं प्रक्रिया) विनियम 2018 को यथावत रूप मे लागू किये जाने का आदेश दिया है। (प्रतिलिपि संलग्न)-03

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समिति उक्त तथ्यों के आलोक में इस निष्कर्ष पर पहुंचती है कि भारत में उच्च शिक्षा के सर्वोच्च नियमन करने वाली संवैधानिक संस्था विश्वविद्यालय अनुदान आयोगए नई दिल्ली द्वारा

पी-एच्.डी. मे प्रवेश के लिये निर्धारित न्यूनतम अहर्ता विनियम "विश्वविद्यालय अनुदान आयोग (एम.फिल/पी-एच्.डी. उपाधि प्रदान करने हेतु न्यूनतम मानदंड और प्रक्रिया विनियम 2016" में लागू प्रावधान को ही छात्र हित, क्षेत्र विशेष के हित, समाज एवं विश्वविद्यालय के व्यापक हित मे लागू किए जाने की प्रबल संस्तुति करती हैं।"

8. Primarily, the existent writ petition has been paraded for quelling the impugned decision dated 15.01.2021 of the High Level Deans Advisory Committee as well as the queried notification dated 16.01.2021 on the ground that the same are in teeth of the Research Eligibility Test general rule and instructions issued in regards to Ph.D. Course Programme by the respondent-University as well as the Regulations issued in this esteem from time to time by the UGC, thus, rendering the same pertinacious as well as fallacious. It has also been itemized in the writ petition that the assailed decision as well as the notification is tangibly proscribed and capricious on the part of the respondent-University. as the same is antagonistic to the UGC Regulations.

9. As the amendment application was filed subsequently, whereby Clause 3.1 (b) of Deen Dayal Upadhyaya Gorakhpur University Research Ordinance, 2018 (Minimum Criteria and Procedure for Research Degree Ph.D) is being confronted, hence, during the progression of argument, succeeding questions have arisen before this Court, which are germane for determining both the writ petitions:-

10. **Issue No.1:**

(i) Whether the Regulations edged by the UGC are binding upon any State University of India?

(ii) Whether the minimum qualification prearranged by the respondent-University for expansion of edification upto graduate level for Pre-Ph.D./Ph. D. Course is divergent to the Regulations framed by the UGC?

(iii) Where the Regulations framed by the UGC mentioning the minimum qualifications upto Graduate Level for any course or degree is silent, then the Ordinance outlined by a University counseling minimum qualifications shall triumph over the Regulations of the UGC or not?

(iv) Whether the Ordinance mounted by the respondent-University prescribing minimum qualification upto and under-graduate level is in congruence with the Regulations framed by the UGC?

Issue no.2:

Can the petitioners, who have applied for Pre-Ph.D./Ph.D. degree course, with open eyes, contest the vires of the Ordinance, wherein the minimum qualification for Pre-Ph.D./Ph.D. course is prescribed, after their admissions being found illegitimate and conflicting to the conditions declared in the Advertisement/news item read with Clause-3 (1) (b) of the Ordinance of University,

Issue no.3:

Whether the University can terminate the admission of the petitioners after some epoch of interval on the liability of its own officials/officers?

Issue no.4:

Whether UGC Regulations-2016 and 2018 have been embraced by the State Government?

Apart from the above, learned counsel for the petitioners has also raised an issue, that principle of estoppels and acquiescence will apply against the University in the actualities of the present case.

11. Respective Submissions:

In sustenance of the relief, as prayed for in the present writ petition as well as on the issues referred to above, learned counsel for the petitioners have advanced his submissions, which are as follows:

(i) The petitioners had secured admissions in pre-Ph.D. Course for the Session 2019-2020 after appearing in the written examination charted by interview, as such, they had qualified the rigorous assessment undertaken by the respondent-University for the said course.

(ii) The petitioners had also undergone classes, which is patent from the attendance sheets, a copy of which has been enclosed as Annexure-4 to the writ petition.

(iii) Certainly, the petitioners were not 2nd Division in undergraduate course, which was the per-requisite, as per the Ordinance-2018 but the UGC Regulations, in this regard, were silent and as they had appeared in the examination piloted by the respondent-University by no deception or caricature on their part, as their applications divulged having obtained 3rd Division in undergraduate examination, as such, now the respondent-University cannot cancel their admission after such a long interval, which will amount to taking the catbird seat or advantage of the wrong perpetrated by them and the petitioners are at no accountability (also in the event that till date no action has been taken against any of the officials of the respondent-University).

(iv) Further, the norm of estoppels and acquiescence will also apply against the University.

(v) Further, the Ordinance-2018, which fixes second division to be scored by a candidate in under-graduate course for seeking admission to the Ph.D. Course is, thus, haphazard and unconscionable.

Further, the said fixation has no nexus to the object sought to be realized, rather it defeats, as the petitioners are selected candidates, as such, the Ordinance is profoundly erroneous and unmerited, hence the same be declared as ultra-virus.

(vi) Further, this Court under Article 226 of the Constitution of India is a Court of equity and even-handedness, as such, the relief can be molded even if the Ordinance is not professed ultra-virus, as the petitioners have continued in the said course for nearly two years and their admissions, thus, can be protected.

(vii) To draw the consciousness on the aforesaid submissions, the learned counsel for the petitioners has placed reliance upon several judgments of the Apex Court as well as judgment of Single Judge of this Court, which are as follows:

(a) **Ran Vijay Singh & Others Versus State of U.P. & Others** reported in reported in (2018) 2 SCC 357;

(b) **Tridip Kumar Dingal & Others Versus State of West Bengal & Others**, reported in (2009) 1 SCC 768;

(c) **Rajesh Kumar Daria Versus Rajasthan Public Service Commission** reported in (2007) 8 SCC 785;

(d) **Rajesh Kumar & Ors. etc. Versus State of Bihar & Ors. etc**., reported in (2013) 4 SCC 690;

(e) **Vikas Pratap Singh & Others Versus State of Chhattishgarh & Others** reported in (2013) 14 SCC 494; and

(f) **Ram Naresh Singh And 26 Others vs State Of U.P. And 29 Others**, reported in (2018) 3 UPLBEC 2134.

(viii) Thus, in view of the commandment law laid down by the Apex Court and by this Court, the petitioners' entitlement to aegis of their admission, in the atypical particulars of the present case, needs to be examined.

Undeniably, as the petitioners have been selected after undertaking the stipulated procedure (written test followed by interview). There is no caricature or deceit on their part. Having scrutinized their studies fittingly, for about two years, it would be undeserved to tolerate the respondent-University to jettison their admissions by lobbing them out of the course, in view of the ruling laid down by the Apex Court.

(ix) Further, the University-establishments must take an altruistic and public-spirited assessment in the matter, otherwise, it would also be "grave travesty of justice", if the petitioners/students nosedive to get the relief, as prayed.

12. On the other hand, Mr. Rohit Pandey, learned counsel for the respondent-University has advanced his arguments on the aforesaid following issues, which are as follows:

(i) The University Grants Commission (hereinafter referred to as the "UGC") has been established by the enactment of the Central Government being University Grants Commission Act, 1956 (hereinafter referred to as the "Act,1956"). Under Section 26 of the Act, 1956, the Commission is accredited to make Regulations. Under Section 26 (f), the UGC can frame Regulation delineating the minimum criterions of directives for grant of any degree by any University and under Section 26 (g), the Commission can frame Regulation regarding preservation of cannons and harmonization of labor or conveniences in University.

In implementation of aforesaid muscles, the Commission has framed University Grants Commission (Minimum Standards and Procedure for Award of M.Phil/Ph.D. Degrees) Regulations, 2009 and in supersession thereof, the Commission framed Regulations of 2016 (hereinafter referred to as the "UGC Regulations, 2009"), which has been further amended in 2018 being first amendment and second amendment of 2018.

Under Clause-2 and 3 of Regulations, 2016, the Commission has approved minimum eligibility criteria for admission to M.Phil and Ph.D. programme. Under Clause-5, the Regulations provide the modus operandi for admission and Clause-

5.2.2 provides that Higher Educational Institutions shall notify number of seats for admission, distinctive discipline-wise dissemination of available seats, criteria for admission, process for admission, examination centers and all relevant information for the assistance candidates.

Now reverting back to the present substance, it is acknowledged that the question with regard to applicability of UGC Regulations on the University, it is acquiesced that in respect of Central Universities, it is obligatory for those Universities to uphold the guidelines issued by UGC, whereas in respect of State Universities, it has to be first befittingly accepted by the State Government and thereafter, direction is to be dispensed by the State Government to all State Universities to integrate the precise UGC Regulation in the Statute or Ordinances of the concerned University.

The aforesaid issue of applicability of UGC Regulation on the State Universities by adoption came up for contemplation before the Apex Court in the case of ***Kalyani Mathivanan v. k.v. Jeyaraj and Others (2015) 6 SCC 363***, wherein it has been held that unless the UGC Regulations are formally adopted by the State and the Statutes are amended, it cannot be applied ipso facto upon the State Universities.

The aforesaid Judgment of Apex Court was followed by this Hon'ble Court in the case of ***Amrit Prasad Vs. State of U.P.*** reported in ***2016(1) ADJ, 690***.

(ii) The petitioners in this writ petition have applied pursuant to the Advertisement issued by the answering respondent-University for Research Eligibility Test, 2019. In the guidelines and instructions, it has been clearly stipulated that the candidates are required to possess minimum second division marks in graduation. The petitioners have consciously applied pursuant to the advertisement and they themselves placed them in a situation where, at the time of scrutiny of their eligibility, they have been found ineligible on account of not having minimum second division marks in graduation, as per Clause-3.1 (b) of the University Research Ordinances, 2018. The case laws, which have been relied upon in support of the aforesaid submission, are as under:

(a). ***Ramjit Singh Kardam & Others v. Sanjeev Kumar and Others*** *Civil Appeal No. 2103 of 2020.*

(b). ***Ashok Kumar and Another v. State of Bihar and Others*** *reported in (2017) 4 SCC 357*

(c). ***Madras Institute of Development studies and Another*** *Versus K. Sivasubramaniyan and Others reported in (2016) 1 SCC 454.*

(iii) The respondent-University has framed the Deen Dayal Upadhyaya Gorakhpur University Research Ordinances, 2018 (Minimum Criteria and Procedure for Research Degree- Ph.D.), in accordance with the UGC Regulations for admission in Ph.D/M.Phil.

Referring to the case of the Apex Court in the case of ***R. Chitralekha v. State of Mysore and Others AIR 1964 SC 1823***, learned counsel for the respondent-University submits that a State Law providing for such standards, having regard to Entry-66 of List-I, would be struck down as unconstitutional only if the same is found to be so heavy or devastating, so as to wipe out or appreciably abridge the Central field and not otherwise. The Court also pointed out that if a State law prescribes higher percentage of marks for extra-curricular activities in the matter of

admission to colleges, it cannot be said that it would be encroaching on the field covered by Entry 66 of List-1. The law is now fairly well settled that while it is not open for the Universities to dilute the norms and standards, as prescribed by the regulatory bodies such as UGC or AICTE, it is always open to the Universities to prescribe enhanced norms.

He further submits that the role of the Universities vis-a-vis the AICTE, the Apex Court has held in ***Bharathidasan University and Another v. All India Council for Technical Education and Others reproted in (2001) 8 SCC 676***, that AICTE is not a super power with a devastating role undermining the status, authority and autonomous functioning of the Universities in areas and spheres assigned to them.

A three Judges Bench of the Apex Court in case of ***State of T.N. and Another v. S.V. Bratheep (Minor) and Others*** reported in (2004) 4 SCC 513, wherein this Court held that even the State Government can prescribe higher standards than those prescribed by AICTE.

The above principle was later applied in the case of ***Universities in Visveswaraiah Technical University & Another Vs. Krishnenedu Halder & Others,*** reported in (2011) 4 SCC 606, wherein the Apex Court considered the previous decisions and summarized the legal position emerging there-from.

The Apex Court, in its latest judgment of ***APJ Abdul Kalam Technological University and another v. Jai Bharat College of Management and Engineering Technology and others, Civil Appeal No. 4016 of 2020*** held that the powers of the Universities to enhance the norms and standard cannot be doubted.

This Court in the case of ***Registrar, Chhatrapati Shahuji Maharaj University vs. Vinay Gupta & Others***, reported in 2009 (3) ADJ 263, also laid down that the prescriptions by the University of having at least 45% marks in the qualifying examination i.e. graduation course is an additional qualification, which is fully supported by the ratio of the judgments of the Apex Court.

The Punjab and Haryana High Court, while dealing with identical controversy in ***Civil Writ Petition No. 4294 of 1987*** in the case of Shamsher Singh Tyagi Vs. State of Haryana and Jammu and Kashmir High Court in SWP No. 1558 of 2017 in the case of ***Tanveer Ahmad Vs. Skuast &Others***, have also held that the University Grants Commission lays down the minimum standards required and the Universities can prescribe higher qualifications, which are in consonance (not contrary) with the UGC Regulations. The only requirement that has to be followed is that the qualifications prescribed have to be reasonable and attainable by the candidates.

The UGC Regulations prescribes Minimum Standards and Procedure for Award of M.Phil/Ph.D. Degrees. The word "minimum qualification" has been discussed by the Punjab and Haryana High Court in para-11 of the ***Shamsher Singh Tyagi (supra)***.

In deduction, it is acquiesced that the respondent-University has prearranged the minimum stipulations for admission to Ph.D. Course in harmony with the UGC Regulations and they are not in desecration to the same. It is within the authorities of the University to counsel rational and realistic higher qualifications to conserve the necessary standard of tutelage in the University.

(iv) The University can terminate the admission of the petitioners, as they do not possess the minimum eligibility criteria as

per the Deen Dayal Upadhyaya Gorakhpur University Research Ordinance, 2018. It is further submitted that there stands no estoppel against law, therefore, the University was thoroughly vindicated in annulling the admissions of the students.

The Apex Court in the case of ***State of Rajasthan and Ors. v. Lata Arun JT 2002 (5) SC 210***, examined the cancellation of admission of a candidate to the General Nursing and Midwifery and Staff Nurse Course on the ground that the Respondent did not possess the eligibility criteria. In the said case, initially the High Court had allowed the writ petition and the special appeal filed, against the judgment passed therein, before the Division Bench of the High Court was also dismissed. However, the Apex Court allowed the appeal and held that the High Court was in error in issuing directions to the appellants to treat the respondent as a candidate possessed of all the prescribed qualification and to declare the result.

The Apex Court in the case of ***A.P. Christians Medical Educational Society v. Government of A.P. reported in (1986) 2 SCC 667***, Court observed that the Apex Court cannot by its fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. The Apex Court cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws."

In the case of ***Gurdeep Singh v. State of J. & K. and Ors. (1986) 2 SCC 667***, the Apex Court examined the selection of a candidate, who was ineligible to be admitted. It quashed his selection and made its observations in paragraph 9 of the judgment.

Other relevant case laws, which learned counsel for the respondent-University in support of the aforesaid, has relied upon are as follows:

(a) Rajasthan State Industrial Development vs. Subhash Sindhi reported in (2013) 5 SCC 427;

(b) U.O.I. vs. Godfrcy Philips Pvt. Ltd. reported in (1985) 4 SCC 369.

(v) The countering respondent-University, i.e. Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur has been established under U.P. State Universities Act, 1973. As per Section-7 of the Act, which advocates the control and callings of University, it is provided under sub-Section-1 that it is the authority and responsibility of the University to provide for instruction in such branches of erudition, as the University may think apposite and to make provision for research for furtherance and propagation of awareness.

Sub-Section-3 provides powers and duties of the university to institute degrees, diplomas and other academic distinctions.

Sub-Section-4 provides powers and duties of the University to hold examination and to grant and confer the degrees and diplomas and other academic distinctions.

Sub-Section-6 provides powers and duties of the university to confer honorary degree or other academic distinctions in the manner and under condition laid down in the Statute.

Under Section 51 (2) of Act, 1973, the University is authorised to casing its Ordinances for distinctive matters including (a) admission of students to the University and their enrollment and endurance, as such, (b) the course of study to be laid down for all degrees, diplomas and other academic distinctions of University, (c) the condition under which the students shall be admitted to the examinations, degrees and diplomas of

University and shall be entitled for accolade of such degrees and diplomas.

In view of the aforesaid provisions of Act, 1973, it is unequivocal that the University is vested to configure its Ordinances for steering any course of study, which comprises M.Phil and Ph.D. programme. The Clause 5.2.2 of UGC Regulations, 2016 also sanctions to frame the criteria and system for admission by the Higher Educational Institutions.

(vi) The Ordinances of University are enclosed by Expert Academic Body and it is within the especial dominion of academic body to commend certain eligibility criteria for admission. The UGC is consigned with the supremacy to frame Regulation under Section 26 (f) and (g) to outline the minimum principles of Institution to grant of any degree by any University and to standardize the preservation of students and synchronization of work and facilities in University. The parameter framed by UGC recommends only minimum standards and word "minimum" symbolizes the magnitude which should not be depressed and disparaged any further by any authority or the University. The UGC Act and Regulations do not proscribe the University to acclaim any higher standards in eligibility benchmarks for admission in any course of study. The power of the UGC is sourced from Entry-66 of List-1 of the Constitution of India, whereas power of the University is sourced from Entry-25 of List-lll. It has been settled that both admittances have to be read concomitantly and it cannot be read in such a custom to practice an estimation entirely in the matter of admission but if certain recommendations of standards have been made pursuant to Entry-66 of List-1, then those standards will triumph over the standards fixed by the State University in exercise of powers under Entry-25 of List-III insofar as they unsympathetically distress the principles laid down by the Union of India or any other authority operational under it.

In the present case, the UGC has prescribed the minimum standards, therefore, the canons set by the university in eligibility criteria for admission cannot be dubbed as the principles, which undesirably shake the standards laid down by the Union of India. Moreover, the ideals prescribed by the University are robust and rational and cannot be termed in any manner, as illogical and stroppy. In support of the same, the learned counsel for the respondent-University has relied upon the verdict of the Apex Court in the case of ***State of Tamil Nadu vs. K. Shyam Sundar, Civil Appeal No. 6015-6027/2011.***

(vii) The UGC Regulation, 2016 has specificed the minimum eligibility criteria for admission to M.Phil and Ph.D. is to have a master degree with 55% marks. The University, in its Ordinances, has approved the minimum second division marks in graduation for the candidate to possess apart from the minimum eligibility, as prescribed by the UGC, is in addition to the minimum requirement, which, in any manner, does not lower down the minimum eligibility, which has been recommended by the UGC under its Regulations, therefore, this can be treated as prescription of advanced standards by the University. The issue of predominance of the Ordinance of University over Regulation of the UGC does not ascend, as there has to be no repugnancy or incongruity in the Regulations of UGC and Ordinances of University. The University has bordered its Ordinances-2018, in consonance with UGC Regulations-2016 and 2018. In the Judgments of the Apex Court discussed above, it has been held that the University

is sanctioned to prescribe higher standards than the standards prescribed by Regulatory Authority.

(viii) In this regard, it is submitted that the State Government, in execution of its command under Section 66-A of U.P. State Universities Act, 1973, has issued instructions to the University and counsels a layout for enclosing the Ph.D. Research Ordinances in consonance with the UGC Regulations, 2016 and its first and second Amendment of 2018. It is palpable from the University Research Ordinances, 2016 that the Ph.D. Ordinances have been enclosed, as per directions issued by the State Government. Therefore, question of espousal does not have any further bearing.

On the aggregate leverage of the aforesaid submissions, the learned counsel for the respondent-University submits that the admission of petitioners has been made in defilement of University Research Ordinances, 2018 and therefore, the same has been negated. The University cannot be necessitated to go against its own ordinances and statutes because the petitioners have willfully applied pursuant to the advertisement, which advocates the minimum eligibility criteria of having second division in graduation, therefore, the petitioners are not entitled to be granted any relief. The writ petition justifies to be dismissed.

13. For gainsaying/invalidating the submissions made by the learned counsel for the petitioners, Dr. Amar Nath Singh, learned Standing Counsel has made following submission:

(i) Unless the UGC Regulations are formally embraced by the State and the Statutes are amended, it cannot be applied ipso facto upon the State Universities. In sustenance of this submission, he has relied upon the judgment of the Apex Court in the cases of (a) **Kalyani Mathivanan vs. K.V. Jeyaraj & Others** reported in (2015) 6 SCC 363, and (b) **Amit Prasad Vs. State of U.P.** reported in (2016) 1 ADJ 690.

(ii) The concern that the Ordinance of the University is predominant over the Regulations, does not ascend, as there has to be no detestation or ambiguity in the Regulations of UGC and Ordinances of the University.

(iii) The law is well adroitly established that while it is not uncluttered for the Universities to insipid the norms and criterions as prearranged by the supervisory organizations, such as UGC or AICTE, it is relentlessly expose to the Universities to counsel customs. Case Laws in support of aforesaid submission are as under:

(a). **R. Chitralekha vs. State of Mysore and Others** reported in AIR 1964 SC 123,

(b). **Bharathidasan University and another vs. All India Council for Technical Education and Others** reported in (2001) 8 SCC 676,

(c). State of T.N. and another vs. S.V. Bratheep (Minor) and Others (2004) 4 SCC 513,

(d). **Visveswaraiah Technological University and another v. Jai Bharat College of Management and Engineering Technology and Others**, Civil Appeal No. 4016 of 2020, and

(e). **Registrar, Chhatrapati Shahuji Maharaj University vs. Vinay Gupta and Ors**. reported in 2009 (3) ADJ 263.

(iv) As the petitioners have applied with open eyes pursuant to an advertisement, wherein minimum prerequisite upto graduate level is prescribed as per Ordinance of the University, then at this stage, they cannot encounter the Ordinance consequently.

Case Law in support of aforesaid submission is as under:

(a). **Ramjit Singh Kardam vs. Sanjeev Kumar & Others**, Civil Appeal No. 2103 of 2020 (Paragraph 37 is relevant).

(v) The University can red line the admission of the petitioners, as they do not enjoy the minimum eligibility criteria, as per the Deen Dayal Upadhyaya Gorakhpur University Research Ordinance, 2018. There stands no estoppel against law, therefore, the University was thoroughly warranted in terminating the admission of the students. Case laws in support of the aforesaid submission are as under:

(a). **State of Rajasthan and Ors. vs. Lata Arun** reported in JT 2002 (5) SC 210,

(b). **A.P. Christians Medical Educational Society vs. Government of A.P**. reported in (1986) 2 SCC 667

(c). **Gurdeep Singh vs. State of J.&K. And others** reported in (1986) 2 SCC 667

(vi) The State Government in implementation of its power U/s 66-A of U.P. State Universities Act, 1973 has issued guidelines to the University and proposes a layout for outlining the Ph.D. Research Ordinance in consonance with the UGC Regulations, 2016 and its first and second amendment of 2018. It is evident from the University Research Ordinance, 2018 that the Ph.D. Ordinances have been edged as per directions issued by the State Government. Therefore, question of espousal does not have any further germaneness.

In view of the aforesaid submission, it is submitted that the petitioners are not authorized to be settled any respite and the writ petition is liable to be dismissed.

14. This Court has contemplated the submissions made by the learned counsel for the parties and have gone through the annuls of the contemporaneous writ petition as well as judicially perused the rules and case laws trusted upon by the learned counsel for the parties punctiliously.

15. Before coming to the virtues of the case set up by the corresponding parties, it is also apposite to remark here that this Court on 18th November, 2021 required Mr. Rohit Pandey, learned counsel for the respondent-University to apprise the Court as to what action has been taken against the persons, who are answerable for admitting the petitioners for Pre-Ph.D. Course, which are said to be proscribed.

16. On 23rd February, 2022, when both these writ petitions have been earmarked for delivery of judgment, Mr. Rohit Pandey, learned counsel for the respondent-University apprises the Court verbally that inquiry proceedings are unresolved against the stumbling officers/officials of the respondent-University.

17. For determining the velitation involved in both the writ petitions, this Court may also record that till January 3, 1977, Education was a State subject under Entry 11 in List II. By the 42nd Amendment Act, 1976, Entry 11 was obliterated and it was positioned in the Concurrent List by enlarging the Entry 25, as set out above. Entry 25 List III relating to education including technical education, medical education and Universities has been made subject to the power of Parliament to legislate under Entries 63 to 66 of List I. Entry 66 List I and Entry 25 List III should, therefore, be read together. Entry 66 gives influence to Union to see that a vital standard of higher education in

the country is sustained. The standard of Higher Education comprising of scientific and technical should not be depressed at the hands of any particular State or States. Secondly, it is the especial obligation of the Central Government to synchronize and determine the cannons for higher tutelage. That authority embraces the power to appraise, blend and shelter apposite rapport to any project of nationwide predominance. It is gratuitous to state that such a synchronize act in higher education with proper ideals, is of utmost significance to national headway. It is in this countrywide attentiveness, the legislative field in regard to 'education' has been distributed between List I and List III of the Seventh Schedule.

18. The University Grants Commission has been established by the enactment of the Central Government being University Grants' Commission Act, 1956 (hereinafter referred to as the "Act, 1956") by the Ministry of Human Resource Development (HRD) (Now Ministry of Education) based in New Delhi. The Central Act i.e. University Grants Commission Act, 1956, has sanctioned University Grants Commission to make regulations under Section 26 (f). Section 26 (f) provides that the University Grants Commission can mount Regulation outlining the minimum criteria of directives for endowment of any degree by any University, whereas Section 26 (g) provides that the Commission can frame Regulation regarding conservation of ideals and dexterity of labor or conveniences in University. The foremost objective and capacity of the UGC in higher education is to afford capitalization to universities and to organize, regulate and retain integrities in advanced educational establishments. The commission emboldens construal between universities, government and the community. The UGC has also fixed some canons for universities to be permitted by the UGC. With the progression of higher education in India, many high-level, medium and small universities are recognized day by day. Among these universities, there are voluminous phony and non-recognized universities. Therefore, the University Grants Commission circulated the list of sham universities in India to comfort students identify these repudiated universities.

19. The notable accomplishments and occupations of University Grants Commission are (i) to endorse and harmonize university edification , (ii) to mount rubrics on minimum standards of education, (iii) to set standards for examination like **ICAR NET**, UGC NET & CSIR UGC NET, (iv) to dissect evolvement in the pitch of college and university tutelage, (v) to licence endowments to the universities and colleges, (vi) to sustain the construction between the Union and State Governments and institutions of higher education, and (vii) to advocate binding procedures to Central and State governments to make affirmative vicissitudes in University Education.

20. Apart from the aforesaid, it would also be appropriate for this Court to reproduce certain clauses of the Deen Dayal Upadhyay Gorakhpur University Research Ordinance, 2018, which provides for Minimum Criteria and Procedure for Research Degree-Ph.D.

21. Clause-3 of the Ordinance, 2018 provides for Guidelines and Eligibility for

Admission in Ph.D. Programme. Clause-3.1 enunciates for minimum expected eligibility for appearing in Research Entrance Test, which is as follows:

"3.1.....

(a) The minimum percentage of marks in the qualifying post-graduate exam for the candidates of unreserved and other Backward Classes (Creamy layer) is 55%, and for other Backward Classes (Non-Creamy Layer), Scheduled Caste, Scheduled Tribe, and physically Challenged Category candidates the eligibility is 50%.

(b) The Candidate should have passed his graduation with second division or have obtained required marks fulfilling the guidelines issued by the University Grant Commission from time to time.

(c) The Candidates appearing in the final year of their post graduation can also apply for Research Entrance Test but before taking admission in research programme, they must complete the expected eligibility by passing their post graduation exam."

22. It would also be relevant to reproduce the University Grants Commission (Minimum Standards and Procedure for Award of M.Phill./Ph.D. Degrees) Regulations, 2016. Clause-3 of Regulations, 2016 stipulates for eligibility benchmarks for admission to Ph.D. programme, which reads as follows:

"3.

3.1 Master's Degree holders satisfying the criteria stipulated under Clause 2 above.

3.2 Candidates who have cleared the M.Phil course work with at least 55% marks in aggregate or its equivalent grade ''B' in the UGC 7-point scale (or an equivalent grade in a point scale wherever grading system is followed) and successfully completing the M.Phil. Degree shall be eligible to proceed to do research work leading to the Ph. D. Degree in the same Institution in an integrated programme. A relaxation of 5% of marks, from 55% to 50%, or an equivalent relaxation of grade, may be allowed for those belonging to SC/ST/OBC(non-creamy layer)/differently-abled and other categories of candidates as per the decision of the Commission from time to time.

3.3 A person whose M.Phil. dissertation has been evaluated and the viva voce is pending may be admitted to the Ph.D. programme of the same Institution;

3.4 Candidates possessing a Degree considered equivalent to M.Phil. Degree of an Indian Institution, from a Foreign Educational Institution accredited by an Assessment and Accreditation Agency which is approved, recognized or authorized by an authority, established or incorporated under a law in its home country or any other statutory authority in that country for the purpose of assessing, accrediting or assuring quality and standards of educational institutions, shall be eligible for admission to Ph.D. programme."

Clause-5 of the Regulations, 2016 articulates for procedure for admission. Clause 5.2.2, which is relevant, is quoted herein below:

"5.

5.2 Higher Educational Institutions (HEIs) referred to in sub-clause 1.2 above and Colleges under them which are allowed to conduct M.Phil. and/or Ph.D. programmes, shall:

5.2.1 decide on an annual basis through their academic bodies a predetermined and manageable number of M.Phil. and/or Ph.D. scholars to be admitted depending on the number of available Research Supervisors and other academic and physical facilities available, keeping in mind the norms regarding the scholar- teacher ratio (as indicated in Para 6.5), laboratory, library and such other facilities;

5.2.2 notify well in advance in the institutional website and through advertisement in at least two (2) national newspapers, of which at least one (1) shall be in the regional language, the number of seats for admission, subject/discipline-wise distribution of available seats, criteria for admission, procedure for admission, examination centre(s) where entrance test(s) shall be conducted and all other relevant information for the benefit of the candidates;

5.2.3 adhere to the National/State-level reservation policy, as applicable. 5.3 The admission shall be based on the criteria notified by the Institution, keeping in view the guidelines/norms in this regard issued by the UGC and other statutory bodies concerned, and taking into account the reservation policy of the Central/State Government from time to time."

23. FINDINGS OF THE COURT

Now this Court comes to **Issue No.1.**

For fathom issue no.1, it is indispensable for this Court to replicate law as laid down by the Apex Court in several verdicts as well as by the Punjab and Haryana High Court, which are being noticed herein below:

A Constitution Bench of the Apex Court in the case of Osmania University Teacher's Association Vs. State of Andhra Pradesh & Another reported in (1987) 4 SCC 671 has opined as follows:

"19. The power of the State to prescribe certain norms for admission to colleges came for consideration before this Court in R. Chitralekha & Anr. Vs. State of Mysore & Ors., reported in [1964] 6 SCR 368 where Subba Rao J., as he then was, ob- served:

"that if the law made by the States by virtue of Entry 11 of List II of the Seventh Schedule to the Constitution makes impossible or diffi- cult the exercise of the legislative power of the Parliament under the entry "Co-ordination and determination of standards in institutions for higher education or research and scientif- ic and technical institutions" reserved to the Union, the State law may be bad. This cannot obviously be decided on speculative and hypo- thetical reasoning. If the impact of the State law providing for such standards on entry 66 of List I is so heavy or devastating as to wipe out or appreciably abridge the central field it may be struck down. But that is a question of fact to be ascertained in each case."

26. In Prem Chand Jain v. R.K. Chhabra, [1984] 2 SCR 883 this Court has held that the UGC Act falls under Entry 66 of List I. It is then unthinkable as to how the State could pass a parallel enactment under Entry 25 of List III, unless it encroaches Entry 66 of List I. Such an encroachment is patent and obvious. The Commissionerate Act is beyond the legislative competence of the State Legislature and is hereby declared void and inoperative. In the result, these appeals are allowed with costs. The judgment of the High Court is reversed. There shall be a direction to the State not to enforce the provisions of the impugned Act.

30. The Constitution of India vests Parliament with exclusive authority in regard to co-ordination and determination of standards in institutions for higher education. The Parliament has enacted the

UGC Act for that purpose. The University Grants Commission has, therefore, a greater role to play in shaping the academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the Universities. Democracy depends for its very life on a high standards of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs. It is hoped that University Grants Commission will duly discharge its responsibility to the Nation and play an increasing to role bring about the needed transformation in the academic life of the Universities."

In **S. Satyapal Reddy & Ors. Vs. Government of A.P. & Ors**., (1994) 4 SCC 391, the Apex Court held as under:-

"7. It is thus settled law that Parliament has exclusive power to make law with respect to any of the matters enumerated in List I or concurrent power with the State Legislature in List III of the VIIth Schedule to the Constitution which shall prevail over the State law made by the State Legislature exercising the power on any of the entries in List III. If the said law is inconsistent with or incompatible to occupy the same filed, to that extent the State law stands superseded or becomes void. It is settled law that when Parliament and the Legislature derive that power under Article 246 (2) and the entry in the Concurrent List, whether prior or later to the law made by the State Legislature, Article 246 (2) gives power, to legislate upon any subject enumerated in the Concurrent List, the law made by Parliament gets paramountcy over the law made by the State Legislature unless the State law is reserved for consideration of the President and receives his assent. Whether there is an apparent repugnance or conflict between Central and State laws occupying the same field and cannot operate harmoniously in each case the Court has to examine whether the provisions occupy the same field with respect to one of the matters enumerated in the Concurrent List and whether there exists repugnancy between the two laws. Article 254 lays emphasis on the words "with respect to that matter". Repugnancy arises when both the laws are fully inconsistent or are absolutely irreconcilable and when it is impossible to obey one without disobeying the other. The repugnancy would arise when conflicting results are produced when both the statutes covering the same field and applied to a given set of facts. But the court has to make every attempt to reconcile the provisions of the apparently conflicting laws and court would endeavour to give harmonious construction. The purpose to determine inconsistency is to ascertain the intention of Parliament which would be gathered from a consideration of the entire field occupied by the law. The proper test would be whether effect can be given to the provisions of both the laws or whether both the laws can stand together. Section 213 itself made the distinction of the powers exercisable by the State Government and the Central Government in working the provisions of the Act. It is the State Government that operates the provisions of the Act through its officers. Therefore, sub-section (1) of Section 213 gives power to the State Government to create Transport Department and to appoint officers, as it thinks fit. Sub-section (4) thereof also preserves the power. By necessary implication, it also preserves the power to prescribed higher qualification for appointment of officers of the State

Government to man the Motor Vehicles Department. What was done by the Central Government was only the prescription of minimum qualifications, leaving the field open to the State Government concerned to prescribe if it finds necessary, higher qualifications. The Governor has been given power under proviso to Article 309 of the Constitution, subject to any law made by the State Legislature, to make rules regulating the recruitment which includes prescription of qualifications for appointment to an office or post under the State. Since the Transport Department under the Act is constituted by the State Government and the officers appointed to those posts belong to the State service, while appointing its own officers, the State Government as a necessary adjunct is entitled to prescribe qualifications for recruitment or conditions of service. But while so prescribing, the State Government may accept the qualifications or prescribe higher qualification but in no case prescribe any qualification less than the qualifications prescribed by the Central Government under sub-section (4) of Section 213 of the Act. In the latter event, i.e., prescribing lesser qualifications, both the rules cannot operate without colliding with each other. When the rules made by the Central Government under Section 213 (4) and the statutory rules made under proviso to Article 309 of the Constitution are construed harmoniously, there is no incompatibility or inconsistency in the operation of both the rules to appoint fit persons to the posts or class of officers of the State Government vis-a-vis the qualifications prescribed by the Central Government under sub-section (4) of Section 213 of the Act.

8. It is seen that A.P. Transport Subordinate Service Rules have been made by the Governor exercising the power under proviso to Article 309 of the Constitution and Rule 6 thereof prescribes the qualifications as enumerated above. Graduation in Mechanical Engineering is one of the higher qualifications than Diploma. Since Section 213 (4) gives such power to the State Government by operation of Section 217 of the Act, the statutory rules remain valid and operate in the field without colliding with the Central rules. Both the rules would operate harmoniously and effect can be given to both the rules. Thus the question of inconsistency or repugnancy under Article 254 of the Constitution does not arise. Therefore, we do not find that there is any conflict in the exercise of power by both Central and State Governments or inconsistency in operation of the provisions of the statutory rules made by the Governor under proviso to Article 309 and the rules made by the Central Government under Section 213 (4) of the Act. The recruitment as per State rules is valid and legal."

The Apex Court in the case of **State of Tamil Nadu & Another Vs. S.V. Bratheep (Minor) & Others,** reported in (2004) 4 SCC 513 in paragraph nos. 8 to 12, has observed as follows:

"8. As regards the scope of the Entries in the Constitution arising under Entry 66 of List I and Entry 25 of List III of the Seventh Schedule to the Constitution was examined in great detail by a constitution Bench of this Court in Dr. Preeti Srivastava & Anr. Vs. State of M.P. & Others, [1999] 7 SCC 120. After adverting to these two entries in the Seventh Schedule, this Court stated as follows:

"35....Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in

institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

36. ***It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for ad****mission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education."*

9. .....If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, can it be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standard fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed by the AICTE would allow admission only on the basis of the marks obtained in the qualifying examination the additional test made applicable is the common entrance test by the State Government. *If we proceed to take the standard fixed by the AICTE to be the common entrance test then the prescription made by the State Government of having obtained certain marks higher than the minimum in the qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either event, the streams proposed by the AICTE are not belittled in any manner. The manner in which the High Court has proceeded is that what has been prescribed by the AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even the higher as stated by this Court in Dr. Preeti Srivastava's case. It is no doubt true as noticed by this Court in Adhiyaman's case that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such*

which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges. It is not very high percentage of marks that has been prescribed as minimum of 60% downwards, but definitely higher than the mere pass marks. Excellence in higher education is always insisted upon by series of decisions of this Court including Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.

10. Argument advanced on behalf of the respondents is that the purpose of fixing norms by the AICTE is to ensure uniformity with extended access of educational opportunity and such norms should not be tinkered with by the State in any manner. We are afraid, this argument ignores the view taken by this Court in several decisions including Dr. Preeti Srivastav's case that the State can always fix a further qualification or additional qualification to what has been prescribed by the AICTE and that proposition is indisputable. The mere fact that there are vacancies in the colleges would not be a matter, which would go into the question of fixing the standard of education. Therefore, it is difficult to subscribe to the view that once they are qualified under the criteria fixed by the AICTE they should be admitted even if they fall short of the criteria prescribed by the State. The scope of the relative entries in the Seventh Schedule to the Constitution have to be understood in the manner as stated in the Dr. Preeti Srivastava's case and, therefore, we need not further elaborate in this case or consider arguments to the contrary such as application of occupied theory no power could be exercised under Entry 25 of List III as they would not arise for consideration.

11. The argument advanced on behalf of the respondents that these matters are indeed governed by the decision in Islamic Academy of Education and Anr. v. State of Karnataka and Ors. [2003] 6 SCC 697, and T.M.A. Pai Foundation v. State of Karnataka, [2002] 8 SCC 481. In fact this Court did not consider the question that has arisen for our consideration in the present case but was dealing with entirely different issue in relation to fee structure of minority and non-minority educational institutions and whether private unaided professional colleges are entitled to fill their seats to the full extent by their own method of admission. That is not the issue before us at all. Therefore, no reliance could be placed by the respondents on the decisions either in TMA Pai Foundation or Islamic Academy case.

12. One other argument is further advanced before us that the criteria fixed by the AICTE was to be adopted by the respective colleges and once such prescription had been made it was not open to the Government to prescribe further standards particularly when they had established the institutions in exercise of their fundamental rights guaranteed under Article 19 of the Constitution. However, we do not think this argument can be sustained in any manner. Prescription of standards in education is always accepted to be an appropriate exercise of power by the bodies recognising the colleges or granting affiliation, like AICTE or the University. If in exercise of such power the prescription had been made, it cannot be said that the whole matter has been foreclosed."

Bearing in mind the aforesaid annotations, the Apex Court in the case of **State of Tamil Nadu (Supra)** has pronounced that recommendation of standards in edification is continually acknowledged to be an apt exercise of

authority by the bodies pinpointing the colleges or yielding affiliation, like AICTE or university. If an implementation of such power the instruction had been prepared, it cannot be said that the unabridged substance has been foreclosed. In view of the aforementioned, the Apex Court has held that it is allowable for the State Government to commend higher qualifications for tenacities of admission to the engineering colleges than what had been suggested by AICTE (which is a statutory body like UGC in the present case) and what has been prearranged by the State and deliberated by us, as it is not antagonistic to the equivalent but is only analogous or auxiliary to it.

In the case of **Visveswaraya Technological University & Others Vs. Krishnendu Halder & Others** reported in (2011) 4 SCC 606, following the judgment of the Apex Court in the case of **State of Tamil Nadu (Supra)** has held that eligibility criteria for admission under Statutory Rules and Regulations of State Government/University could be unperturbed or snubbed.

It has further been held that a student whose grades fall short of the eligibility criteria fixed by the State/University, or any college which acknowledges such students explicitly under the management quota, cannot avow that the admission of students found qualified under the criteria fixed by AICTE, should be ratified even if they do not accomplish the higher edibility criteria fixed by the State/University.

In paragraph-17 of the case of **Visveshwarya Technological University (Supra)**, in paragraph no. 14 has observed as follows:

".....(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the Central Body/AICTE. The term `adversely affect the standards' refers to lowering of the norms laid down by Central Body/AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the Central Body/AICTE.

.....

(iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the state and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations."

Thereafter the Apex Court in the case of Visveshwarya Technological University (Supra), in paragraph-17 has held as follows:

"17. No student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact the State/University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the

University. ***Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or `adversely affect' the standards if any fixed by the Central Body under a Central enactment. The order of the Division Bench is therefore unsustainable."***

The Punjab & Haryana High Court in the case of **Shamsher Singh Tayagi Vs. State of Haryana** reported in 2006 0 Supreme (P&H) 2462 following the judgment of the Apex Court in the case of **Brahmo Samaj Education Society & Others Vs. State of West Bengal & Others** reported in (2004) 6 SCC 224, has observed as follows:

"(14) A reading of the observations of the Honble Supreme Court reproduced hereinabove would show that it has been accepted by the Court that a higher eligibility requirement for appointment as a teacher can be prescribed by the State or a University over and above the minimum requirement prescribed by the Central body being AICTE or UGC. Moreover on a bare reading of the Regulations, it is clear that in the present case only minimum qualifications have been prescribed by the UGC. Therefore in view of the Regulations relied upon by Mr. Jain for the present case and also the judgments mentioned hereinabove, the argument raised by Mr. Jain cannot be accepted."

The Apex Court in the case of **Kalyani Mathivanan VS. K.V. Jeyaraj & Others** reported in (2018) 6 SCC 363, in paragraph nos. 50 to 53 has observed as follows:

"50. In State of Tamil Nadu & Another Vs. Adhiyhaman Education & Research Institute & Others, (1995) 4 SCC 104, this Court noticed that Entry 66 of List I of the Seventh Schedule has remained unchanged from the inception and that Entry 11 was taken out from List II and was amalgamated with Entry 25 of List III. In the said case the Court held as follows: "12.The subject "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions" has always remained the special preserve of Parliament. This was so even before the Forty-second Amendment, since Entry 11 of List II even then was subject, among others, to Entry 66 of List I. After the said Amendment, the constitutional position on that score has not undergone any [pic]change. All that has happened is that Entry 11 was taken out from List II and amalgamated with Entry 25 of List III. However, even the new Entry 25 of List III is also subject to the provisions, among others, of Entry 66 of List I. It cannot, therefore, be doubted nor is it contended before us, that the legislation with regard to coordination and determination of standards in institutions for higher education or research and scientific and technical institutions has always been the preserve of Parliament. What was contended before us on behalf of the State was that Entry 66 enables Parliament to lay down the minimum standards but does not deprive the State legislature from laying down standards above the said minimum standards. We will deal with this argument at its proper place.

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41. What emerges from the above discussion is as follows:

(i) The expression 'coordination' used in Entry 66 of the Union List of the Seventh

Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.

(ii) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.

(iii) If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause (2) of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.

(iv) Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case.

(v) When there are more applicants than the available situations/seats, the State authority is not prevented from laying down higher standards or qualifications than those laid down by the Centre or the Central authority to short-list the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.

(vi) However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the Central law, they act unconstitutionally. So also when the State authorities de-recognise or disaffiliate an institution for not satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally."

51. In Dr. Preeti Srivastava & Another Vs. State of M.P. & Others, (1999) 7 SCC 120, a Constitution Bench of five Judges dealt with the State competence under List III Entry 25 to control or regulate higher education which is subject to standards laid down by the Union of India. The Court noticed that the standards of higher education can be laid down under List I Entry 66 by the Central Legislation and held as follows:

"35. The legislative competence of Parliament and the legislatures of the States to make laws under Article 26 is regulated by the VIIth Schedule to the Constitution. In the VIIth Schedule as originally in force, Entry 11 of List II gave to the State an exclusive power to legislate on "education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III".

Entry 11 of List II was deleted and Entry 25 of List III was amended with effect from 3-1-1976 as a result of the

Constitution 42nd Amendment Act of 1976. The present Entry 25 in the Concurrent List is as follows:

"25.Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour." [pic] Entry 25 is subject, inter alia, to Entry 66 of List I. Entry 66 of List I is as follows:

"66. Coordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

36. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education. Standards of education in an institution or college depend on various factors. Some of these are:

(1) the calibre of the teaching staff;

(2) a proper syllabus designed to achieve a high level of education in the given span of time;

(3) the student-teacher ratio;

(4) the ratio between the students and the hospital beds available to each student;

(5) the calibre of the students admitted to the institution; (6) equipment and laboratory facilities, or hospital facilities for training in the case of medical colleges;

(7) adequate accommodation for the college and the attached hospital; and [pic](8) the standard of examinations held including the manner in which the papers are set and examined and the clinical performance is judged.

37. While considering the standards of education in any college or institution, the calibre of students who are admitted to that institution or college cannot be ignored. If the students are of a high calibre, training programmes can be suitably moulded so that they can receive the maximum benefit out of a high level of teaching. If the calibre of the students is poor or they are unable to follow the instructions being imparted, the standard of teaching necessarily has to be lowered to make them understand the course which they have undertaken; and it may not be possible to reach the levels of education and training which can be attained with a bright group. Education involves a continuous interaction between the teachers and the students. The pace of teaching, the level to which teaching can rise and the benefit which the students ultimately receive, depend as much on the calibre of the students as on the calibre of the teachers and the availability of adequate infrastructural facilities. That is why a lower student-teacher ratio has been considered essential at the levels of higher university education, particularly when the training to be imparted is a highly professional training requiring individual attention and on-hand training to the pupils who are already doctors and who are expected to treat patients in the course of doing their postgraduate courses."

52. In Annamalai University Vs. Secretary to Government, Information and Tourism Department & Others, (2009) 4 SCC 590, this Court observed that UGC Act was enacted by Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas the Open University Act was enacted by Parliament in exercise of its power under Entry 25 of List III. It was held that in such circumstances the question of repugnancy between the provisions of the said two Acts, does not arise. The Court while holding that the provisions of the UGC Act are binding on all the Universities held as follows:

"40. The UGC Act was enacted by Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas the Open University Act was enacted by Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the Statement of Objects and Reasons of the Open University Act shows that the formal system of education had not been able to provide an effective means to equalise educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.

42. The provisions of the UGC Act are binding on all universities whether conventional or open. Its powers are very broad. The Regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-section (1) of Section 26 are of wide amplitude. They apply equally to open universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by UGC. The standards and the coordination of work or facilities in universities must be maintained and for that purpose required to be regulated. The powers of UGC under Section 26 (1) (f) and 26 (1) (g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of UGC are all-pervasive in respect of the matters

specified in clause (d) of sub-section (1) of Section 12-A and clauses (a) and (c) of sub-section (2) thereof."

53. The aforesaid judgment makes it clear that to the extent the State Legislation is in conflict with Central Legislation including sub-ordinate legislation made by the Central Legislation under Entry 25 of the Concurrent List shall be repugnant to the Central Legislation and would be inoperative."

In **A.P.J. Abdul Kalam Technological University & Another Vs. Jai Bharath College of Management and Engineering Technology & Others** reported in (2021) 2 SCC 564, the Apex has pronounced that while counseling eligibility criteria sinking the models laid down by the Central Body/AICTE for admission to institutions of higher education, the State/University cannot undesirably distress canons laid down by the Central Body/AICTE. Advocating higher standards for admission by laying down qualifications in accumulation to or higher than those prescribed by Central Body/AICTE consistent with object of endorsing higher standards and brilliance in higher educations will not be reflected as unsympathetically disturbing standards laid own by the Central Body/AICTE. Thus, the Apex Court has apprehended that University/State Government concerned undoubtedly has the muscle to fix higher eligibility criteria than the minimum prearranged by the Central Governing Body/AICTE to triumph the refinement in edification.

For ready reference, relevant paragraphs of the judgment of the Apex Court in the case of **A.P.J. Abdul Kalam Technological University (Supra)** i.e. paragraph nos. 44 to 48 are being quoted herein below:

"44. In R. Chitralekha Vs. State of Mysore and Others, the Constitution Bench of this Court pointed out that the question regarding the impact of Entry 66 of List-I on Entry-25 of List-III must be determined by a reading of the Central Act and the State Act conjointly. The Court pointed out that a State Law providing for such standards, having regard to Entry 66 of List-I, would be struck down as unconstitutional only if the same is found to be so heavy or devastating as to wipe out or appreciably abridge the Central field and not otherwise. The Court also pointed out that if a State law prescribes higher percentage of marks for extra-curricular activities in the matter of admissions to colleges, it cannot be said that it would be encroaching on the field covered by Entry 66 of List-I.

45. The decision of the Supreme Court in R. Chitralekha (supra) was followed in several cases including the one in State of A.P. Vs. K. Purushotham Reddy & Others. The decision in K. Purushotham Reddy (supra) arose under very peculiar circumstances. The State of Andhra Pradesh enacted in the year 1986, an Act known as Andhra Pradesh Commissionerate of Higher Education Act, 1986. The constitutional validity of the said Act was questioned on the ground of lack of legislative competence, in view of the University Grants Commission Act, 1956. Though a Full Bench of the High Court rejected the challenge, the Supreme Court declared the Act as unconstitutional, by its judgment in Osmania University Teachers' Association vs. State of Andhra Pradesh & Another. Thereafter, the Government of Andhra Pradesh enacted the Andhra Pradesh State Council of Higher Education Act, 1988. This Act was declared as unconstitutional by the High Court, on the same premise on which the 1986 Act was

declared by this Court as unconstitutional. Therefore, the matter was carried to this Court. A Two Member Bench of this Court doubted the correctness of the decision in Osmania University Teachers' Association (supra), and hence, the matter was referred to a three-member Bench. The three-member Bench rejected the challenge to the State Act, by following the decision in R. Chitralekha (supra) and pointed out that when a State Act is in aid of the Parliament Act, the same would not entrench upon the latter.

46. The law is now fairly well settled that while it is not open to the Universities to dilute the norms and standards prescribed by AICTE, it is always open to the Universities to prescribe enhanced norms. As regards the role of the Universities vis-a-vis the AICTE, this Court held in Bharathidasan University & Another Vs. All India Council for Technical Education and Others, that AICTE is not a super power with a devastating role undermining the status, authority and autonomous functioning of the Universities in areas and spheres assigned to them. *This view was followed in Association Management of Private Colleges Vs. All India Council for Technical Education and Others.*

(Emphasis added)

47. That even the State Government can prescribe higher standards than those prescribed by AICTE was recognized by a three-member Bench of this court in State of T.N. & Another Vs. S.V. Bratheep (Minor) & Others. This principle was later applied in the case of Universities in Visveswaraiah Technological University & Another Vs. Krishnendu Halder & Others, where this Court considered the previous decisions and summarised the legal position emerging therefrom as follows:

(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the Central Body/AICTE. The term "adversely affect the standards" refers to lowering of the norms laid down by Central Body/AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the Central Body/AICTE.

(ii) The observation in para 41(vi) of Adhiyaman to the effect that where seats remain unfilled, the state authorities cannot deny admission to any student satisfying the minimum standards laid down by AICTE, even though he is not qualified according to its standards, is not good law.

(iii) The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year. The main object of prescribing 6 (2004) 4 SCC 513 7 (2011) 4 SCC 606eligibility criteria is not to ensure that all seats in colleges are filled, but to ensure that excellence in standards of higher education is maintained.

(iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the

need to maintain a healthy ratio between the total number of seats available in the state and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations.

48. Visveswaraiah (supra) principles were reiterated in Mahatma Gandhi University and Another vs. Jikku Paul and Others8. The legal position summarised in paragraph 14 of the report in Visveswaraiah (supra) (extracted above) were quoted with approval by the Constitution Bench in Mordern Dental College & Research Centre & Others Vs. State of Madhya Pradesh & Others. In Modern Dental College (supra), issue No. IV framed for consideration by the Constitution Bench (as reflected in the opinion of the majority) was as to "whether the legislation in question was beyond the legislative competence of the State of Madhya Pradesh". While answering this issue, the opinion of the majority was to the effect (i) that the decision in Dr. Preeti Srivastava & Another Vs. State of M.P. & Others did not exclude the role of the States altogether from admissions; and (ii) that the observations in Bharati Vidyapeeth (deemed university) and Others Vs. State of Maharashtra & Another as though the entire gamut of admissions was covered by Entry 66 of ListI, has to be overruled. In the concurring and supplementing opinion rendered by R. Banumathi, J., in Modern Dental College (supra), the legal position enunciated in Visveswaraiah (supra) were extracted and followed."

24. From prudently perusing of the aforementioned laws laid down by the Apex Court in its verdicts referred to above, this Court is of the estimation that once Act, 1956 is recognized by the State, then any directions or guidelines edged under the said Act intermittently are requisite for all the States/Universities/Colleges to admit the same. Meaning thereby, the Regulations outlined by the University Grants Commission are obligatory upon the all the State Universities and Institution through the Republic. However, in view of the decree of the Apex Court in the case of **Kalyani Mathivanan (Supra),** it is vibrant that unless or until, any procedures enclosed by the UGC are espoused and instigated by the State Legislation, the same will be relatively mandatory and will be comparatively directory. It is also conventional from the aforesaid findings that the objective and purpose of the UGC and other Central Commission is to safeguard that in higher education, minimum criterions of education are provided to all the students of all higher educational institutions/universities through the country correspondingly. However, in the actualities of the contemporaneous case, the regulations edged by the UGC of the year 2016 and 2018 are silent in counseling higher eligibility criteria for admission to Pre-Ph.D. Course. From examination of the decree as laid down by the Apex Court in its judgments, which have been quoted herein above, it is established that for sponsoring higher standards for admission to the higher educational courses, the State Legislation has every authority/right to counsel/fix maximum eligibility criteria but the same should not be irrational or manageable and such prescription or fascination cannot be said to be, in dissension to, or, infringement of, the Regulations mounted by the Central Legislation like UGC. However, it is also unblemished that the State Legislation cannot subordinate the minimum eligibility

criteria in higher education, as riveted by the Central Legislation like the UGC, as any dropping of the customs laid down can and does have a confrontational influence on the principles of edification in the establishments of higher education. In the specifics of the present case, in the Regulations of the UGC of the year 2016, the minimum eligibility criteria approved for admission to M.Phil and Ph.D is to have a master degree with 55% marks, whereas the respondent-University vide its Ordinances, has recommended the minimum second division marks in graduation for the candidate to possess apart from the minimum admissibility, as prescribed by the UGC, is in additional to the minimum prerequisite, which does not lower down the minimum eligibility, in any fashion, which has been approved by the UGC vide its Regulations. Hence, the same can be treated as prescription of higher standards by the respondent-University. Therefore, the issue of prevailing the Ordinance of the respondent-University over the Regulations framed by the UGC does not ascend, as there has to be no repugnancy or paradox in the Regulations of the UGC and Ordinances of the respondent-University. This Court, therefore, is of the outlook that Clause-3.1 (b) of the Deen Dayal Upadhya, Gorakhpur University Research Ordinance 2018 (Minimum Criteria and Procedure for Research Degree-Ph.D) being in consonance with the regulations framed by the UGC and not in violation of the same, which offers that for admission in Ph.D. Course, only those candidates will be qualified, who fortified second division marks in undergraduate course, is not foist or incompatible to the regulations outlined by the UGC.

25. In view of the aforesaid, this Court finds that the encounter made on behalf the petitioners to the vires of Clause-3.1 (b) of the Deen Dayal Upadhya, Gorakhpur University Research Ordinance 2018 (Minimum Criteria and Procedure for Research Degree-Ph.D) cannot be approved by this Court and, therefore, Issue no.1 and its sub-issues answer against the petitioners.

26. Since Regulations mounted by the UGC of the year 2016 and 2018 are silent in fixation of eligibility criteria for admission to Ph.D. Course under or upto graduate level, the embracing of the aforesaid pronouncements does not ascend. Therefore, the issue no. 4 is not applicable in the particulars of the existent case.

Now this Court garners up on Issue No.3

In the actualities of the contemporaneous case, pursuant to the news item/advertisement acquainted by the respondent-University, wherein it has explicitly been mentioned that for appearing in research eligibility test, the minimum eligibility criteria for Ph.D. degree is to have second division in graduation, the petitioners applied with open eyes and appeared in the test, ensuingly, they have been avowed eligible for the explanations preeminently known to the respondent-University. Consequently, they have been issued eligibility certificate. Thereafter on scrutiny of their candidature, it was established that the petitioners were not eligible as per the University Research Ordinance, 2018 as they did not possess the minimum second division marks in graduation. As such, after a comprehensive inquiry, it was found that the admissions contracted to the petitioners on some blunders perpetrated by the officials of the respondent-University are dissimilar to the news item/advertisement and the Ordinance

of the respondent-University, the respondent-University has determined to revoke the admissions of the petitioners for which a notification dated 16th January, 2021 has been issued by the respondent-University. In the credence of this Court, the respondent-University has every authority/right to terminate the admissions of the petitioners, which are antagonistic to Ordinances of the respondent-University at any time. In the case of **State of Rajasthan & Others Vs. Lata Arun** delineated in 2002 (5) SC 210, the Apex Court has surveyed the invalidation of admission of a candidate to the General Nursing and Midwifery and Staff Nurse Course on the ground that the respondent did not possess the eligibility criteria. The Apex Court, while setting aside the assessment of the High Court, held that the high Court has miscalculated in issuing guidelines to the appellants to treat the respondent as a candidate possessed of all the prearranged qualification and to asseverate his result.

In **A.P. Christians Medical Educational Society Vs. Government of Andhra Pradesh & Another** reported in (1986) 2 SCC 667, has unmistakably discoursed that the Court cannot issue direction to the University to safeguard the comforts of the students, who had been admitted to the medical college as that would be in strong indiscretion of the provisions of the University Act and the protocols of the University. The appropriate portion whereof is being quoted herein below:

"10. Shri K.K. Venugopal, learned counsel for the students who have been admitted into the MBBS course of this institution, pleaded that the interests of the students should not be sacrificed because of the conduct or folly of the management and that they should be permitted to appear at the University examination notwithstanding the circumstance that permission and affiliation had not been granted to the institution. He invited our attention to the circumstance that students of the Medical college established by the Daru-Salaam Educational Trust were permitted to appear at the examination notwithstanding the fact that affiliation had not by then been granted by the University. Shri Venugopal suggested that we might issue appropriate directions to the University to protect the interests of the students. We do not think that we can possibly acceed to the request made by Shri Venugopal on behalf of the students. Any direction of the nature sought by Shri Venugopal would be in clear transgression of the provisions of the University Act and the regulations of the University. ***We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws. ...."***
(Emphasis added)

Correspondingly, in the case of ***Gurdeep Singh Vs. State of Jammu and Kashmir & Others***, reported in 1995 Supp (1) SCC 188, the Apex Court, while probing the selection of a candidate, who was ineligible to be admitted, has held that in order to sustain the limpidness of academic progression, the selection and admission of respondent no.6 must be quashed. Paragraph-12 of the aforesaid judgment, which is relevant, reads as follows:

"12. What remains to be considered is whether the selection of respondent No. 6 should be quashed. We are afraid, unduly lenient view of the courts on the basis of

human consideration in regard to such excesses on the part of the authorities, has served to create an impression that even where an advantage is secured by stratagem and trickery, it could be rationalised in courts of law. Courts do and should take human and sympathetic view of matters. That is the very essence of justice. ***But considerations of judicial policy also dictate that a tendency of this kind where advantage gained by illegal means is permitted to be retained will jeopardise the purity of selection process itself; engender cynical disrespect towards the judicial process and in the last analyses embolden errant authorities and candidates into a sense of complacency and impunity that gains achieved by such wrongs could be retained by an appeal to the sympathy of the court. Such instances reduce the jurisdiction and discretion of courts into private benevolence. This tendency should be stopped. The selection of respondent No. 6 in the sports category was, on the material placed before us thoroughly unjustified. He was not eligible in the sports category. He would not be entitled on the basis of his marks, to a seat in general merit category. Attribution of eligibility long after the selection process was over, in our opinion is misuse of power.*** *While we have sympathy for the predicament of respondent No. 6, it should not lose sight of the fact that the situation is the result of his own making. We think in order to uphold the purity of academic processes, we should quash the selection and admission of respondent No. 6. We do so though, however, reluctantly."*

Further more, the Apex Court in the case of **Rajasthan State Industrial Development and Investment Corporation Vs. Subhash Indhi Cooperation Housing Society, Jaipur & Others** reported in (2013) 5 SCC 427, has observed that the State and statutory authorities are not bound by their erstwhile erroneous understanding or elucidation of law. The relevant portion whereof reads as follows:

"Be that as it may, there can be no estoppel against the law or public policy. The State and statutory authorities are not bound by their previous erroneous understanding or interpretation of law. Statutory authorities or legislature cannot be asked to act in contravention of law."

In assessment the aforesaid mature legal postulations of the law, this Court is of the estimation that the respondent-University has not committed any illicitness or aberration in cancelling the admission of the petitioners on the ground that they are ineligible for Ph.D. course, as they have not possessed second division marks under or upto graduate level, which is prerequisite under Clause 3.1 (b) of Ordinance, 2018 of the respondent-Commission. Therefore, Issue no.3 also answers against the petitioners.

28. Now, this Court comes to Issue No.2:

As already perceived above, the petitioners applied pursuant to news item/advertisement informed by the respondent-Commission for Research Eligibility Test, 2019. In spite of the fact that in the aforesaid news item/advertisement, it has unequivocally been mentioned that the candidates are required to retain minimum second division marks in Graduation, the petitioners, who did not possess the second division marks in Graduation, have applied pursuant to the aforesaid news item/advertisement, with open eyes and they themselves postured

them in a situation, where at the time of examination of their eligibility, they were found ineligible on account of not having minimum second division marks in graduation as per Clause 3.1 (b) of University Research Ordinances, 2018. In the stance of the Court, writ petitioners, after having applied and appeared in the test without any demur, are not authorized to encounter the same, after their admissions have been negated on the ground that their admissions are conflicting the Ordinances of the respondent-University.

The law on the subject has been crystalized in several decisions of the Apex Court Court

In the case of **Chandra Prakash Tiwari vs. Shantanu Shukla** reported in (2002) 6 SCC 127, the Apex Court has laid down the principle that when a candidate appears at an examination without demurral and is consequently found to be unrewarding, a challenge to the process is inhibited. The question of contemplating a petition challenging an examination would not ascend where a candidate has appeared and partaken. He or she cannot subsequently turn around and contend that the process was prejudice or that there was a hiatus therein, merely because the result is not palatable.

The Apex Court, in **Union of India v. S. Vinodh Kumar** reported in (2007) 8 SCC 100, has held as follows:

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same..."

In **Vijendra Kumar Verma v. Public Service Commission** reported in (2011) 1 SCC 150, the Apex Court has opined that the candidates who had participated in the selection process were cognizant that they were required to retain certain specific credentials in computer operations. The appellants had appeared in the selection process and after partaking in the interview sought to contest the selection process as being without jurisdiction. This was held to be verboten.

In the case of **Chandigarh Admn. Jasmine Kaur** reported in (2014) 10 SCC 521, it has been opined by the Apex Court that a candidate who takes a premeditated hazard or chance by subjecting himself or herself to the selection process cannot turn around and grumble that the process of selection was prejudiced after knowing of his or her non-selection.

In **Pradeep Kumar Rai vs. Dinesh Kumar Pandey**, reported in (2015) 11 SCC 493, the Apex Court has held that :

"Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

The Apex Court in the case of **Madras Institute of Development Studies and Another Vs. Sivasubramaniyam & Others** reported in (2016) 1 SCC 454,

dealing with the issue as to whether a person who determinedly takes part in the process of selection can turn around and question the scheme of selection is no longer res integra. Paragraph nos. 13 to 18 of the aforesaid judgment, read as follows:

"19. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment, turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.

20. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.

21. In Dr. G. Sarana vs. University of Lukcnow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held:-

"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: "It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

22. In Madan Lal & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that:-

"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only

because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash v. Akhilesh Kumar Shukla it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

23. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:-

"We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

24. In the case of Ramesh Chandra Shah and others vs. Anil Joshi & Others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under:-

"In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

In the case of **Ashok Kumar & Another Vs. State of Bihar & Others** reported in (2017) 4 SCC 357, the Apex Court has opined that those candidates who had taken part in the selection process astute with the procedure laid down therein were not authorized to question the same.

In view of the aforementioned established proposition of law, this Court is of the view point that as the petitioners applied pursuant to the news item/advertisement with open eyes and were declared eligible, they are not enabled to contest the said news item/advertisement after their admissions have been annulled by the respondent-University, as the same is antagonistic to the Ordinances, 2018. Hence, the Issue No.2 is also in negative to the petitioners.

29. This Court is now going to scrutinize the issue, as raised by the learned counsel for the petitioners that the principles of estoppels and acquiescence will apply against the University in the actualities of the present case.

It is settled proposition of law that estoppel does not lie against the Statute. (Vide **Delhi Development Authority Vs. Ravindra Mohan Aggarwal & Ors**., (1999) 3 SCC 172; and **M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu & Ors.,** (1999) 6 SCC 464). Nor the Court has an authority to issue any direction contrary to law. (Vide **Union of India & Ors. Vs. Kirloskar Pneumatic Co. Ltd.**, (1996) 4 SCC 453; **State of U.P. & Ors. Vs. Harish Chandra & Ors.,** (1996) 9 SCC 309; **Vice Chancellor, University of Allahabad & Ors. Vs. Dr. Anand Prakash Mishra & Ors.**, (1997) 10 SCC 264; and **Shish Ram & Ors. Vs. State of Haryana & Ors.**, (2000) 6 SCC 84).

A Constitution Bench of the Hon'ble Apex Court in **Dr. H.S. Rikhy etc. Vs. The New Delhi Municipal Committee**, reported in AIR 1962 SC 554, has emphatically held that question of estoppel does not arise against Statute, and the Court placed reliance upon **paragraph 427 of Volume XV, 3rd Edition of the Halsbury's Law of England**, wherein it has been observed as under:-

"Results must not ultra vires - A party cannot, by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do.. . . . "

The Apex Court in the said case precluded an analogous contention observing as under:-

"In this connection, it is also convenient here to notice the argument that the Committee is estopped by its conduct from challenging the enforceability of the contract. The answer to the argument is that where a Statute makes a specific provision that a body corporate has to act in a particular manner and no other, that provision of law being mandatory and not directory, has to be strictly followed."

Similar view has been recapped by the Apex Court in **Bengal Iron Corporation Vs. Commercial Taxes Officer & Ors.**, AIR 1993 SC 2414; **S. Saktivel Vs. M. Venugopal Pillai, (2000) 7 SCC 104; Chandra Prakash Tiwari Vs. Shakuntala Shukla**, (2002) 6 SCC 127; and **I.T.C. Ltd. Vs. Person Incharge, AMC, Kakinada & Ors.,** (2004) AIR SCW 792.

Similarly, in **A.C. Jose Vs. Sivan Pillai** reported in AIR 1984 SC 921, a similar view has been reiterated by the Apex Court perceiving as under:-

"Lastly, it was argued by the counsel for the respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process, although he was present in the meeting personally or through his agent. This argument is wholly untenable because when we are considering a constitutional or statutory provision, there can be no estoppel against a Statute and whether or not the appellant agreed or participated in the meeting, which was held before introduction of the voting machines. If such a process is not permissible or authorised by law, he cannot be estopped from challenging the same."

In **Union of India & Ors. Vs. Godfrey Philips India Ltd**., reported in

(1985) 4 SCC 369, it was held by the Apex Court that:-

"There can be no promissory estoppel against the Legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition.....promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. .....promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it....."

Thus, in interpretation of the above, the question of application of estoppel against Statute/Public Policy does not arise, as the Ordinance, 2018 outlined by the respondent-University has a statutory dynamism and the respondent-University cannot be constrained to take admission of a student against the qualifications prescribed in statutes. As such, the issue as raised by the learned counsel for the petitioners has no force and the same cannot be acknowledged.

30. It is no doubt accurate that all the concerns deliberated herein above have gone against the petitioners, in view of the conclusions of the Apex referred to above but this Court also cannot lose of the sight of the fact that despite the fact that in the news item/advertisement notified by the respondent-Commission, it has unambiguously been stated that the candidates are required to possess minimum second division marks in Graduation, the petitioners, who did not possess the second division marks in Graduation, the petitioners applied pursuant to the aforementioned news item/advertisement, and they themselves postured them in a situation, where at the time of scrutiny of their eligibility i.e. after nearly two years, they were found ineligible on account of not having minimum second division marks in graduation as per Clause 3.1 (b) of University Research Ordinances, 2018, but it is also correct that there is a fault on the part of the respondent-University, which declared the petitioners eligible for Research Eligibility Test and they have continued in the Pre Ph.D. Course for nearly two years, meaning thereby that the petitioners have spent his tresurable time in enduring the same.

31. In assessment of the aforesaid, this Court finds that the petitioners as well as the respondent-Commission are found at culpability in admissions of the petitioners, which is disagreeing to the Ordinances of the respondent-university. This Court under Article 226 of the Constitution of India is a Court of equity and impartiality, therefore, the justice should be done between the parties with the same fair-mindedness.

Considering the issue of equity, the Apex Court in the case of **Ashok Chand Singhvi Vs. University of Jodhpur & Ors.** reported in 1989 Supreme (SC) 38 in paragraph-17, has held that candidate cannot be made to suffer adversity for impreciseness and onerousness of authorities-Statutes, rules and regulations of University. Relevant portion whereof read as follows:

".....At the same time, this Court took the view that the fault lay with the engineering colleges which admitted the appellants and that there was no reason why the appellants should suffer for the sins of the management of these engineering colleges. Accordingly, this Court allowed the appellants to continue their studies in the respective engineering colleges in which they were granted admission. **The same principle which weighed with this Court in that case should also be applied in the instant case. The appellant was not at fault and we do not see why he should suffer for the mistake committed by the Vice-Chancellor and the Dean of the Faculty of Engineering."**

The Calcutta High Court, in the case of **Dr. Pawan Kumar Agarwal & Etc. vs. The University of Calcutta And Anr.** reported in AIR 1998 Cal 105, has held as follows:

"87. It appears therefore that the Vice-Chancellor acted mechanically and without application of his mind and passed order which had the penal consequence affecting the career of the students. The Vice-Chancellor acted merely on the basis of the observations of the Dean and did not personally apply his mind which he should have after giving opportunity to the petitioners to explain their position. Facts on record as already noted clearly demonstrate that the Vice-Chancellor did not apply his mind in taking such decision of cancellation of admission and failed

88. Accordingly I am of the opinion that there is gross violation of natural justice and absence of fairplay and fairness in action. The petitioners should not be made to suffer for the alleged irregularity in the internal administration of the University. The petitioners have already completed their studies and have appeared at the examinations. The order of cancellation of admission dated 23rd August, 1993 is accordingly set aside. The University is directed to publish the result of the petitioners forthwith."

Again the Apex Court Court, in the case of **Rajendra Prasad Mathur Vs. Karnataka University & Another** reported in 1986 (Supp) SCC 740, has held that though the appellants were not eligible for admission to the engineering degree course and they had no legitimate entitlement to such admission but the blameworthiness for their undeserved admissions must lie more upon the engineering colleges which contracted admission than upon the appellant-students, because the Principals of these engineering colleges must have known that the appellants were not eligible for admission and yet for the sake of capitation fee in some of the cases they granted admission to them. The appellants being fledgling students might have sincerely presumed that they were eligible for the admission. Therefore, notwithstanding the datum that the appellants were ineligible for the admission, they must be allowed to continue their studies in the respective engineering colleges in which they were granted admission. The relevant portion of

the judgment of the Apex Court reads as follows:

"8. .....But it must be noted that the blame for their wrongful admission must lie more upon the Engineering Colleges which granted admission then upon the appellants. It is quite possible that the appellants did not know that neither the Higher Secondary Education of the Secondary Education Board, Rajasthan nor the first year B.Sc. Examination of the Rajasthan and Udaipur Universities was recognised as equivalent to the Pre-University Examination of the Pre-University Education Board, Bangalore. The appellants being young students from Rajasthan might have presumed that since they had passed the first year B.Sc. Examination of the Rajasthan or Udaipur University or in any event the Higher Secondary Examination of the Secondary Education Board, Rajasthan they were eligible for admission. The fault lies with the Engineering Colleges which admitted the appellants because the Principals of these Engineering Colleges must have known that the appellants were not eligible for admission and yet for the sake of capitation fee in some of the cases they granted admission to the appellants. We do not see why the appellants should suffer for the sins of the managements of these Engineering Colleges. ***We would therefore, notwithstanding the view taken by us in this Judgment allow the appellants to continue their studies in the respective Engineering Colleges in which they were granted admission. But we do feel that against the erring Engineering Colleges the Karnataka University should take appropriate action because the managements of these Engineering Colleges have not only admitted students in eligible for admission but thereby deprived an equal number of eligible students from getting admission to the Engineering Degree Course. We also endorse the directions given by the learned Judge in the penultimate paragraph of his Judgment with a view to preventing admission of ineligible students.***

The Delhi High Court in its latest judgment in the case of Abha George & Ors. vs. All India Institute of Medical reported in 2022 SCC Online Del 366, following the numerous rulings of the Apex Court has held that in the actualities and surroundings of the case, the respondents cannot be endorsed to take benefit of their identifiable wrong and cannot be permitted to take the entreaty that under the prospectus they had the authority to terminate the admission of ineligible students and the principle of estoppel will steer against them. The respondents are estopped from annulling the admission of the petitioners and further from thwarting them from pursuing the 'Pre Tib' course in the contemporaneous realities and statuses.

32. This Court also cannot loose sight of the element that human approach does not entail leaning in favour of one party. The Courts and Tribunals, while dealing with the statutory provisions, should not be channelled with altruistic contemplation and emotional appeal for the reason that if Courts advance on these basis, it would amount to fluctuating or modifying the statutory provisions or necessities of law.

In **Madamanchi Ramappa & Anr. Vs. Muthaluru Bojjappas**, AIR 1963 SC 1633, the Apex Court held as under:-

"What is administered in courts is justice according to law and consideration of fair play and equity however important

they may be, must yield to clear and express provisions of the law."

Correspondingly, in **Gauri Shanker Gaur Vs. State of U.P**. reported in AIR 1994 SC 169, it has been held by the Apex Court that "in interpreting a statute even handedness will not discharge against a public statute of broad spectrum policy in cases admitted to fall within the statute and it is the responsibility of the Court to give effect to the legislative intent."

Thus, equity can supplement to but cannot supplant the statutory provisions and if any room is given for impartiality or compassion, the recruitment rules would become nugatory and field would be left open for nepotism. Thus, it is not permissible to bend the law for adjusting equity. (Vide Ahmedabad Municipal Corporation Vs. Virendra Kumar Patel, (1997) 7 SCC 650; and Smt. Rampati Jaiswal Vs. State of U.P. & Ors., AIR 1997 All. 170).

33. However, bearing in mind the element that the petitioners have been granted admissions to Pre-Ph.D. course by the respondent-University, despite the datum that they did not possess second division at graduate level, as is essential under news item/advertisement acquainted by the respondent-University, as per Clause 3.1 (b) of the Ordinances, 2018 and they have perused their studies for nearly two years as also the information that in the said admission of the petitioners, both the petitioners as well as officials/officers of the respondent-University are also accountable and till date of final hearing of this matter, no officer or official has been penalized by the respondent-University for yielding erroneous admissions to the petitioners as well as seeing their bright career, this Court feels it apposite in the interest of substantial justice to direct the respondent-University to authorization of the petitioners to complete their Pre-Ph.D. course treating this case to be distinctive. It is ordered, accordingly.

34. It is clarified that this case will not be taken as a precedent.

35. Both these writ petitions stand disposed of subject to the observations made above.

(2022)06ILR A195
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DINESH PATHAK, J.

Writ-C No. 6737 of 2022

M/S Om Construction Sole Prop. ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Javed Husain Khan, Gulrez Khan, Sr. Advocate

Counsel for the Respondents:
C.S.C., Vinod Kumar Chandel

A. Civil Law - UP Kshettra Samiti and Zila Parishad Rules, 1984 – R. 18 – First Amendment Rules, 2020 – Participation in work-contract of Parishad – Prescription of Eligibility – Rule 18 provide no requirement of registration with Labour Department – Contrary to it advertisement required so – Technical bid of petitioner was rejected due to lack of registration – Legality challenged – Held, in the absence of any statutory provision, the Zila Panchayat was fully empowered to prescribe eligibilities/ ineligibilities that were required to be fulfilled by persons

applying for the contract – Since the tender was invited in respect of a work contract, consequently, the prescription of the condition that an applicant applying for the contract should be registered with the Labour Department cannot be said to be illegal or arbitrary or contrary to Rule 18. (Para 9 and 12)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Manoj Kumar Gupta, J. & Hon'ble Dinesh Pathak, J.)

1. The instant writ petition has been filed praying for quashing of the order dated 4/5.01.2022 and also the contract agreement dated 7.01.2022 executed in favour of respondents no.6 & 7 and for a further direction to respondents no.2 to 5 to accept the technical bids of the petitioner and thereafter proceed to consider the financial bids.

2. The facts in brief necessary for adjudication of the present petition are that the petitioner is a registered firm of C category in Public Works Department, Mirzapur. Respondent no.2, Zila Panchayat invited tenders for various works. The petitioner firm applied for the works shown at serial nos.50, 51, 52, 67, 97 and 98. Its technical bid has been rejected in respect of work no.51 and 52 on the ground that it is not registered with the Labour Department. The decision of Technical Bid Committee dated 4/5.01.2022 in shape of office memorandum is under challenge to the extent it seeks to disqualify the bids of the petitioner firm in respect of work no.51 and 52.

3. The contention of learned counsel for the petitioner is that the Works in respect of which bids were invited are governed by the Uttar Pradesh Kshettra Samiti and Zila Parishad Rules, 1984. Initially Rule 18 permitted participation of only approved contractors whose names figure in a register maintained in the office of the Parishad or Kshettra Samiti in Form No.W-1. Rule 18 was subject matter of challenge in Writ-C No.8847 of 2020 Narayan Verma and another Vs. State of U.P. and 3 others and was decided by a Coordinate Bench by judgement dated 17.3.2020. The Division Bench, after considering Rules 18 and 19, held that the rule framing authority never intended to confine the work contracts of the District Panchayats only to the approved contractors or registered contractors under Rule 18. The relevant part of the discussion from the said judgement is extracted below:-

"By force of clause (iii), the terms used but not defined in the Rules shall have the meaning assigned to them in Rule 2 of the Rules of 1965. On going through the Rules aforesaid we noticed that the term approved contractor is not defined therein too. In absence of the definition of the term aforesaid, the amplitude of it cannot be extended to cause discrimination among the contractors placed on registered roll of government departments and further to restrict the choice of Panchayat Raj institutions to limited sphere. It is always desirable to have a broad and better choice with a view to achieve and attain better quality of work. A statute is required to be interpreted in the fashion that allows it to be workable at its optimum and also in consonance to the thrust of the complete enactment. The position would have been different, if any restriction would have been given in the Rules of 1984 or by specific assertion the "approved contractor" would have been defined in such a manner to create monopoly in grant of work on

contract. In entirety, we have to interpret Rule 18 and the term "Approved Contractor" to satisfy thrust of the Rules. As such, a conjoint reading of Rules 18 and 19 of the Rules of 1984 and by taking care of other provisions we have to see the intention of the Rule framing authority. For the reasons already given, we are having no doubt that the Rule framing authority was not intending to confine the work contracts of the district panchayats only to the approved contractors or registered contractors under Rule 18."

4. It is submitted that after the said judgement, Rule 18 was amended by the First Amendment Rules, 2020 notified in U.P. Extraordinary Gazette dated 14th July, 2020. The amended Rule 18 reads thus:-

"18. Registration and qualification of contractors:-

In addition to the contractors registered in all the Zila Panchayats, the contractors also registered in the irrigation department, public works departments of the State Government will be eligible to participate in the tenders to be invited in regard to the construction and other works of the Zila Panchayats and in case of the tender being lowest for a particular work, the contractor shall be made to deposit required registration fees in the Zila Panchayat for the purpose of registration by means of a demand draft/e-banking and it shall be compulsory for the Zila Panchayat to register that contractor which one week and ask him to deposit security etc. according to the terms and conditions of the particular tender and Zila Panchayat shall execute an agreement with him. A sum of Rs.10000 (Rs. Ten Thousand only) shall be deposited by contractors as registration fees in the Zila Panchayat."

5. It is submitted that under amended Rule 18, there is no requirement of a person participating in contract to be registered with Labour Department, therefore, the condition in the advertisement relating thereto (Condition No.9) is illegal and contrary to the amended Rule 18. Therefore, the technical bid of the petitioner has been wrongly rejected.

6. Learned counsel appearing on behalf of respondents no.2 to 5 Sri V.K. Chandel submitted that the petitioner firm participated with full knowledge of the stipulations under the contract, particularly condition no.9, as it had submitted other documents prescribed under the said clause except the registration certificate with the Labour Department. He further submitted that some contracts have been awarded to respondents 6 and 7 long back and at this distance of time, the petition should not be entertained. He also submitted that the amendment to Rule 18 would not mean that the Zila Panchayat was denuded of its power to prescribe other conditions including the one relating to an applicant being registered with the Labour Department.

7. We have considered the submissions of learned counsel for the parties and perused the record. Condition No.9 of the advertisement reads thus:-

"निविदादाता को समस्त प्रपत्र नीश्चित प्रारूप टी-4, टी0- 5, टी -6 पैनकार्ड, जीसटी प्रमाण पत्र, श्रम पंजीयन तथा पंजीयन प्रमाण पत्र व अन्य अभिलेख प्रत्येक बिड के साथ लगाना अनिवार्य है।"

8. The petitioner has admittedly submitted Character Certificate, Solvency Certificate, G.S.T. registration, PAN Card

and other documents required to be filed under Clause no.9 and other clauses of the advertisement except the registration certificate with the Labour Department. The issue for consideration is whether in view of amended Rule 18, the requirement of filing certificate of registration from the Labour Department is valid or not.

9. A perusal of unamended Rule 18 reveals that it restricted the right to participate in work contracts of a Parishad or a Kshettra Samiti to a limited class of contractors who were registered in the office of the Parishad or Kshettra Samiti and their name figures in Form No.W-1 maintained in this behalf. It seems that a Government Order dated 16.8.2019 was issued by the State Government whereby all the contractors registered with any of the government department were held entitled to participate in tender floated by district panchayats. The said Government Order was challenged in Writ Petition (MB) No.6025 of 2020, Ashok Kumar Singh Vs. State of U.P. on the ground that it goes contrary to Rule 18. The challenge was upheld on the reasoning that a G.O. can supplement the Rule, but not supplant it.

10. The unamended Rule 18 was again subject matter of consideration in Writ Petition No.8874 of 2020 Narayan Verma and another Vs. State of U.P. and others in context of a challenge made to the same Government Order dated 16.8.2019. This time, another Division Bench deciding the issue by judgement dated 17.3.2020 declared the earlier judgement in Ashok Kumar Singh (supra) to be per incuriam on account of non-consideration of other provisions of the Rules, particularly Rule 19 and held that the rule making authority never intended to restrict the work contracts of the District Panchayats only to the approved contractors or registered contractors under Rule 18. It seems that despite the above clarification made by the Division Bench in Narayan Verma (supra), Rule 18 was amended. The amendment is clarificatory in nature and the effect of the amendment is that now it has unequivocally been provided that apart from the persons registered in Form No.W-1 in the office of Parishad or Kshettra Panchayat, other contractors also registered in the irrigation department and public works departments of the State Government would be eligible to participate in the tenders to be invited in regard to construction and other works by the Zila Panchayats.

11. The amendment in Rule 18 thus lays down the zone within which an applicant should fall to entitle him to participate in the tender. It does not lay down the eligibilities or ineligibilities for the contractors participating in the tender process. In fact, none of the Rules prescribe the same. These were prescribed in the e-tender notice by the respondent Zila Panchayat.

12. In the absence of any statutory provision, the Zila Panchayat was fully empowered to prescribe eligibilities/ ineligibilities that were required to be fulfilled by persons applying for the contract. No doubt, such conditions are to be reasonable and logical and should have nexus with the purpose for which such requirements are prescribed. Since the tender was invited in respect of a work contract, consequently, the prescription of the condition that an applicant applying for the contract should be registered with the Labour Department, in our opinion, cannot be said to be illegal or arbitrary or contrary

to Rule 18. In fact, as held above, there is no scope of such a condition coming in conflict with Rule 18 , as it operates in a different field.

13. Apart from the above, we also find sufficient force in the submission of learned counsel for respondents no.2 to 5 that the contract work having been settled in favour of respondents no.6 and 7 long back in the month of January, 2022 itself, it is not a fit case to interfere.

14. Having regard to the above discussion, the writ petition fails and is hereby dismissed.

(2022)06ILR A199
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-C No. 13077 Of 2022

Ravi Offset Printers & Publishers Pvt Ltd., Agra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan(Senior Advocate), Sri Kunal Ravi Singh, Manjari Singh

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 19 – Contract matter – Policy decision – Judicial interference – Scope – Validity of clause 9(A) of E-tender was challenged – Held, in the matter of a policy decision so taken by the tender issuing authorities, a judicial restrain is to be resorted to and merely because certain terms and conditions seems to be not suitable to a particular party cannot be a ground to hold it illegal, arbitrary or in violation of Article 19 of the Constitution of India – Clause 9 (1) and (4) of Clause 9-A of the tender dated 21.4.2022 does not suffer from any infirmity or illegality and the same is confirmity and consonance under Article 19 of the Constitution of India. (Para 29 and 35)

Writ petition dismissed (E-1)

List of Cases cited :-

1. Bareilly Development Authority & anr. Vs Ajai Pal Singh & ors. 1989 (2) SCC 116

2. St. of Gujrat & anr. Vs Meghji Pethraj Shah Charitable Trust & ors. 1994 (3) SCC 552

3. St. of U.P. & ors. Vs Bridge & Roof Company (India) Ltd.; 1996 (6) SCC 22

4. India Thermal Power Ltd. Vs St. of M.P. & ors. 2000 (3) SCC 379

5. Tata Cellular Vs U.O.I.; 1994 (6) SCC 651

6. Caretel Infotech Ltd. Vs Hindustan Petroleum Corp. Ltd. & ors. 2019 (14) SCC 81,

7. Uflex Limited Vs Government of Tamil Nadu & ors. 2022 (1) SCC 165

8. National High Speed Rail Corp. Ltd. Vs Montecarlo Ltd. & anr.; AIR (2022) SC 866

9. M/s Agmatel India Pvt. Ltd. Vs M/s. Resoursys Telecom & ors. AIR (2022) SC 1103

10. Monark Infrastructure (P) Ltd. Vs Commercial Ullas Nagar Municipality & ors. AIR (2000) SC 2272

(Delivered by Hon'ble Vivek Kumar Birla, J. & Hon'ble Vikas Budhwar, J.)

1. The extent and the scope of judicial interference in writ jurisdiction in the matter of tenders so floated by public authorities is the subject matter of present proceedings.

2. Factual matrix of the case as worded in the present petition are that the petitioner claims itself to be a private

limited company by the name and style of Ravi Offset Printers And Publishers Pvt. Ltd. having its office at C-60, 61, 62, 63 EPIP, Shasti puram, Agra-282007 engaged in the trade of printing and supply of books pertaining to educational stream in the State of U.P. According to the petitioner, it applied for e-tender referable to the academic years 2020-2021 and 2021-2022 for providing the books pertaining to NCERT (National Council of Educational Research and Training). It has come on record that in the year 2020 itself the petitioner participated in the e-tender and deposited the earnest money in the form of FDR no. 774111 for an amount of Rs. 12,62,000/- along with the prescribed tender fee and thereafter, the petitioner was found to be the lowest bider and awarded contract which eventually culminated into execution of agreement of 03.03.2020 between the second respondent (Madhyamik Shiksha Parishad) on one hand and the petitioner on the other hand for the purpose in printing and supply of NCERT books for class IXth to XIIth for the student studying in Government aided/unaided recognized schools in State of U.P.. It has further been averred that a work order was on 07.03.2020 with regard to printing and distribution of of NCERT books.

3. Pleadings further reveals that due to the onslaught of the pandemic relating Covid-19 a nationwide lockdown was put to motion resulting that all the commercial activities came to stands still and the petitioner could not execute agreements and honour the commitments and the obligations which it wanted to discharge as a bidder. On account of the circumstances so occasioned as referred to above certain disputes arose between the petitioner and the second respondent with regard to the payment of royalty and GST amount necessitating issuance of demand notice dated 12.03.2020, 18.06.2020, 10.08.2020, 01.10.2020, 24.11.2020 and 30.12.2020 seeking recovery of a certain amount. The petitioner herein as per its own saying took recourse to arbitration while invoking arbitration clause and thereafter, preferred an Arbitration and Cancellation Application under Section 11(4) no. 14 of 2021 being (Ravi Offset Printers And Publishers Pvt. Ltd. s. Madhyamic Siksha Parishad U.P.) before the Court which came to be decided while appointing one of the retired judge of this Court as the sole arbitrator. Record further reveals that the petitioner preferred claim petition before the sole arbitrator which is annexed as annexure-3 at page no. 36 of the petition along with stay application seeking following reliefs:-

"(ii) Set-aside the Impugned Demand Notices dated 12.03.2020, 18.06.2020, 10.08.2020, 01.10.2020 & 24.11.2020 as well as impugned Order dated 30.12.2020.

(iv) Direct the Opposite Party to discharge/release the FDR No.774111 dated 03.02.2020, amounting to Rs. 12,62,000/-, deposited by the Claimant as Earnest Money Deposit."

4. According to the learned counsel for the petitioner the arbitration proceeding which are stated to be pending before the sole arbitrator being arbitration case no. 14 of 2021 was begin lingered on, on account of non-cooperation of respondents as they have not even deposited the fee of the learned Arbitrator and in fact on 22.03.2022 the petitioner got deposited the entire fee execution of the respondents herein

5. Record further reveals that an e-tenders has been again issued by the second

respondent on 21.04.2022 for procurement of books of NCERT for the academic year 2022-2023 for class IXth to XIIth copy of the e-tender dated 21.04.2022 is at page no. 16 of the writ petition.

6. Relevant extract of the offending provision of e-tender notice dated 21.04.2022 referable to the academic year 2022-2023 which is subject matter of the present petition is being quoted hereinunder:-

"पूर्व के ऐसे प्रकाशक / मुद्रक जिन पर माध्यमिक शिक्षा परिषद, उत्तर प्रदेश का जी०एस०टी० सहित रायल्टी बकाया है उनकी निविदायें विचारणीय नहीं होगी।

किसी प्रकार का विधिक विवाद शिक्षा विभाग के साथ न हो।"

7. Alleging the sub clause 1 and sub clause 4 of clause 9 (A) of e-tender dated 21.04.2022 being in violation of Article 19 of the Constitution of India besides being arbitrarily discriminatory, the petitioner herein has filed the present petition seeking following reliefs:-

"(I) Issue a writ order or direction in nature of certiorari quashing the sub clause 1 and 4 of clause 9 (A) of tender dated 21.04.2022 (Annexure-1) with regard to ineligibility of the petitioner to apply for the tender.

(II) Any other or further relief with the Court may deem fit and proper under the facts and circumstances of the case;

(III) Award the cost of writ petition."

8. Heard Sri Shashi Nandan,learned Senior Counsel assisted by Sri Kunal Ravi Singh, learned counsel for the petitioner as well as Sri Amit Kumar Singh, learned Additional Chief Standing who appears for the respondents.

9. Sri Shashi Nandan learned Standing Counsel assisted by Sri Kunal Ravi Singh has made the following submissions:-

A. The e-tender dated 21.04.2022 containing the conditions under the heading sub clause 1 and 4 of clause 9 (A) is not only arbitrary discriminatory and illegal but it is violative under Article 19 of the Constitution of India.

B. Merely because certain disputes have been raised by second respondent, Madhyamik Shiksha Parishad with regard to payment of royalty and GST for the preceding academic years, it will not denude the petitioner of its fundamental right to profess its trade while participating in the tender and exclude it from the zone of consideration.

C. Zone of consideration cannot be compartmentalised in such a manner so as to exclude in participating in the bid particularly when the stage of screening would come subsequently, when the bids are to be finalized.

D. In absence of any quantification of the amount of royalty and GST so claimed by the second respondent, the same cannot partake the character of a dispute or exclude the petitioner from zone of consideration.

10. Sri Amit Kumar Singh, learned Additional Chief Standing Counsel has opposed the writ petition while arguing that the present wit petition so instituted at the behest of the petitioner, is not maintainable as by virtue of the present writ petition, the petitioner is seeking relief of alteration of the terms and the condition so embodied in the e-tender. It has been further argued by Sri Singh that it is the province of the employer/tender issuing authority to engraft terms and conditions which is not within the realm of Article 226 of the

Constitution of India. In nutshell, the submission of learned Additional Chief Standing Counsel is to the extent that the petitioner being one of the aspirant cannot dictate that a particular condition should be engrafted in the tender which suits to it.

11. We have heard the learned counsels for the parties and perused the record.

12. Undisputedly, petitioner claims itself to be one of the aspirant who wanted to participate in the e-tender so issued on 21.04.2022 for procurement of books of NCERT for the academic year 2022-2023 for the class of IXth to XIIth.

13. According to Sri Shashi Nandan, learned Senior Counsel, the only obstacle which denudes the petitioner to come within the zone of consideration is sub clause 1 and 4 of Clause 9 (A) of the e-tender dated 21.04.2022.

14. So far as the sub clause on of Clause 9 (A) of e-tender itself provides that one of the essential condition to participate in the e-tender is this that an aspirant should not be defaulter with respect to payment of royalty and GST. Similarly, the sub clause 4 of Clause 9 (A) of the tender condition itself shows that an intending party who participates in the tender should not have any legal dispute with respondent no. 2, Madhyamik Shiksha Parishad.

15. In case in hand this Court finds that there exists certain disputes referable to non-payment of royalty and GST at the end of the petitioner pursuant thereon demand notices were issued for recovery of certain amount which was quantified and the same was carried in arbitration pursuant whereto by the order of this Court sole arbitration has been appointed for the arbitration proceedings are stated to be pending.

16. Now a question arises as to whether, the conditions so embodied in sub clause 1 and 4 of Clause 9 (A) of the e-tenders can be held to be illegal arbitrary or violative of Article 19 of the Constitution of India at the behest of the petitioner wherein the petitioner admittedly has certain disputes with the respondent no. 2 and the matter is stated to pending before arbitrator wherein after quantification of the amount referable to royalty and GST demand notice has been issued.

17. Another issue which needs to be noticed is the scope of judicial intervention in the matter of prescription the covenant/terms and the conditions engrafed in the tender.

18. The Hon'ble Apex Court in the case of **Bareilly Development Authority And Another Vs. Ajai Pal Singh And Others reported in 1989 (2) SCC 116** in paragraph no. 22 has observed as under:-

"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."

19. The Hon'ble Apex Court in the case of **State of Gujrat and Anothers vs. Meghji Pethraj Shah Charitable Trust And Others 1994 (3) SCC 552** in paragraph no. 22 has observed as under:-

"22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alterant partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was - as has been repeatedly urged by Sri Ramaswamy - a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further."

20. In the case of **State of U.P. and Others vs. Bridge & Roof Company (India) Ltd. reported in 1996 (6) SCC 22**, the Hon'ble Apex Court in paragraph nos. 15 and 16 has observed as under:-

"15. In our opinion,the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings,i.e,in the writ petition filed by it.The High court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiteration the effect of the order of the Deputy commissioner made under the proviso to section 8-D (1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is governed by the provisions of the contract Act or may be,also by certain provisions of the sale of Goods Act.Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated,in a writ petition. That is a matter either for arbitration as provided by the contract of for Civil court as the case may be. whether any amount is due to the respondent from the appellant-Government under the contract and,if so,how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition,viz.,to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High court under Article 226. Indeed, the High Court has not granted the said prayer."

21. In the case of **India Thermal Power Ltd. vs. State of M.P. And Others 2000 (3) SCC 379**, the Hon'ble Apex Court in paragraph no. 11 has observed as under:-

"11. It was contended by Mr. Cooper, learned senior counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPPs had entered into PPAs under Sections 43 and 43A of the Electricity Supply act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their

terms and conditions. This contention has been upheld by the High Court, in our opinion the said contention is not correct and High Court was wrong in accepting the same. Section 43 empowers Electricity Board to enter into arrangement for purchase of electricity on such terms as may be agreed. Section 43 A(l) provides that a generating company may enter into a contract for the sale of electricity generated by it with Electricity Board, As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the official gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision con-tained in section 43A(2) and notifications issued thereunder. Merely be-cause a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contact incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contact may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). Opening and maintaining of an Escrow Account or an Escrow Agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining Escrow Accounts that obligation cannot be regarded as statutory."

22. Proposition of law so called out in the above noted judgments itself draws irresistible conclusion that merely because a contract has been floated by the Government or its instrumentalities would not be said to be a statutory contract amenable to writ jurisdiction as even otherwise there is a marked difference between a contract floated as a commercial venture and a statutory contract.

23. Another facet which needs to be addressed is with regard to the fact as to the scope of judicial intervention in the matter of tenders and contracts while using judicial platform so as to advise the tender enacting authority to include certain conditions and to exclude some conditions which finds its presence in the contract itself.

24. The Hon'ble Apex Court in the case of **Tata Cellular vs. Union of India reported in 1994 (6) SCC 651** in paragraph no. 94 has observed as under:-

"94. The principles deducible from the above are :

(1) The modem trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative

decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

25. In the case of Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited And Others reported in 2019 (14) SCC 81, the Hon'ble Apex Court in paragraph nos. 37 to 43 has observed as under :-

"37. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector.

38. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.3, this Court has expounded further on this aspect, while observing that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. It has been cautioned that Constitutional Courts are expected to

exercise restraint in interfering with the administrative decision and ought not to substitute 3 (2016) 16 SCC 818 their view for that of the administrative authority. Mere disagreement with the decision making process would not suffice.

39. Another aspect emphasised is that the author of the document is the best person to understand and appreciate its requirements. In the facts of the present case, the view, on interpreting the tender documents, of respondent No.1 must prevail. Respondent No.1 itself, appreciative of the wording of clause 20 and the format, has taken a considered view. Respondent No.3 cannot compel its own interpretation of the contract to be thrust on respondent No.1, or ask the Court to compel respondent No.1 to accept that interpretation. In fact, the Court went on to observe in the aforesaid judgment that it is possible that the author of the tender may give an interpretation that is not acceptable to the Constitutional Court, but that itself would not be a reason for interfering with the interpretation given. We reproduce the observations in this behalf as under:

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

40. We may also refer to the judgment of this Court in Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr.,4 authored by one of us (Sanjay Kishan Kaul, J.). The legal principles for interpretation of commercial contracts have been discussed. In the said judgment, a reference was made to the observations of the Privy Council in Attorney General of Belize v. Belize Telecom Ltd. 5 as under:

"16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended..." ....

"19. .....In Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

"the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more

suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

41. Nabha Power Limited (NPL)6 also took note of the earlier judgment of this court in Satya Jain (Dead) Through LRs. and Ors. vs. Anis Ahmed Rushdie (Dead) Through LRs. and Ors.7, which discussed the principle of business efficacy as proposed by Bowen, L.J. in the Moorcock8. It has been elucidated that this test requires that terms can be implied only if it is necessary to give business efficacy to the contract to avoid failure of the contract and only the bare minimum of implication is to be there to achieve this goal. Thus, if the contract makes business sense without the implication of terms, the courts will not imply the 6 (supra) 7 (2013) 8 SCC 131 8 (1889) LR 14 PD 64 (CA) same.

42. The judgment in Nabha Power Limited (NPL) 9 concluded with the following observations in para 72:

"72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any "implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

43. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the 9 (supra) opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit." \

26. Following the judgments, the Hon'ble Apex Court in the case of Uflex Limited vs. Government of Tamil Nadu And Others reported in 2022 (1) SCC 165 in paragraph no. 43 has observed as under :-

"43. The present dispute has its history in many prior endeavours by the original petitioners which have proved to be unsuccessful. It does appear that in a competitive market they have not been so successful as they would like to be. Merely because a company is more efficient,

obtains better technology, makes more competitive bids and, thus, succeeds more cannot be a factor to deprive that company of commercial success on that pretext. It does appear to us that this is what is happening; that the two original petitioners are endeavouring to continuously create impediments in the way of the succeeding party merely because they themselves had not so succeeded. It is thus our view that the Division Bench has fallen into an error in almost sitting as an appellate authority on technology and commercial expediency which is not the role which a Court ought to play."

27. Recently, in the case of National High Speed Rail Corporation Limited vs. Montecarlo Limited And Another reported in AIR (2022) SC 866, the Hon'ble Supreme Court in paragraph nos. 7.6, 7.7, 7.8, 7.8(1), 7.8(2), 7.8(3) and 7.8(4) has observed as under :-

"7.6 At this stage, it is to be noted that what can be said to be substantially responsive Technical Bid has been defined under Article 33.2. The High Court in the impugned order has observed and held that the Bid submitted by the original writ petitioner can be said to be substantially responsive Technical Bid. However, it is required to be noted that when the author of the tender document, in the present case, JICC/JICA, had taken a conscious decision that the Bid submitted by the respondent - original writ petitioner can be said to be non-responsive and suffering from material deviation, it was not for the High Court to consider/opine whether the Bid submitted by the original writ petitioner is substantially responsive Technical Bid or not unless the decision is found to be perverse and/or suffered from mala fides and/or favoritism.

7.7 At the cost of repetition, it is to be noted that under the contractual obligation, it was not open for the appellant - corporation and/or even the Republic of India to deviate from any of the terms and conditions of the loan agreement and/or the decision of JICC/JICA. Therefore, in absence of any allegation of mala fides/arbitrariness and/or favouritism, we are of the opinion that the High Court has committed a grave error in interfering with a conscious decision taken by the JICC/JICA, which has been followed by the appellant.

7.8 At this stage, few decisions of this Court on the interference by the Courts in the tender matters are required to be referred to:-

7.8.1 In the case of Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited, AIR 2016 SC 4305, this Court in paras 11 to 13 and 15 has observed and held as under :-

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622, it was held by this Court, relying on a host of decisions that the decision- making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision- making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons v. Port of Bombay, (1989) 3 SCC 293, it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India, (1994) 6 SCC 651 went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, as mentioned in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 (AIR) 2016 SC 3814

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

7.8.2 In the case of B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. and Ors., (2006) 11 SCC 548, after considering the various decisions of this Court on the point enumerated in para 66, this Court has observed and held as under:

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially

complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

7.8.3 In the case of Michigan Rubber (India) Limited Vs. State of Karnataka, (2012) 8 SCC 216, after considering various other decisions of this Court on the point, more particularly, after considering the decisions in the case of Jagdish Mandal (supra) and Tejas Constructions and Infrastructure (P) Ltd. (supra), in paras 23 and 24, this Court has observed and held as under:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected? If the answers to the above questions are in the negative, then there should be no interference under Article 226."

7.8.4 In the case of the Central Coalfields Limited & Anr. Vs. SLL- SML [A Joint Venture Consortium] and Ors., (2016) 8 SCC 622, it is specifically observed and held by this Court that the

Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. It is further observed that whether a term of NIT is essential or not is a decision taken by the employer, which should be respected and soundness of that decision cannot be questioned by Court. In the case before this Court, the bid was rejected for non furnishing of bank guarantee in prescribed format. While submitting EMD by furnishing bank guarantee in format prescribed by GTC of another tender and the bidder took the plea that bank guarantee format of present tender was ambiguous. Rejecting the claim of the bidder and upholding the decision of the employer of rejection of bid for non-compliance of submitting the bank guarantee in prescribed format, this Court in paras 31 to 38, 42 to 44, 47 to 49, 52, 55 and 56 has observed and held as under:

"31. We were informed by the learned Attorney General that 9 of the 11 bidders furnished a bank guarantee in the prescribed and correct format. Under these circumstances, even after stretching our credulity, it is extremely difficult to understand why JVC was unable to access the prescribed format for the bank guarantee or furnish a bank guarantee in the prescribed format when every other bidder could do so or why it could not seek a clarification or why it could not represent against any perceived ambiguity. The objection and the conduct of JVC regarding the prescribed format of the bank guarantee or a supposed ambiguity in NIT does not appear to be fully above board.

32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

33. In Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489, this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage: (SCC p. 500, para 7)

"7. ... It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable."

34. In Ramana Dayaram Shetty case, the expression "registered IInd Class hotelier" was recognised as being inapt and perhaps ungrammatical; nevertheless common sense was not offended in

describing a person running a registered IInd grade hotel as a registered IInd class hotelier. Despite this construction in its favour, Respondent 4 in that case were held to be factually ineligible to participate in the bidding process.

35. It was further held that if others (such as the appellant in Ramana Dayaram Shetty case) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4 -- treatment that was constitutionally impermissible. Expounding on this, it was held: (SCC p. 504, para 10)

"10. ... It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege." (emphasis supplied)

36. Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the goalposts, they were denied the "privilege" of participation.

37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

38. In G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488, both the principles laid down in Ramana Dayaram Shetty were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable". Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in Ramana Dayaram Shetty sense.

42. Unfortunately, this Court in Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273 did not at all advert to the privilege-of-participation principle laid down in Ramana Dayaram Shetty and

accepted in G.J. Fernandez. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in Poddar Steel.

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in Tata Cellular v. Union of India, (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular) in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case, SCC p. 531, para 22)

"22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of NIT and the GTC wascertainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non- essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.

52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in Nazir Ahmad v. King Emperor, AIR 1936 PC 253 (2), namely:

"... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

There is no valid reason to give up this salutary principle or not to apply it mutatis mutandis to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in Nazir Ahmad that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, insofar as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

28. In M/s. Agmatel India Pvt. Ltd. vs. M/s. Resoursys Telecom And Others reported in AIR (2022) SC 1103, the Hon'ble Supreme Court in paragraph nos. 16 and 17 has observed as under :-

"16. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject matter of discussion in various decisions of this Court. We need not multiply the authorities on the subject, as suffice it would be refer to the 3-Judge Bench decision of this Court in Galaxy Transport Agency (supra) wherein, among others, the said decision in Afcons Infrastructure Limited (supra) has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and equipment. This Court referred to various decisions on the subject and stated the legal principles as follows: -

"14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818, this Court held:

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender

documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given." (page 825) (emphasis supplied)

15. In the judgment in Bharat Coking Coal Ltd. v. AMR Dev Prabha 2020 SCC OnLine SC 335, under the heading "Deference to authority's interpretation", this Court stated:

"51. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. (Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818): (AIR 2016 SC 4305)

53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality." (emphasis supplied)

16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India, 2019 SCC OnLine SC 1133, this Court held as follows:

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case." (emphasis supplied)

17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the

Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, this Court noted:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or Whether the process adopted or decision made is so arbitrary and irrational that the court can say:"the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action." (pages 531-532) (emphasis supplied)

19. Similarly, in Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272, this Court stated as follows:

"26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures

objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints." (page 288)

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four- member Tender Opening Committee with its own."

(Underlining emphasis in the original; emphasis in bold supplied)

17. The above-mentioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the Constitutional Court, that, by itself, would not be a reason for interfering with the interpretation given.

Application of relevant principles to the case at hand

29. Applying the judgments of the Hon'ble Apex Court as extracted, this Court finds that in the matter of a policy decision so taken by the tender issuing authorities, a judicial restrain is to be resorted to and merely because certain terms and conditions seems to be not suitable to a particular party cannot be a ground to hold it illegal, arbitrary or in violation of Article 19 of the Constitution of India.

30. The present case cannot also be analysed from another point of angle that in case sub-clause (1) and sub-clause (4) of Clause 9-A of the tender in question is struck down then it will create havoc and undesired result as it will tantamount to give gateway to those intending parties who are not only defaulter but also chronic litigants having litigation with

the entities who have floated tenders which would further tantamount to putting something in the mouth which is not liable to be eaten or swallowed.

31. So far as the argument of Sri Shashi Nandan, learned Senior Counsel in relation to the fact that there is no dispute of payment of royalty and GST and same cannot exclude the petitioner from coming into the zone of consideration is concerned, this Court is unable to accept the said proposition as dispute arise only when there is a disagreement between two as defined in the various dictionaries which are often being used for reference. The dictionary meaning of the word "dispute' is as under:-

"Black's Law Dictionary, 5th edition, page 424 defines "dispute' as under:

"to argue about, to contend ... words; an argument; a debate; a quarrel".

Cambridge Dictionary defines "dispute' as under:

"a disagreement or argument between two people, groups or countries."

Collins' Dictionary defines "dispute' as under:

"A dispute is an argument or disagreement between people or groups."

32. This Court finds that there exists not only a serious dispute but also demand has raised by the second respondent with respect to unpaid royalty and GST.

33. Sri Shashi Nandan who appears for the petitioners has relied upon the judgment in the case of Monark Infrastructure (P) Ltd. vs. Commercial Ullas Nagar Municipality & Ors. reported in AIR (2000) SC 2272 so as to contend that this Court can interfere with the policy of the Government in the matter of contract / tender when the same is arbitrary or unreasonable.

34. There is no quarrel to the proposition of law so propounded by the Hon'ble Supreme Court as argued by learned Senior Counsel, however, this Court while applying the judgments so relied upon by the learned Senior Counsel has to analyse the facts of the present case so as to form the opinion in that regard. This court finds that the conditions embodied under Sub-clause 1 and Sub-clause 4 of Clause 9 (A) are no where violative of the Article 19 of the Constitution of India.

35. After giving anxious consideration to the submission of the respective parties, this Court finds its inability to subscribe to the argument of the learned Senior Counsel who appears for the petitioner as according to the firm opinion of the Court, the best suited authority to incorporate the terms and the conditions of the contract / tender are framers of the tender and further the Clause 9 sub-clause (1) and sub-clause (4) of Clause 9-A of the tender dated 21.4.2022 does not suffer from any infirmity or illegality and the same is confirmity and consonance under Article 19 of the Constitution of India.

36. Resultantly, the present writ petition is wholly misconceived and is liable to be dismissed.

37. Accordingly, it is dismissed.

38. Cost made easy.

(2022)06ILR A220
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. 22404 of 2021

Sanyukt Swasthya Outsourcing/Samvida Karmchari Sangh, U.P. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Srivastava, Sri Ravindra Singh

Counsel for the Respondents:
C.S.C., Sri Manish Goel(Addl. A.G.), Sri Brajesh Kumar Dwivedi, Sri Pradeep Kumar Tripathi, Sri M.C. Chaturvedi (Sr. Adv.), Sri Saurabh Srivastava, Smt. Subhash Rathi (Addl. C.S.C.)

A. Civil Law - Equal Remuneration Act, 1976 – Minimum Wages Act, 1948 – Code on Wages, 2019 – Section 1(3) – International Covenants of Economic, Social and Cultural Rights 1966 – Article 7 – GO dated 31.12.2015, 28.03.2018 – Citizen's right to live with human dignity – Fixation of uniform honorarium/ minimum pay – Outsourcing of manpower on contractual basis – Non-adherence of the GOs – Discrepancies and the differential treatment in the matter pertaining to grant of remuneration to the outsourced employees – Legality challenged – India as a democratic and socialist country became a signatory of the covenant of 1966 – Effect – Payment of regular pay-scale – Entitlement – Held, the State being a model employer cannot act in such a manner, which not only creates disparity or tantamount to encourage differential treatment in the matter of payment of remuneration, which might be in the form of honorarium as well as in the matters of working conditions – Payment of the remuneration should be as per the Minimum Wages Act, 1948 and working conditions should include number of working hours, days of working, maternity leave etc. – High Court issued directions. (Para 7, 19, 21, 22, 28, 29, 32, 34 and 36)

Writ petition partly allowed (E-1)

List of Cases cited :-

1. Gujarat Majdoor Sabha & ors. Vs St. of Guj.; 2020(10) SCC 459

2. Civil Appeal No. (S) 3153 of 2022; Maniben Maganbhai Bhariya decided on 25.4.2022

3. St. of Punj.Vs Jagjit Singh; 2017(1) SCC 148

4. Sabha Shanker Dube Vs Divisional Forest Officer & ors. 2019(12) SCC 297

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Anay Kumar Srivastava, learned counsel for the petitioner, Sri Manish Goel, Addl. Advocate General, assisted by Smt. Subhash Rathi, learned Addl. Chief Standing Counsel for the State-respondent, Sri M.C. Chaturvedi, learned Senior Advocate, assisted by Sri Pradeep Kumar Tripathi, appearing for Respondent no.5.

2. Alleging disparity and differential treatment, the petitioner, who claims itself to be the registered union of unorganized sector has filed the present petition under Article 226 of the Constitution of India seeking the following reliefs:

"a) Issue a writ, order or direction in the nature of Certiorari quashing all the tenders issued by respondent nos. 9 to 80 in violation of G.O. dated 07.12.2020 and 23.04.2020.

b). Issue a writ, order or direction in the nature of Certiorari 10 quashing the order dated 24.11.2020 passed by respondent no. 6.

c). Issue a writ, order or direction in the nature of Mandamus directing all the respondents to follow the Government orders and not to issue tenders in violation of G.O. dated 23.04.2020.

d). Issue a writ, order or direction in the nature of Mandamus commanding the respondents to provide similar honorarium/payment to all the employees and do away with the anomalies in payment for the employees of the same rank and work.

e).Issue a writ, order or direction in the nature of Mandamus to not to interrupt the continuity of already working employees in terms of G.O. dated 18.12.2019 and 18.08.2020 and 25.08.2020.

f). Issue any other writ, order or direction which this Hon'ble Court may deem fit and Circumstances of the case.

g). award the cost of the petition to the petitioner."

3. The factual matrix as worded in the writ petition is that the petitioner being Sanyukt Swasthya Outsourcing / Samvida Karmchari Sangh, U.P. Lucknow, claims itself to be a union of contractual employees registered under the provisions contained under The Trade Union Act, 1926 Kanpur, Uttar Pradesh. According to the petitioner, State of Uttar Pradesh came up with a policy decision in the shape of Government Order dated 31.12.2015 addressed to the Director General, Medical Health Services, U.P. at Lucknow providing for outsourcing of the manpower on contractual basis from Respondent no.7 being Avani Paridhi Energy and Communications Private Limited and M/s Rama InfoTech Private Limited, Fazalganj, Kanpur. In continuation of the Government Order dated 31.12.2015, on 28.3.2018, another Government Order was issued, whereby the applicability of the Government Order dated 31.12.2015 was extended for a further period of 6 months. Eventually, the application of the Government Order dated 31.12.2015 for the purposes of procurement of manpower through outsourcing was extended on 5.11.2018, 31.12.2018 and 8.3.2019.

4. Ministry of Commerce and Industry, Government of India, with the objective to create an open and transparent procurement platform for Government buyers created an online platform for public procurement in India by the name and nomenclature of Government India e-Market Place (GeM).

5. The above noted online platform was created to facilitate online procurement of goods and services. Further the purchases through GeM portal by Government users had been authorized and made mandatory by the Ministry of Finance by adding a new Rule no. 149 in the General Financial Rules, 2017. The said initiative was launched on 9.8.2016 by the Ministry of Commerce and the Industry, Government of India with the prime object to increase transparency, efficiency, speed in public procurement. Though the online platform (GeM Portal) was launched on 9.11.2016 by the Ministry of Commerce and Industry, Government of India, however, State of Uttar Pradesh by virtue of the Government Order no. 8/2019/20/1/91Ka-2/2019 dated 18.12.2019 came up with a policy decision that for the purposes of procurement of manpower through outsourcing and the same would be done by virtue of the online platform being Government e-Market Place (GeM).

However, due to the sudden surge of the pandemic relating to COVID-19, the same could not be implemented and accordingly on 23.4.2020, a clarification was issued by the Respondent no.1, whereby the applicability and the procurement of the manpower through outsourcing by online mode through GeM Portal was deferred. On 18.8.2020, the State of Uttar Pradesh issued a Government Order addressed to all the Additional Chief Secretaries / Principal Secretaries / Secretaries, U.P. Shashan and all the District Magistrates posted throughout the State of U.P. coming up with a policy that the Government Order dated 18.12.2019 providing for outsourcing of the manpower through GeM Portal is being implemented forthwith. Thereafter, on 25.8.2020, another Government Order was issued by the State of Uttar Pradesh, whereby for purchases of goods and services of the Government Departments and its subsidiary, use of GeM Portal had been made mandatory and the Government Order dated 18.12.2019 was directed to be implemented strictly. The relevant extract of Clause-2(4), (5), Clause 3(6), (7) and Clause 6 are being quoted hereinunder:

"2. ....

4. उक्त शासनादेश के प्रस्तर-3 (4) के अनुसार जेम के माध्यम से ही आउटसोर्सिंग कर्मी लेने की अनिवार्यता किये जाने से वर्तमान में कार्य कर रहे कर्मियों की निरन्तरता बाधित नहीं की जायेगी। वर्तमान में कार्य कर रहे आउटसोर्स कर्मियों को ही जैम पोर्टल द्वारा चयनित संवाप्रदाताओं द्वारा रखा जायेगा। इस हेतु कार्यरत कर्मचारियों की सेवा के सम्बन्ध में संतुष्ट प्रमाण पत्र क्रेता विभाग द्वारा सेवाप्रदाता को उपलब्ध कराया जायेगा। केवल नवीन कर्मियों का चयन सेवायोजन पोर्टल से ही अनिवार्य रूप से किया जायेगा।

5- उक्त शासनादेश के प्रस्तर.4 (1) के अनुसार कार्मिकों को विलम्ब से भुगतान को रोकने के लिए क्रेता विभाग द्वारा आउटसोर्सिंग एजेन्सी को उपलब्ध करायी गयी धनराशि पर 18 प्रतिशत ब्याज व पेनाल्टी लगायी जायेगी।ृ

"3-...

6. किसी भी विभाग द्वारा किसी गुणवत्तापूर्ण सेवा के लिये कर्मियों को कितना मानदेय देय होगा इसका निर्णय संबंधित विभाग, विभिन्न सुसंगत वित्तीय नियमों के अनुरूप एवं श्रम विभाग के न्यूनतम वेजेज के अनुसार करेगा, जो कि वर्तमान में कार्मिकों को प्राप्त हो रहे मानदेय से कम अनुमन्य नहीं होगा। श्रम संविदा नियमावली सप्ताहिकए राजकीय मातृत्व आदि अवकाश एवं कार्य के घण्टे जैसे नियमों का अनुपालन कुराने की जिम्मेदारी क्रेता विभाग की होगी।

7. सेवा प्रदाता द्वारा EPF, ESI & GST आदि की कटौती Service Level Agreement (SLA) के

अनुसार की जायेगी, क्रेता विभाग द्वारा इसका अनुपालन सुनिश्चित कराया जायेगा।"

"6- जेम पोर्टल से सेवा क्रय करने की प्रक्रिया पूर्ण करने में कम से कम 15 दिन का समय लगता है। सम्बन्धित विभाग सेवा की आवश्यकतानुसार यह सुनिश्चित करेगे कि वर्तमान में चल रहे अनुबंध समाप्त होने के कम से कम एक माह पूर्व ही मैनपावर सेवा क्रय की जेम पोर्टल पर प्रक्रिया प्रारम्भ कर देंगे, ताकि शासकीय कार्य में व्यवधान उत्पन्न न हो । सेवा क्रय करने वाले विभाग को पूर्व में शासनादेश संख्या-11/2017/523/18-2-2017 970 30)/2016 दिनांक 23.08.2017 के माध्यम से स्पष्ट किया जा चुका है कि उनके द्वारा अपनी आवश्यकताओं को जोन, मण्डल, जनपद अथवा किसी अन्य वर्गीकरण के

आधार पर टुकड़ों में नहीं लिया जायेगा, अभिप्राय यह है कि क्रेता विभाग को जिन कर्मिको की आवश्यकता होगी उनको जेम पोर्टल के माध्यम से एक ही बिड की जायेगी, जिससे सुदृढ एव सक्षम सेवा प्रदाता का चयन हो सके।"

6. Thereafter on 7.12.2020, another Government Order was issued stipulating the modalities for procurement of manpower through sealed bids. Clause 3(i), (ii) of the said order are quoted hereinunder:

"3. जैम पोर्टल से मैनपावर आपूर्ति के संबंध में उपयुक्त शासनादेश में उल्लिखित व्यवस्था से विचलन कदापि न किया जाय और निम्नलिखित बिन्दुओं पर विशेष ध्यान देते हुये पूर्ण पारदर्शिता बरती जाय.

(i) विभाग द्वारा अपनी आउटसोर्सिंग मानव संसाधन की सकल आवश्यकता को चिन्हित कर जेम पोर्टल की "बन्च निविदा" विधि से एक ही निविदा द्वारा की जायए जिससे सक्षम सेवाप्रदाता का चयन हो सके।

(ii) ई०एम०डी० का निर्धारण शासनादेश दिनांक 25.08.2020 में दी गयी व्यबस्था के अनुसार किया जाय और इसमें किसी प्रकार की छूट या शिथिलता उकृत शासनादेश की व्यवस्था के विपरीत न दी जाय। ई०एम०डी०ःएफ०डी०आर० जमा करने के संबंध में आई०टी० एवं इलेक्ट्रानिक्स विभाग केशासनादेश संख्या.1/2018/3070/78-2-2018/42 आई०टी०/2017 (22), दिनांक 03-01-2018 निर्गत है। इसमें उल्लिखित व्यवस्था के अनुसार ही कार्यवाही की जाय।"

7. **Petitioner herein alleging non-adherence of the Government Order issued from time to time in the matter of procurement of manpower through outsourcing had filed the above noted writ petition with the following grievances:**

(a). Despite specific stipulation contained in the Government Order dated 18.12.2019, as followed from time to time and the Government Order dated 7.12.2020 providing that the procurement of the manpower through outsourcing is to be resorted to by a single integrated tender for the entire State of Uttar Pradesh and not either district-wise or cluster-wise, the online tenders are being floated through GeM portal either district-wise or cluster-wise, resulting in disparity between outsourced employees in one district vis-a-vis others in the matter of honorarium and working condition.

(b). Government Order so issued on 18.12.2019 as followed on 25.8.2020 provides for non-interruption of their engagement, then too without there being any deficiency in the services rendered by the members of the petitioner-Association, their engagement has been set at naught.

8. **This Court on 4.10.2021**, while entertaining the present writ petition, **passed the following orders:**

"4.10.2021

The prayer made in this petition can appropriately be addressed after receipt of counter affidavit as the petitioner has challenged the tender issued by the respondent nos. 9 to 80 as violative of Government Orders dated 7.12.2020 and 23.4.2020.

Learned Standing Counsel has accepted notice on behalf of respondent nos. 1 to 4, 6 and 8 to 80; Sri B.K. Tripathi has accepted notice on behalf of respondent no. 5.

Let notice be issued to respondent no.7 fixing 15.11.2021.

Steps be taken within one week through registered speed post.

List as fresh on 15.11.2021, by which date, respondents shall file their respective counter affidavit."

9. On 15.11.2021, this Court noticed the discrepancies and the differential treatment so made in the matter pertaining to grant of remuneration to the outsourced employees engaged by the service provider through GeM portal and after bestowing anxious consideration to Annexure-6 at page-70, which happened to be the relevant extract of the advertisement so loaded on GeM portal sought response from the respondents. **The order passed by this Court on 15.11.2021 is quoted hereinunder**:-

"Heard Sri Anay Kumar Srivastava, learned counsel for the petitioner, Sri M.C. Chaturvedi learned Additional Advocate General assisted by Sri P.K. Tripathi, learned Standing Counsel for respondent no. 5 and Sri Saurabh Srivastava, learned counsel for respondent nos. 1, 2, 3, 4 and 6.

The learned counsel for the petitioner submits that the petitioners are not challenging the engagement of other employees working on various posts by outsourcing through GEM portal. Their entire objection is that since e-tenders have been invited through GEM portal to engage persons through outsourcing either district-wise or cluster-wise and different jobs are being given by the service provider in different districts/clusters, which has resulted in disparity between the outsourced employees of one district than that of the other district. In other words, outsourced employees engaged by a service provider in district 'A' is getting Rs. 10,000/- for a particular job while outsourced employees for the same job of district 'B' kept by the other service provider, is getting Rs. 12,000/-. Therefore, the Government being a model employer cannot discriminate between the outsourced employees for the same work in one district and the outsourced employees for another district in the same department. This violates the basic principle of equality enshrined in the Constitution on one hand and on the other hand, unemployed youths of the unorganized service sector are placed in a very disadvantageous position. Attention has been drawn to bid documents in which the lowest bid for the job as Ward Aaya/Ward Boy is Rs.7,500/- per month. The engagement is for a period of 9 months. The work is being taken for 7 days in a week and there is no leave admissible to them. Thus, per day wages comes to Rs. 250/-. Therefore, the modus operandi being operated by the State Government for engaging the employees by outsourcing through GEM portal is nothing but a glaring example of exploitation of employees of unorganized service sector, particularly youths who have no option but to work on the terms and condition dictated by the service providers and as per bid made by them.

Matter requires consideration.

Let counter affidavits be filed by means of personal affidavit separately by the respondent nos. 1, 2, 3 and 4.

Put up this case as fresh for further hearing on 01.12.2021."

10. **Pursuant to the order dated 15.11.2021**, passed by this Court as extracted hereinabove, **a counter affidavit**

was filed by Respondent no.4/ Director General, Medical and Health Services, U.P. at Lucknow, sworn on 17.12.2021, **wherein in paragraph-3, 4, 5, 6 & 7, the following averments were made:**

"3. That in compliance of the aforesaid directions of this Hon'ble Court, a committee has been constituted, headed by Director General, Medical & Health Services, U.P. Lucknow on 07.12.2021 in which the matter of fixation of uniform honorarium/minimum pay has been considered. Considering the anomalies in respect of honorarium, it has been revealed that there are individuals engaged against the sanctioned and created posts in the medical units. In spite of these, other individuals who are engaged under National Health Mission, their honorarium has been fixed according to the guidelines of the Government of India. The committee also found that one more reason for difference in the honorarium paid against the similar posts in the medical units, is that there has been non uniformity in the procedure of procurement of services and as such there was difference in the bids for the honorarium as provided by the different Outsourcing Agencies. In addition to above, it has also been found that different districts were engaging the individuals on contractual basis at district level also and for that reason also there were certain differences in extending the honorarium to the individuals. The copy of the minutes. of meeting dated 07.12.2021, is being filed herewith and marked as ANNEXURE NO. 1 to this personal affidavit.

4. That in pursuance of the aforesaid facts as stated above as well as the provisions as contained under para. 4 of the office order dated 07.12.2021, issued by the Secretary, State of U.P., Lucknow, the Committee also considered the guidelines for engaging individuals via outsourcing through Government E-Market Place (GEM) in the Medical & Health Department for bidding, divided in six clusters for selection of service providing agencies. The committee also decided unanimously for procurement of manpower through outsourcing agencies for skilled/semi-skilled/un-skilled, it has been decided to pay the minimum honorarium to the individuals against the similar posts. The copy of the Letter No. 630-37 pravartan-(M.W.)/15 dated 08.10.2021, which fixed the minimum wages for skilled/semi-skilled/un-skilled manpower is being filed herewith and marked ANNEXURE NO. 2 to this personal affidavit.

5. That the Secretary, Government of Uttar Pradesh, Lucknow vide its Government Order no. 1094(1)/Panch-1-2021 dated 21.11.2021 issued certain guidelines in compliance of the Government Order dated 25.08.2020 and 07.12.2020 for purchasing the manpower through outsource agencies. Copy of the Government Order no. 1094(1)/Panch-1-2021 dated 21.11.2021 is being filed herewith and marked as ANNEXURE NO. 3 to this personal affidavit.

6. That the Secretary, Government of Uttar Pradesh, Lucknow vide its Office Order no. W-68/Panch-1-2021 dated 07.12.2021 issued certain guidelines for the purchasing the manpower through outsourcing agency for introducing the Government E-Market Place (GEM) developed by Government of India. Copy of the Office Order no. W 68/Panch-1-2021 dated 07.12.2021 is being filed herewith and marked as ANNEXURE NO. 4 to this personal affidavit.

7. That in addition to above the Respondent no. 4 i.e. Director General, Medical & Health Services, U.P. Lucknow issued the standing instructions to all the Chief Medical Superintendents as well as Chief Medical Officers of entire State of U.P. to provide honorarium as per the minimum wages as fixed by the Labour Department of U.P. vide its Office Order no. dated 13.12.2021. Copy of the Office Order dated 13.11.2021 is being filed herewith and marked as ANNEXURE NO. 5 to this personal affidavit."

11. Perusal of the averments made in the counter affidavit so filed by Respondent no.4 sworn on 17.12.2021 as referred to above reveals that a committee was constituted by the Respondents headed by Respondent no.4 being Director General, Medical & Health Services of U.P. on 7.12.2021 in the matter of fixation of uniform honorarium / minimum pay. **It has been further averred that the committee found the anomalies in respect of honorarium.** The averments contained in the counter affidavit further reveals that the honorarium paid to the outsourced employees should be as per the minimum wages as fixed by the Labour Department of the State of U.P.

12. **A counter affidavit was also filed by Respondent no.5 sworn on 16.12.2021** coming with the stand that the Respondent no.5 happens to be Uttar Pradesh Medical Supplies Corporation Limited, which is an undertaking of the Government of Uttar Pradesh (Government Company incorporated under the Companies Act, 2013) and is a nodal agency created pursuant to the Government Order dated 3.10.2017 to procure drugs, medical equipments and other health care commodities and services for its supplies to various Government Hospitals and Health Care units through out the State of U.P. On 11.3.2022, a personal affidavit was filed by Respondent no.1 (State of U.P. through its Additional Chief Secretary, Medical and Health Services, U.P. at Lucknow), **wherein in paragraphs- 6 to 11, the following averments were made:-**

"6. That it is relevant to submit here that the Medical and Health Department select the service provider agencies for supplying the manpower through outsourcing in the Health Department and its supporting office vide GEM Portal and the service provider agency follow the different Government Orders/Directions issued from time to time by the State Government/Micro, Small and Medium Entrepreneur (hereinafter referred to as "the MSME")/Labour Department. The Medical and Health Department also follows the guidelines when the service provider was selected through the GEM Portal to supply the manpower through outsourcing.

7. That in the Government Order No. 31/2020/273/18-2-2020-97(ल0उ0)/2016 टी0सी0 dated 25.8.2020 by Micro Small and Medium Entrepreneur, Anubhag-2 it has been provided that how much "Mandeya' (मानदेय) is to be provided by the department for the qualitative services rendered by the employees. The concerned department take decision as per relevant financial Rules of the Department and as per minimum wages settled by the Labour Department and this "Mandeya' (मानदेय) will not be less than the "Mandeya' (मानदेय) received by the employees at present. Likewise as per labour contract Rules for providing weekly, state holidays, maternity leave and hours of working the duty of the compliance of Rules will be that of the "Kreta' (क्रेता) Department. It is relevant to state here that vide letter dated 8.10.2021 the minimum wages as applicable

from 1.10.2021 to 31.3.2022 has been stated as hereinafter mentioned:-

कमांक	प्रतिमाह	प्रतिमाह मूल मजदूरी रूपये में	परिवर्तनीय मंहगाई भत्ता रूपये में		दिनांक1.4.2021 से 20.9.2021	
			दिनांक 01.1.2021 से 30.09.2021 तक	दिनांक 01.10.2021 से 31.03.2022 तक	कुल मजदूरी (रूपये में)	दैनिक मजदूरी (रूपये में)
1	2	3	4	5	6	7
1	अकुशल	5750	3328	3434	9184	353.23
2	अर्ध कुशल	6325	3660	3777.29	10,102,.29	389
3	कुशल	7085	4100	4231.16	11316.16	435.23

Copy of the letter No. 630-37-Pravartan-M.W.)/15 dated 8.10.2021 is already been annexed as Annexure No. 2 to the personal affidavit of respondent no. 4 and it is being annexed herewith the present personal affidavit. A copy of the personal affidavit filed by respondent no. 4 is being filed herewith and marked as ***Annexure No. 1*** *to this affidavit.*

8. That it is relevant to submit here that vide Government Order No. 42/2020/ई-153 /18-2-2020-97(ल0उ0)/2016 टी0सी0 dated 07.012.2020 issued by Micro Small and Medium Entrepreneur (MSME), Anubhag-2 para 4 it has clearly been stated that after the finalization of tender vide GEM portal to maintain control over the Service provider the liability will be that of the head of the department so that the service provider company may not harass or exploit the employees out sourced employee. In para 6 of the Government Order it has also been provided that in the State the relevant Government Orders have to be strictly complied with so far manpower outsourcing is concerned. Photostat copy of the Government Order dated 7.12.2020 is being filed herewith and marked as ***Annexure No. 2*** *to this affidavit.*

9. That to fix the "Mandeya' (मानदेय) of the outsourcing employees of the medical and health department the consideration prima facie is to be made with regard to minimum wages as decided by the labour department, the relevant Financial Rules and thereafter the head of the department fixed the "Mandeya' (मानदेय) as per minimum wages of the labour department and as per relevant Financial Rules with the service provider agency. So far as the leave and working hours are concerned the relevant Government Orders and the criteria as settled by the Labour Department is concerned.

10. That regarding the service benefits of the outsource employees the Government Orders issued by the MSME Department are considered by the head of the department and accordingly are complied with and as has already been stated in the affidavit filed on 16.12.2021 in pursuant to order of this Hon'ble Court dated 15.11.2021. The minimum wages are paid

to the outsource employee as per minimum wages settled by the Labour Department.

11. That it is pertinent to relevant to state here that so far as the procurement of manpower services are concerned it is being done vide GEM remuneration to be paid to different classes of inductees/man power by the service provider is concerned, model conditions of engagement of man-power, through working hours and leave/holidays are concerned different Government Orders are being postulated by the Labour Department and Micro Small and Medium Entrepreneur, Anubhag-2 but as this Hon'ble Court has stated that

"Entire scheme for procurement of man-power service and matters relating thereto be reduced in writing in one comprehensive Government Order/policy decision and copy thereof be filed along with the counter affidavit."

It is humbly submitted that the aforesaid is not within the jurisdiction of Medical and Health and Family Welfare Department rather the relevant department/party is the "Additional Chief Secretary, Department of Appointment and Personnel, Government of Uttar Pradesh' and this party has not been impleaded by the petitioner. It may kindly impleaded so that proper policy decision/the Government Order is being framed. It is submitted that vide GEM Portal different departments out source employees and one department i.e. the answering respondent cannot governed all vide framing policy decision/Government Orders. It is competent authority as stated aforesaid who is responsible to frame policy decision to be followed to be followed by all the departments. The deponent files the present affidavit with unconditional and unqualified apology. The deponent is a law abiding citizen and ready to comply with order of this Hon'ble Court as and when directed by this Hon'ble Court."

13. **On 11.3.2022, this Court passed the following orders** relevant extract whereof is being quoted hereinunder:

"... Since, prima facie, discrimination is being made by the Medical and Health Services Department between the outsource employee in one district and outsource employee in another district for the same work in the same department and even our orders are not being complied with on one pretext or the other, therefore, we are left with no option except to call upon the Chief Secretary of the State of U.P. to look into the matter and to file his personal affidavit in response to the orders dated 15.11.2021 and 22.02.2022, within three weeks.

As prayed by the learned Additional Chief Standing Counsel, put up this case as a fresh case for further hearing on 8th April, 2022."

14. A **personal affidavit has been filed by the Chief Secretary, State of Uttar Pradesh on 8.4.2022, wherein the following averments have been made:**

"4. That in pursuant to the order of this Hon'ble Court dated 11.3.2022 a meeting was organized under the Chairmanship of Chief Secretary, Uttar Pradesh Shashan, Lucknow on 23.3.2022 decisions were taken and in pursuant to directions, the decisions taken by Director General Medical and Health Services, Uttar Pradesh Shashan dated 1st April 2022. Details and comparative information were sought by the officers and employees who are being paid "Mandey'. The detail and comparative status being carried out regarding the

person's employer as per "Jan Shakti' and i.e. who are working under the minimum Mandey as fixed by the Labour Department. **The letter issued by Director General, Medical and Health Services, Uttar Pradesh, Lucknow written to the Secretary, Medical Health and Family Welfare Department Uttar Pradesh Shashan Chikitsa Anubhag-1 dated 1st April 2022.** A copy of the letter dated 1.4.2022 issued by Director General, Medical and Health Services, Uttar Pradesh, Lucknow written to the Secretary, Medical Health and Family Welfare Department Uttar Pradesh Shashan Chikitsa Anubhag-1 is being filed herewith and marked as Annexure No. 2 to this affidavit.

5. That the facts included in the letter dated 1.4.2022 are as hereinafter mentioned:

".....मुख्य सचिव महोदय की अध्यक्षता में दिनांक 23.03.2022 को हुई बैठक के

कार्यवृत्त में दिये गये निर्देशों के क्रम में आउटसोर्सिंग से लिये जाने वाले भिन्न.भिन्न प्रकार की

जनशक्ति के लिए मानदेयों का निर्धारण हेतु विस्तृत सूचना

परिधिगत अधिकारियों से प्राप्त कर तुलनात्मक अध्ययन एवं श्रम विभाग द्वारा निर्धारित न्यूनतम मानेदय पर आधारित है। यह भी अवगत कराना है कि आउटसोर्स के माध्यम से भरे जाने वाले उन्हीं सम्बन्धित पदों की सूचना दी जा रही है जिनका मानदेय भुगतान राज्य बजट से किया जाता है। इस सूचना में सेवारत कार्मिकों के मानदेय में ई०पी०एफ०, ई०एस०आई०. सर्विस चार्ज इत्यादि आगणित नहीं हैए इन वैधानिक मदों का भुगतान सरकार द्वारा समय.समय पर निर्धारित दरों के कम में नियमानुसार किया जायेगा। उक्त प्रस्तावित / आंकलित दर यथाशीघ्र निर्धारित कर उ०प्र० मेडिकल सप्लाई कार्पोरेशन द्वारा गतिमान आउटसोर्स कार्मिकों की कलस्टरवार निविदा प्रक्रिया की कार्यवाही पूर्ण होने/ कियान्वित होने के उपरान्त लागू किया जायेगा।"

A copy of the letter along with documents annexed with the letter dated 1.4.2022 is being filed herewith and marked as Annexure No. 3 to this affidavit.

6. That in the matter in question the information/proposal provided by the Director General Medical and Health Services, U.P. Lucknow vide letter dated 1.4.2022 regarding the post taken vide outsourcing under Medical Health and Family Planning Department, Uttar Pradesh was accepted by the Government and rate of ''Mandey' was fixed of outsource employees vide Government Order No. 119/PANCH-1-2022 dated 5.4.2022 was issued. Hence after taking into consideration the letter dated 1.4.2022 by the Director General Medical and Health Services, Uttar Pradesh, Lucknow decision taken in the meeting and the information/proposal has accepted by the Government/State of U.P. the Government Order dated 5.4.2022 was issued fixing the uniform rates of Mandey of outsource employees in the State. Photostat copy of the Government order dated 5.4.2022 is being filed herewith and marked as ***Annexure No. 4*** *to this affidavit.*

7. That the minimum Mandey was fixed vide the policy decision dated 5.4.2022 is as hereinafter mentioned:

".....के अनुपालन में दिनांक 23.03.2022 को मुख्य सचिव, उ०प्र० शासन की अध्यक्षता में सम्पन्न बैठक, जिसमें श्रम, कार्मिक तथा सुक्ष्म लघु एवं माध्यम उद्यम विभाग ने भी प्रतिभाग किया में निर्णय लिया गया कि चिकित्सा स्वास्थ्य एवं परिवार कल्याण विभाग के अधीन सभी संवर्ग, जो आउटसोर्सिंग से रखे जाते हैं की सूची बनायी जाए। तदोपरान्त हर संवर्ग में जो अधिकतम मानदेय किसी भी जनपद में दिया जा रहा हो, उसी को सभी जनपदों में लागू किया जाए किन्तु यदि किसी जनपद में किसी पद विशेष के लिए बहुत अधिक धनराशि दी जा रही हो, जो तर्कसंगत न हो, उसे प्रदेश में एकरूप दर निर्धारण हेतु विचारण में नहीं लिया जायेगा। यह मानदेय श्रम विभाग द्वारा अकुशल, अर्द्धकुशल एवं कुशल श्रमिकों के लिए निर्धारित न्यूनतम मानदेय से अधिक होगा।

4- महानिदेशक, चिकित्सा एवं स्वास्थ्य सेवाओं के द्वारा आउटसोर्सिंग से लिए जाने वाले भिन्न-भिन्न प्रकार की जनशक्ति के लिए दरों के निर्धारण हेतु उपरिसंदर्भित पत्र दिनांक 01.04.2022 द्वारा उपलब्ध करायी गयी सूचना के तुलनात्मक अध्ययन एवं श्रम विभाग द्वारा निर्धारित न्यूनतम मानदेय पर आधारित विवरण निम्नवत् दर्शित है:

क0सं0	पदनाम	श्रेणी	श्रम विभाग के शासनादेश दिनांक 08.10.2021 के अनुसार परिगणित मूल मानदेय	परिधिगत अधिकारियों से प्राप्त सूचनाओं के अनुसार अधिकांश चिकित्सालयों में दिये जाने वाले मूल मानदेय	स्वास्थ्य महानिदेशालय द्वारा प्रस्तावित मूल मानदेय
1	2	3	4	5	6
1.	वार्ड ब्वाय वार्ड आया	अकुशल	9184	10706.91	10706.91
2.	चपरासी/ अर्दली	अकुशल	9184	9999.83	9999.83
3.	सफाई कर्मचारी	अकुशल	9184	9302.20	9302.20
4.	मल्टीपरपस वर्कर/मल्टीटास्क वर्कर	अकुशल	9184	11509.20	11509.48
5.	कुक/कुकमेट/धोबी/माली	अकुशल	9184	10706.91	10706.91
6.	प्लमबर	अर्धकुश	10102.29	11177.44	11177.44

		ल			
7.	कम्प यूटर सहा यक कम रजि स्ट्रेश न क्ल र्क	कु श ल	11316.16	12844.51	12 84 4.5 1
8.	इले क्ट्री शिय न कम जनरे टर आप रेटर	कु श ल	11316.16	11316.16	11 31 6.1 6
9.	वाहन चाल क	कु श ल	11316.16	11779.58	11 77 9.5 8

आउटसोर्स के उपरोक्त पदों जिनके मानदेय का भुगतान राज्य बजट से किया जाता है, के मानदेय में ई०पी०एफ० ई०एस०आई०. सर्विस चार्ज इत्यादि आगणित नहीं है, इन वैधानिक मदों का भुगतान सरकार द्वारा समय-समय पर निर्धारित दरों के कम में नियमानुसार किया जायेगा। उक्त प्रस्तावित / आंकलित दर उ०प्र० मेडिकल सप्लाई कार्पोरेशन द्वारा गतिमान आउटसोर्स कार्मिकों की कलस्टरवार निविदा प्रक्रिया की कार्यवाही पूर्ण होने / कियान्वित होने के उपरान्त लागू होगी।

5- इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि शासन द्वारा सम्यक् विचारोपरान्त महानिदेशालय द्वारा आउटसोर्सिंग जनशक्ति के उपरोक्त समस्त प्रकृति के पदों के संबंध में मानदेय निर्धारण हेतु श्रम विभाग की न्यूनतम दरों के सापेक्ष उपरोक्त प्रस्तर-4 के तालिका में अंकित पदों के सापेक्ष अन्तिम स्तम्भ-6 में प्रस्तावित मानदेय को स्वीकार कर लिया गया है। यह मानदेय उत्तर प्रदेश मेडिकल सप्लाई कारपोरेशन द्वारा गतिमान आउटसोर्स कार्मिकों की कलस्टरवार निविदा प्रक्रिया में सम्मिलित किये जायेंगे तथा उक्त कार्यवाही पूर्ण होने पर लागू किये जायेंगे।"

8. That the aforesaid is being decided and preferred in view of the order of this Hon'ble Court dated 11.3.2022 and in pursuant to order of this Hon'ble Court, the present personal affidavit is being filed to the Chief Secretary, Uttar Pradesh Shashan, Lucknow. It may kindly be accepted and taken on record. The deponent humbly submits with unconditional and unqualified apology that after consultation with concerned department and approval from the State Government the present policy decision dated 5.4.2022 is being taken and for any modification/amendment or further decision the deponent is always ready to comply with orders of this Hon'ble Court."

15. **This Court** after giving anxious consideration to the Counter Affidavit filed by the Chief Secretary **on 8.4.2022, proceeded to pass the following orders:-**

"Perusal of the personal affidavit filed today shows that the State Government has taken a policy decision with regard to uniformity in scales of payment for different kinds of outsourced employees

and outsourcing agencies. However, some of the important aspects as reflected from our aforequoted order dated 22.02.2022, appears to have been left consideration.

Learned Additional Advocate General states that the Government shall look into all the aspects and take a uniform and comprehensive policy decision in the light of the order dated 22.02.2022 and while taking the decision, shall also take note of the principles laid down by Hon'ble Supreme Court in the case of Gujrat Mazdoor Sabha vs. State of Gujrat, (2020) 10 SCC 459 (paras 33 to 49). He prays that three weeks' time may be granted.

As prayed by learned Additional Advocate General, three weeks' time is granted to file an affidavit annexing therewith the government order/ policy decision. The affidavit shall be filed by the Chief Secretary.

List/ put up in the additional cause list for further hearing on 29.04.2022 at 02:00 P.M."

16. Eventually **on 29.4.2022, a personal affidavit has been filed by the Chief Secretary State of Uttar Pradesh, wherein in paragraphs- 4 to 11 the following averments have been made:**

"4. That it is relevant to state here that in order dated 22.2.2022 passed by this Hon'ble Court in the present matter in question the following points are to be taken into consideration:-

"1. Policy decision emerging from various government orders issued from time to time with regard to procurement of man-power services.

2. Minimum remuneration to be paid to different classes of inductees/man-power by the service provider.

3. Model conditions of engagement of man-power through service providers including working hours and leave/holidays as reflected in the Government Order dated 25.8.2020.

4. In the decision taken by the State Government the Letter of respondent no. 4 dated 12.11.2021 shall also be incorporated."

5. That in order dated 22.2.2022 the first point is regarding the procurement of manpower services. It is relevant to submit here that regarding procurement of manpower services detailed guidelines and directions have been issued by Department of Personnel and M.S.M.E. Department. In the Government Order dated 18.12.2019 directions have been issued in pursuant to E-market place GeM portal Developed by Government of India and adopted by State of U.P. Regarding the aforesaid points as stated in the order of this Hon'ble Court dated 22.2.2022 the information was sought from Additional Chief Secretary Medical and Health Department, U.P. Lucknow and he has stated in detail regarding the aforesaid four points which are as hereinafter mentioned:

"3-(1) अवगत कराना है कि मा0 उच्च न्यायालय के आदेश दिनांक 22.02.2022 में उपरोक्त बिन्दु संख्या–1 Procurement of man - power service के संबंध में विस्तृत दिशा निर्देश कार्मिक विभाग एवं सूक्ष्म, लघू एवं मध्यम उद्यम विभाग द्वारा जारी किए गए है । कार्मिक विभाग द्वारा जारी षासनादेश दिनांक 18.12.2019 में उ0प्र0 के समस्त षासकीय विभागों एवं उनके अधीनस्थ संस्थाओं में मैन पावर के क्रय के लिए भारत सरकार द्वारा विकसित गवर्नमेण्ट ई–मार्केट प्लेस , जेम की व्यवस्था लागू किये जाने के निर्देश दिये गये । इसी क्रम में शासनादेश दिनांक 25.08.2020 सूक्ष्म, लघू एवं मध्यम उद्यम अनुभाग –2 द्वारा निर्गत किया गया है, जिसमें विस्तृत दिशा–निर्देश के साथ यह प्राविधान किया गया है कि प्रदेश के समस्त षासकीय विभागों एवं उनके अधीनस्थ संस्थाओं/निगमों /उपक्रमों आदि में जेम पोर्टल के

माध्यम से अनिवार्य रूप से बिड के माध्यम से ही मैनपावर आउटसोर्सिंग की व्यवस्था की जायेगी सूक्ष्म, लघु एवं मध्यम उद्यम विभाग द्वारा शासनादेश दिनांक 07.12.2020 निर्गत किया गया , जिसमें प्रदेश के षासकीय विभागों एवं उनके अधीनस्थ संस्थाओं में मैनपावर की आपूर्ति जेम पोर्टल के माध्यम से किये जाने विशयक निर्गत शासनादेशों में दिये गये प्राविधानों को कड़ाई से अनुपालन के निर्देश दिये गये।

चिकित्सा एवं स्वास्थ्य विभाग द्वारा कार्मिक एवं एम0एस0एम0ई0 विभाग द्वारा निर्गत षासनादेषों के क्रम में षासनादेश दिनांक 21.11.2021 द्वारा महानिदेषक चिकित्सा एवं स्वास्थ्य सेवायें को निर्देशित किया गया है कि षासनादेश दिनांक 25.08.2020 व दिनांक 07.12.2020 का अनुपालन में मैनपावर का क्रय किया जाना सुनिश्चित करें तथा शासनादेश दिनांक 07.12.2021 के द्वारा मैनपावर के क्रय के लिए भारत सरकार द्वारा विकसित गवर्नमेण्ट ई–मार्केट प्लेस जेम के माध्यम से निविदा करने के संबंध में प्रदेश को 06 क्लस्टरों विभक्त कर चिकित्सा एवं स्वास्थ्य विभाग में सेवा प्रदाता ऐजेन्सी के चयन किये जाने के निर्देश दिये गये है।

इस प्रकार चिकित्सा एवं स्वास्थ्य विभाग द्वारा मैनपॉवर के क्रय किये जाने के संबंध में भारत सरकार द्वारा विकसित गवर्नमेण्ट ई–मार्केट प्लेस जेम की व्यवस्था लागू करने संबंधी कार्मिक विभाग एवं सूक्ष्म, लघू एवं उद्यम विभाग द्वारा निर्गत षासनादेशों का कड़ाई से अनुपालन सुनिश्चित करने हेतु अपेक्षित दिशा–निर्देश महानिदेशक चिकित्सा एवं स्वास्थ्य विभाग को दिये जा चुके है तथा उक्त शासनादेशों का अनुपालन सुनिश्चित किया जा रहा है इस बिन्दु पर चिकित्सा एवं स्वास्थ्य विभाग द्वारा कार्यवाही पूर्ण की जा चुकी है।

3.(2) बिन्दु संख्या–2 Minimum remuneration to be paid to different classes of inductees/man-power by the service provider के संबंध में कार्यवाही पूर्ण की जा चुकी है आउटसोर्सिंग जनषक्ति के वेतन /मानदेय के निर्धारण के संबंध में षासनादेष दिनांक 05.04.2022 (प्रति संलग्न) निर्गत किया जा चुका है।

3.(3) बिन्दु संख्या–3 डodel conditions of engagement of man-power through service providers including working hours and leave/holidays as reflected in the Government order dated 25.08.2020 के संबंध में Modal conditions के बिन्दु पर एम0एस0एम0ई0 विभाग के षासनादेष 25.08.2020 तथा दिनांक 07.12.2020 में विस्तृत दिषा–निर्देष जारी किये गये है जिसका अनुपालन प्रत्येक विभाग द्वारा किया जाना है। चिकित्सा एवं स्वास्थ्य विभाग द्वारा भी इन षासनादेषों को कड़ाई से अनुपालन किया जा रहा है इस हेतु चिकित्सा एंव स्वास्थ्य विभाग द्वारा षासनादेष दिनांक 21.11.2021 एवं षासनादेष दिनांक 07.12.2021 द्वारा महानिदेषक चिकित्सा एवं स्वास्थ्य सेवायें को निर्देषित किया जा चुका है। इसी बिन्दु में अंकित Working hours and leave/holidays के संबंध में श्रम विभाग के परामर्षानुसार षासनादेष संख्या–162/पॉच–1–2022 दिनांक 26.04.2022 (प्रति संलग्न) निर्गत किया जा चुका है।

3.(4) बिन्दु संख्या–4 यह है कि प्रतिवादी संख्या–4 के पत्र दिनांक 12.11.2021 को भी राज्य द्वारा लिये जा रहे निर्णय में incorporate किया जाये। कदाचित यह पत्र दिनांक 12.11.2021 का नहीं है बल्कि प्रतिवादी संख्या–4 अर्थात महानिदेषक चिकित्सा एवं स्वास्थ्य सेवायें द्वारा वाद में योजित षपथ–पत्र के संलग्न–3 में पत्र दिनांक 21.11.2021 षासन के चिकित्सा अनुभाग 1 द्वारा निर्गत पत्र है जिसके द्वारा निर्गत षासनादेष संख्या–574/पॉच–1–2020, दिनांक 23.04.2020 को अवक्रमित करते हुये एम0एस0एम0ई0 अनुभाग–2 के षासनादेष दिनांक 25.08.2020 व दिनांक 07.12.2020 का अनुपालन सुनिष्चित करते हुये मैनपावर का क्रय किया जाना सुनिष्चित करने हेतु महानिदेषक चिकित्सा एवं स्वास्थ्य सेवाय को निर्देषित किया गया है।"

6. That in view of the aforesaid guidelines/policy decision was framed complying the order dated 8.4.2022 as well as the order of this Hon'ble Court dated 22.2.2022 categorically. A photostat copy of the orders of this Hon'ble Court dated 22.2.2022, 11.3.2022 and 8.4.2022 are being filed herewith and marked as Annexure No. 1 to this affidavit.

7. That as stated aforesaid, the policy decision regarding Mandey of the procured manpower has already been decided vide Government Order dated 5.4.2022. In view of the fact that under the Minimum Wages Act, 1948, 74 Establishments are taken into consideration for deciding the daily wages of skilled, unskilled and semiskilled employees vide policy decision dated 31.3.2022. In the order dated 31.3.2022

issued by Labour Commissioner, Uttar Pradesh section- 12 of Minimum Wages Act, 1948 only Private Hospital (Nursing Home) and private clinic and private doctors and the shops related to private doctors are considered i.e. the Government order dated 31.3.2022 i.e. related to private establishments only and not for government hospital hence the policy decision was taken vide Government Order dated 5th April 2022 for bringing on record the uniform policy decision clearly stating therein the "Minimum remuneration to be paid to different classes of inductees/man-power by the service providers".

A copy of the Government Order dated 31.3.2022 and 5th April 2022 are being collectively filed herewith and marked as Annexure No. 2 to this affidavit.

8. That in pursuance to the order of this Hon'ble Court dated 8.4.2022 the police decision was taken for medical department taking into consideration section 13, section 14, section 15 of the Minimum Wages Act, 1948 regarding fixing hours on normal working days overtime on a wage of workers who works for normal working days.

9. That as per Rules 23, Rules 24, Rule 24-A(4), Rule 25, Rule 25-A, Rule 21 of Minimum Wages Rules 1952 were considered while taking the policy decision on 26.4.2022 and it has clearly been stated that the provisions are incorporated in Government Orders dated 5.4.2022 and 26.4.2022 shall be strictly adhered too. Photostat copy of the policy decision dated 26.4.2022 is being filed herewith and marked as Annexure No. 3 to this affidavit.

10. That it is also pertinent to mention here that in State of Uttar Pradesh in Government Department and in the supporting institutions for purchasing of manpower that is outsourcing of manpower. The policy decision in Government of Uttar Pradesh for E-market place, GeM portal was adopted. It was adopted vide Government E-market place and tender vide Gem already are being discussed in the Government orders 7.12.2021. Photostat copy of the Government Order dated 7.12.2021 is being filed herewith and marked as Annexure No. 4 to this affidavit.

11. That in view of the aforesaid the orders of this Hon'ble Court dated 22.2.2022, 11.3.2022 and 8.4.2022 are being complied with vide Government Orders dated 5.4.2022 and 26.4.2022."

17. **Along with personal affidavit dated 29.4.2022, a Government Order dated 5.4.2022 setting out particulars of the remuneration / honorarium to be paid to the outsourced employees as well as the Government Order dated 26.4.2022 relatable to the working conditions of the outsourced employees and the Government Order dated 7.12.2021 pertaining to the modalities with regard to the procurement of the manpower through outsourcing had been annexed. The extracts of the Government Order dated 7.12.2021 5.4.2022 and 26.4.2022 are quoted hereinunder:-**

"7.12.2021

प्रेषक, संख्या.--68/ पांच-1-2021

रविन्द्र, सचिव,

उ०प्र० शासन

सेवा में,

महानिदेशक, चिकित्सा एवं स्वास्थ्य सेवायें

उ0प्र0, लखनऊ

चिकित्सा अनुभाग.1 लखनऊ: दिनांक 07 दिसम्बर, 2021

विषय:- उत्तर प्रदेश के शासकीय विभागों एवं उसके अधीनस्थ संस्थाओं में मैनपावर के कप महोदयए ;आउटसोसिंग आफ मैनपावरद्ध के लिये भारत सरकार द्वारा विकसित गवर्नमेन्ट ई.मार्केट प्लेसए जेम (GeM) की व्यवस्था लागू करने के सम्बन्ध में।

उपर्युक्त विषयक चिकित्सा अनुभाग.1 के शासनादेश संख्या-193/ पांच.1-2020-3 (11)/2016, दिनांक 04:02.2020 एवं शासनादेश संख्या.524 / पांच.1-2020, दिनांक 25.03.2020 का कृपया संदर्भ ग्रहण करेंए जिसके माध्यम से चिकित्सा एवं स्वास्थ्य विभाग के अन्तर्गत मैनपावर के क्रय ;आउटसोर्सिंग आफ मैनपावर) के लिये भारत सरकार द्वारा विकसित गवर्नमेन्ट ई.मार्केट प्लेस, जैम (GeM) की व्यवस्था लागू किये जाने के सम्बन्ध में निर्देश निर्गत किये गये थे।

2. इसी क्रम में मा० उच्च न्यायालय में योजित रिट याचिका संख्या-7937 ;एम०बी०) / 2020: अवति परिधि एण्ड कम्यूनिकेशन बनाम उ०प्र० राज्य व अन्य में मा० उच्च न्यायालय द्वारा पारित आदेश दिनांक 20.04.2020 तथा तत्समय कोबिड -19 के प्रथम चरण के संक्रमण के कारण लॉकडाउन से उत्पन्न स्थिति के दृष्टिगत विभाग में टेंडर प्रक्रिया पूर्ण न होने के कारण शासनादेश दिनांक 31.12.2015 द्वारा प्रचलित व्यवस्था को शासनादेश संख्या-574/ पांच.1-2020, दिनांक, 23.04.2020 द्वारा यथावत् बनाये रखा गया था।

3. पुनः चिकित्सा अनुभाग.1 के शासनादेश संख्या.1094 / पांच.1-2021. दिनांक 21.11.2021 द्वारा कोविड.19 की समकालीन परिस्थितियों के कारण चिकित्सा अनुभाग.1 द्वारा तत्समय निर्गत शासनादेश संख्या-574 / पांच.1-2020, दिनांक 23.04.2020 को अवकमित करते हुए सूक्ष्म, लघु एवं मध्यम उद्यम अनुभाग-2 के शासनादेश संख्या.31/2020 / 273 / 18-2-2020-97 ;ल०उ०) / 2016 टी०सी०ए दिनांक 25.08.2020 एवं शासनादेश संख्या-42 / 2020ई.153 / 18-2-2020-07 ;ल० उ०) / 2016 टी०सी०ए दिनांक 07.12.2020 का अनुपालन सुनिश्चित करते हुए मैनपावर का कय किया जाना सुनिश्चित करने के निर्देश निर्गत किये गये है। उक्त शासनादेश दिनांक 21.11.2021 द्वारा यह भी निर्देश दिये गये हैं कि महानिदेशालय स्तर से उक्त शासनादेशों के अनुपालन में मैनपावर कय की कार्यवाही किये जाने तक सेवा में व्यवधान उत्पन्न न हो यह सुनिश्चित करने हेतु परिधिगत अधिकारियों ;मुख्य चिकित्सा अधिकारियों / मुख्य चिकित्सा अधीक्षको), द्वारों इन शासनादेशों के अनुरूप सेवा प्रदाता का चयन तदर्थ रूप से किया जा सकता है। शासनादेश दिनांक 25.08.2020 एवं दिनांक 07.12.2020 के क्रम में महानिदेशक, चिकित्सा एवं स्वास्थ्य सेवायें द्वारा जैम से मैनपावर कय हेतु सेवा प्रदाता एजेंसी के चयन के साथ ही जनपद स्तर पर किये गये अनु स्वतः समाप्त हो जायेंगे।

4. उक्त के क्रम में मुझे यह कहने का निर्देश हुआ है कि मैनपावर कय (आउटसोर्सिंग आप मैनपावर) के लिये भारत सरकार द्वारा विकसित गवर्नमेन्ट ई.मार्केट प्लेस, जम ;GeM) के माध्यम से निविदा करने के सम्बन्ध में 06 क्लस्टरों में विभक्त कर चिकित्सा एवं स्वास्थ्य विभाग में लागू किया जाय। इस हेतु

प्रदेश के 18 मण्डली को 06 भाग अर्थात् 03 मण्डलों का 01 क्लस्टर बनाते हुए जैन पोर्टल से सेवा प्रदाता एजेंसी का चयन किया जाय एक सेवा प्रदाता को 01 क्लस्टर में ही कार्य दिया जायए कठिनाई आने पर ही शासन के अनुमोदन से ही किसी सेवा प्रदाता एजेंसी को 02 क्लस्टर का कार्य दिया जायेगा। सेवा प्रदाता एजेंसी के चयन का कार्य जेम पोर्टल से दिनांक 31.12.2021 तक पूर्ण कर लिया जाय।

5. नई निविदा सम्पन्न होने तक सन्बन्धित शासनादेशों में उल्लिखित रिट याचिका संख्या. 7937 ;एस0बी0)/2020 तथा याचिका संख्या-31208/2018 ;एम०बी०) में मा० उच्च न्यायालय द्वारा पारित आदेशों का अनुपालन किया जाना सुनिश्चित किया जायेगा। यह शासनोदश सूक्ष्म, लघु एवं मध्यम उद्योग विभाग की सहमति से जारी किये जा रहे हैं।.

कृपया उपरोक्तानुसार कार्यवाही समवद्ध रूप से सुनिश्चित करने का कष्ट करें।"

"5.4.2022

संख्या-119 / पाँच-1-2022

प्रेषक,

अमित मोहन प्रसाद,

अपर मुख्य सचिवए उत्तर प्रदेश शासन

सेवा में

महानिदेशक, चिकित्सा एवं स्वास्थ्य सेवायेंए

उ०प्र०, लखनऊ।

चिकित्सा अनुभाग.1 लखनऊ: दिनांक 05 अप्रैल, 2022

विषय:. मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या.22404 / 2021 (रिट.सी) संयुक्त स्वास्थ्य आउटसोर्सिंग / संविदा कर्मचारी संघ बनाम उ०प्र० राज्य व अन्य में मा० न्यायालय द्वारा पारित आदेश के अनुपालन में आउटसोर्सिंग जनशक्ति के वेतन / मानदेय निर्धारण के संबंध में।

महोदय,

कृपया उपर्युक्त विषयक अपने पत्रांक. 11फ / 2021-22/48. दिनांक 01.04.2022 का कृपया संदर्भ ग्रहण करने का कष्ट करें जिसके माध्यम से मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या.22404 / 2021 (रिट.सी) संयुक्त स्वास्थ्य आउटसोर्सिंग / संविदा कर्मचारी संघ बनाम उ०प्र० राज्य व अन्य में मा० न्यायालय के पारित आदेश के अनुपालन में आउटसोर्सिंग से लिये जाने वाले भिन्न.भिन्न प्रकार की जनशक्ति के लिये दरों का निर्धारण श्रम विभाग द्वारा निर्धारित न्यूनतम मानदेय को आधार बनाकर आउटसोर्सिंग कार्मिकों के मानदेय में एकरूपता के दृष्टिगत समेकित प्रस्ताव शासन के विचारार्थ उपलब्ध कराया गया है।

2. उल्लेखनीय है कि मा० उच्च न्यायालयए इलाहाबाद में योजित रिट याचिका संख्या.22404 / 2021 (रिट.सी) संयुक्त स्वास्थ्य आउटसोसिंग / संविदा कर्मचारी संघ बनाम उ०प्र० राज्य व अन्य में मा० न्यायालय के पारित आदेश दिनांक 11.03.2022 के कियात्मक अंश निम्नवत् है:

"Since, prima facie, discrimination is being made by the Medical and Health Services Department between the outsource employee in one district and outsource employee in another district for the same work in the same. department and even our orders are not being complied with on one

pretext or the other, therefore, we are left with no option except to call upon the Chief Secretary of the State of U.P. to look into the matter and to file his personal affidavit in response to the orders dated 15.11.2021 and 22.02.2022, within three weeks. As prayed by the learned Additional Chief Standing Counsel, out up this case as a fresh case for further hearing on 8th April, 2022."

3. उक्त आदेश के अनुपालन में दिनांक 23.032022 को मुख्य सचिव, उ0प्र0 शासन की अध्यक्षता में सम्पन्न बैठक, जिसमें श्रम, कार्मिक तथा सुक्ष्म लघु एवं माध्यम उद्यम विभाग ने भी प्रतिभाग किया, में निर्णय लिया गया कि चिकित्सा स्वास्थ्य एवं परिवार कल्याण विभाग के अधीन सभी संवर्ग, जो आउटसोर्सिंग से रखे जाते हैं की सूची बनायी जाए। तदोपरान्त हर संवर्ग में जो अधिकतम मानदेय किसी भी जनपद में दिया जा रहा होए उसी को भो जनपदों में लागू किया जाए किन्तु यदि किसी जनपद में किसी पद विशेष के लिए बहुत अधिक धनराशि दी जा रही होए जो तर्कसंगत न हो, उसे प्रदेश में एकरूप दर निर्धारण हेतु विचारण में नहीं लिया जायेगा। यह मानदेय श्रम विभाग द्वारा अकुशलए अर्द्धकुशल एवं कुशल श्रमिकों के लिए निर्धारित न्यूनतम मानदेय से अधिक होगा।

4. महानिदेशक, चिकित्सा एवं स्वास्थ्य सेवाओं के द्वारा आउटसोर्सिंग से लिए जाने वाले भिन्न.भिन्न प्रकार की जनशक्ति के लिए दरों के निर्धारण हेतु उपरिसंदर्भित पत्र दिनांक 01. 04.2022 द्वारा उपलब्ध करायी गयी सूचना के तुलनात्मक अध्ययन एवं श्रम विभाग द्वारा निर्धारित न्यूनतम मानदेय पर आधारित विवरण निम्नवत् दर्शित है:

क्र0सं0	पद नाम	श्रेणी	श्रम विभाग के शासनादेश दिनांक 08.10.2021 के अनुसार परिगणित मूल मानदेय	परिधिगत अधिकारियों से प्राप्त सूचनाओं के अनुसार अधिकांश चिकित्सालयों में दिये जाने वाले मूल मानदेय	स्वास्थ्य महानिदेशालय द्वारा प्रस्तावित मूल मानदेय
1	2	3	4	5	6
1	वार्ड ब्याय वार्ड आया	अकुशल	9184	10706.91	10706.91
2	चपरासी/ अर्दली	अकुशल	9184	9999.83	9999.83
3	सफाई कर्म	अकुशल	9184	9302.20	9302.20

	चारी				
4.	मल्टी परपस वर्कर /मल्टी टास्क वर्कर	अकुशल	9184	11509.20	11509.48
5	कुक/कुक मेट/धोबी/माली	अकुशल	9184	10706.91	10706.91
6	प्लमबर	अर्धकुशल	10102.29	11177.44	11177.44
7	कम्प्यूटर सहायक कम रजिस्ट्रेशन क्लर्क	कुशल	11316.16	12844.51	12844.51
8	इलेक्ट्रीशियन	कुशल	11316.16	11316.16	11316.16
	कम जनरेटर आपरेटर				
9	वाहन चालक	कुशल	11316.16	11779.58	11779.58

आउटसोर्स के उपरोक्त पदों जिनके मानदेय का भुगतान राज्य बजट से किया जाता है, के मानदेय में ई०पी०एफ० ई०एस०आई०. सर्विस चार्ज इत्यादि आगणित नहीं है, इन वैधानिक मदों का भुगतान सरकार द्वारा समय.समय पर निर्धारित दरों के कम में नियमानुसार किया जायेगा। उक्त प्रस्तावित / आंकलित दर उ०प्र० मेडिकल सप्लाई कार्पोरेशन द्वारा गतिमान आउटसोर्स कार्मिकों की कलस्टरवार निविदा प्रक्रिया की कार्यवाही पूर्ण होने / कियान्वित होने के उपरान्त लागू होगी।

5. इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि शासन द्वारा सम्यक् विचारोपरान्त महानिदेशालय द्वारा आउटसोर्सिंग जनशक्ति के उपरोक्त समस्त प्रकृति के पदों के संबंध में मानदेय निर्धारण हेतु श्रम विभाग की न्यूनतम दरों के सापेक्ष उपरोक्त प्रस्तर.4 के तालिका में अंकित पदों के सापेक्ष अन्तिम स्तम्भ.6 में प्रस्तावित मानदेय को स्वीकार कर लिया गया है। यह मानदेय उत्तर प्रदेश मेडिकल सप्लाई कारपोरेशन द्वारा गतिमान आउटसोर्स कार्मिकों की कलस्टरवार निविदा प्रक्रिया में सम्मिलित किये जायेंगे तथा उक्त कार्यवाही पूर्ण होने पर लागू किये जायेंगे।"

"26.4.2022

प्रेषक

संख्या. 162 / पांच.1-2022

अमित मोहन प्रसाद,

अपर मुख्य सचिव,

उत्तर प्रदेश शासन

सेवा में,

महानिदेशक,

चिकित्सा एवं स्वास्थ्य सेवायें

उत्तर प्रदेश, लखनऊ।

चिकित्सा अनुभाग.1 लखनऊरू दिनांक 26 अप्रैलए 2022

विषय. मा० उच्च न्यायालयए इलाहाबाद में योजित रिट याचिका संख्या. 22404 / 2021 (रिट.सी) संयुक्त स्वास्थ्य आउटसोर्सिंग संविदा कर्मचारी संघ बनाम उत्तर प्रदेश राज्य व अन्य में मा०: न्यायालय द्वारा पारित आदेश दिनांक 22.02.2022 एवं दिनांक 08.04.2022 के अनुपालन में सर्विस प्रोवाइडर द्वारा जनशक्ति (मैनपावर) हेतु कार्य के घण्टे तथा छुट्टी एवं अवकाश के सम्बन्ध में दिशा निर्देश

महोदय, कृपया उपर्युक्त विषय के सम्बन्ध में मा० उच्च न्यायालयए इलाहाबाद में योजित रिट याचिका संख्या.22404 / 2021 ;रिट.सी) संयुक्त स्वास्थ्य आउटसोर्सिंग / संविदा कर्मचारी संघ बनाम उत्तर प्रदेश राज्य व अन्य में मा० न्यायालय द्वारा पारित आदेश दिनांक 08.04.2022 का क्रियात्मक अंश निम्नवत है: *".....in the order dated 22.02.2022, this court observed as under:*

"In view of the aforesaid, two weeks and no more time is granted to the respondent Nos. 1 and 2 to file counter affidavits by means of their personal affidavits in which copy of a policy decision emerging from various government orders issued from time to time with regard to procurement of man-power services, minimum remuneration to be paid to different classes of inductees/ manpower by the service provider, model conditions of engagement of man-power through service providers including working hours and leave/ holidays as reflected in the government order dated 25.08.2020 and reiterated in letter of the respondent No. 4 dated 12.11.2021 may be incorporated as per decision of the State Government. In other words, the entire scheme for procurement of man-power service and matters relating thereto be reduced in writing in one comprehensive government order/ policy decision and copy thereof, be filed along with the counter affidavit."

Perusal of the personal affidavit filed today shows that the State Government has taken a policy decision with regard to uniformity in scales of payment for different kinds of outsourced employees and outsourcing agencies. However, some of the important aspects as reflected from our aforequoted order dated 22.02.2022, appears to have been left consideration.

Learned Additional Advocate General states that the Government shall look into all the aspects and take a uniform and comprehensive policy decision in the light of the order dated 22.02.2022 and while taking the decision, shall also take note of the principles: laid down by Hon'ble Supreme Court in the case of Gujrat Mazdoor Sabha vs. State of Gujrat. (2020) 10 SCC 459 (paras 33 to 49). He prays that three weeks time may be granted.

As prayed by learned Additional Advocate General, three weeks' time is granted to file an affidavit annexing therewith the government order/ policy decision. The affidavit shall be filed by the Chief Secretary.

List/ put up in the additional cause list for further hearing on 29.04.2022 at 02:00P.M."

2. अवगत कराना है कि सूक्ष्म, लघु एवं मध्यम उद्यम अनुभाग-2 द्वारा जारी शासनादेश दिनांक 25.08.2020 के द्वारा प्रदेश में शासकीय विभागों एवं उनके अधीनस्थ संस्थाओं में मैनपावर (आउटसोर्सिंग ऑफ मैनपावर) तथा अन्य उपलब्ध सेवाओं के क्रय के लिए भारत सरकार द्वारा विकसित गवर्नमेण्ट ई-मार्केट प्लेस (जेम) की व्यवस्था लागू किये जाने हेतु विस्तृत दिशा निर्देश जारी किए गए है। उक्त शासनादेश के प्रस्तर 6 में यह प्राविधान किया गया है कि "किसी भी विभाग द्वारा किसी गुणवत्तापूर्ण सेवा के लिए कर्मियों को कितना मानदेय देय होगा इसका निर्णय संबंधित विभाग, विभिन्न सुसंगत नियमों के अनुरूप एवम् श्रम विभाग के न्यूनतम वेजेज के अनुसार करेगा। जोकि वर्तमान में कार्मिकों को प्राप्त हो रहे मानदेय से कम अनुमन्य नहीं होगा। श्रम संविदा नियमावली साप्ताहिक राजकीय मातृत्व आदि अवकाश एवम् कार्य के घंटे जैसे नियमों का अनुपालन कराने की जिम्मेदारी केता विभाग की होगी।"

3. इस सम्बन्ध में उल्लेखनीय है कि श्रम विभाग के सुसंगत अधिनियमों एवं शासनादेशों में निम्नवत् व्यवस्था की गयी है:

(i) न्यूनतम वेतन अधिनियम 1948 के अंतर्गत वर्तमान में 74 अनुसूचित नियोजनों के लिए उत्तर प्रदेश शासन द्वारा न्यूनतम मजदूरी निर्धारित की गयी है और प्रत्येक छमाही (अप्रैल-सितम्बर एवम् अक्टूबर-मार्च) के लिए परिवर्तनीय महंगाई भत्ते की गणना की जाती है। मजदूरी की मूल दरों एवम् देय महंगाई भत्ते से सम्बंधित पत्रांक 268-76 / प्रवर्तन-एम0डब्लू / 15 दिनांक 31.03.2022 के माध्यम से जारी नवीनतम आदेश (सलग्न) के कमांक 74 पर ऐसे प्रतिष्ठान जो किसी अनुसूचित नियोजन के अधीन आच्छादित न हो, में नियोजन का उल्लेख है। मजदूरी की जो दरें मासिक आधार पर निर्धारित की गयी हैं उनकी दैनिक दर, मूल मजदूरी और परिवर्तनीय महंगाई भत्ते के 1 / 26 से कम तथा प्रतिघण्टे दर दैनिक दर का 1/6 से कम नहीं होगी। (संगत आदेश संलग्न)" चिकित्सा, स्वास्थ्य एवं परिवार कल्याण विभाग द्वारा निर्गत शासनादेश संख्या-119/ पाँच/ 12022 दिनांक 05.04.2022 द्वारा आउटसोर्स जनशक्ति के वेतन / मानदेय निर्धारण के सम्बन्ध मे दिशा निर्देश पूर्व में ही जारी किए जा चुके है।

(8) न्यूनतम मजदूरी अधिनियम, 1948 की धारा-13 में सामान्य कार्यदिवस के लिए घण्टे नियत करना Fing hours for a normal working days, etc), धारा-14 में अतिकाल (Overtime) धारा-15 में ऐसे कर्मकार की मजदूरी जो सामान्य कार्यदिवस से कम काम करता है (Wage of worker who works for less then normal working day) से सम्बंधित प्राविधान है। तत्संबंधित नियमों का उल्लेख उत्तर प्रदेश न्यूनतम मजदूरी नियमावली, 1952 के नियम-23 से 25 में किया गया है जो निम्नवत है-"

नियम-23- साप्ताहिक विश्राम का दिन किसी अनुसूचित नियोजन, जिसके लिए अधिनियम के (a) अन्तर्गत न्यूनतम मजदूरी दर का निर्धारण हुआ है उसका कर्मचारी अनुसूचित नियोजन में उसी नियोजक के अधीन, लगातार छः दिन से कम नहीं, कार्य किया है, ऐसे कर्मचारी को प्रत्येक सप्ताह एक दिन का विश्राम दिया जायेगा, जो सामान्यतः (रविवार) होगा।

(b) नियम.24. सामान्य कार्यदिवस में कार्य के घण्टों की संख्या व्यक्त कर्मचारी के लिए 9 होगी जिसमें प्रतिदिन के कार्य के घण्टे इस प्रकार निर्धारित किये जायेंगे कि कोई अवधि 5 घण्टे से अधिक नहीं होगीए तथा कोई व्यस्क कर्मचारी 5 घण्टे से अधिक कार्य नहीं करेगा जब तक कि इससे पूर्व इसे कम से कम आधे घण्टे का विश्राम न मिल गया हो। अर्थात कर्मचारी को किसी कार्य दिवस में 5 घण्टे कार्य के बाद कम से कम आधा घण्टे का विश्राम मिल जाना आवश्यक है।

(c) नियम-24(क) (IV) . नियम.24 के अंतर्गत निर्धारित सामान्य कार्य के घण्टों से अधिक कार्य करने पर राज्य सरकार द्वारा भुगतान निर्धारित ओवरटाइम दर पर किया जायेगा। (d) नियम.25- जहाँ कहीं कर्मचारी कारखाना अधिनियम 1948 या उत्तर प्रदेश दुकान और वाणिज्य अधिष्ठान अधिनियम, 1962 के लागू होने के फलस्वरूप इनमें अनुमन्य सुविधा पा रहा हैए वहीं इस नियमावली के नियम 23 एवम 24 के प्राविधान उनके विपरीत प्रभावी नहीं होंगे।

(e) नियम. 25 ;क) अनुसूचित नियोजन में कार्यरत कर्मचारी सामान्य कार्यदिवस के लिए निश्चित कार्य के घण्टों से अधिक कार्य अथवा एक सप्ताह में 54 घण्टों से अधिक कार्य करता हैए उसे प्रत्येक घण्टे या उस घण्टे के किसी अंश के लिए अधिक कार्य हेतु सामान्य दर से दोगुना निम्नांकित ओवर टाइम दर का भुगतान किया जायेगा। ;कृषि एवम् चाय बागान के नियोजन में ओवर टाइम दर सामान्य दर का डेढ़ गुना होगीद्ध। कृषि एवम् चाय बागान के नियोजन को छोड़कर अन्य सभी अनुसूचित नियोजन में किसी एक कलेण्डर वर्ष में कुल 200 घण्टे से अधिक ओवर टाइम नहीं कराया जायेगा।

ओवर टाइम भुगतान दर्शाने वाले अभिलेख का रख.रखाव किया जायेगा। ;द्धि नियम.21. मजदूरी अवधि एक माह से अधिक की नहीं होगी तथा कर्मचारी को मजदूरी का भुगतान उस मजदूरी अवधि की आखिरी तिथि के पश्चात् सातवा दिन समाप्त होने से पूर्व किसी कार्यदिवस में किया जायेगा।

महिला श्रमिक योजित होने की दशा में यदि सेवा प्रदाता ई०एस०आई० से आवर्त होगा तो मातृत्य हितलाम एवम् बीमारी से सम्बंधित हितलाभ ई०एस०आई०सी० से प्रदान किये जायेंगे। 4 शासन द्वारा सम्यक विचारोपरान्त मुझे यह कहने का निर्देश हुआ है कि श्रम विभाग 30 शासन की उपर्युक्त प्राविधानित व्यवस्थाओं को चिकित्साए स्वास्थ्य एवं परिवार कल्याण विभाग में आउटसोर्सिंग ऑफ मैनपावर हेतु कड़ाई से अनुपालन सुनिश्चित किया जाए।"

18. As noticed in the order passed by this Court on 15.11.2021, the learned counsel for the petitioner had itself not pressed the relief with regard to challenge of the engagement of employees working on various posts by outsourcing through GeM portal, thus **the relief stood confined to the disparity and the differential treatment meted to them and non adherence of the Government Orders issued from time to time referable to outsourcing of manpower through GeM portal.**

19. **This Court finds that the State of Uttar Pradesh through its functionaries had filed affidavit before this Court while noticing and admitting the fact that disparity and differential treatment has been meted in the matter of outsourcing, as not only remuneration/ honorarium differs from one place to another, namely for the sake of illustration from one district or the other and further the fact that the**

benefits relatable to weekly rest, maternity leave, holidays, working hours etc, are not being extended to them.

20. **Bearing in mind, the above noted shortcomings and discrepancies now the State of Uttar Pradesh has come up with the uniform policy wherein not only the modalities have been fixed for the bids to be conducted for outsourcing of the manpower, but also uniformity in the payment of honorarium has been taken note of and further even the working conditions have been incorporated in a Government Order, so as to confer the outsourced employees the benefits making them in an advantageous position in that regard.**

21. The genesis of economical, social and cultural rights itself finds its roots in **Article 7 of the International Covenants of Economic, Social and Cultural Rights 1966,** the same is being reproduced hereinbelow:-

"Article 7 The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

22. India as a democratic and socialist country became a signatory of the above noted covenant and ratified the same on 10.4.1979. In view of the aforesaid factual backdrop, various legislations were brought into existence, just in order to give fair wages, equal remuneration for work of equal value that too without distinction of any kind, which presupposes decent living, safe and healthy working conditions inculcating equal opportunity for everyone, which obviously includes not only elimination of the chances of discrimination, but also setting out the terms and conditions regarding their engagement as well as a cozy and congenial environment of working.

23. The Constitutional mandate to the State to protect the citizen's right to live with human dignity echoed by the Apex Court of this country is an unconditional promise that the polity owes to every citizen. This reverberation generated a bonhomie benevolent rights to the marginalized groups of our society.

24. Employees generally have optimistic expectations when they enter the workforce. Regardless of levels of

experience, employees want to be treated with respect and dignity. Employees also want to feel valued and productive while at work. Work is, for many people, an expression of identity and a measure of one's worth to society. Self-esteem is often linked to job satisfaction and career growth.

25. The Parliament in exercise of the powers as conferred therein had enacted an Act by the name and the nomenclature of **Equal Remuneration Act, 1976** in order to provide for payment of equal remuneration to men and women workers and for prevention and discrimination on the ground of sex against the women in the matter of employment and the matters connected therewith and incidental thereto.

26. For the reference, statement of objects and reasons are being extracted hereinunder:

"Prefatory Note - Statement of Objects and Reasons. *Article 39 of Constitution envisages that the State shall direct its policy, among other things, towards securing that there is equal pay for equal work for both men and women. To give effect to this constitutional provision, the President promulgated on the 26th. September, 1975, the Equal Remuneration Ordinance, 1975 so that the provisions of Article 39 of the Constitution may be implemented in the year which is being celebrated as the International Women's Year. The Ordinance provides for payment of equal remuneration to men and women workers for the same work or work of similar nature and for the prevention of discrimination on grounds of sex."*

27. Parliament of India in order to amend and consolidate the laws relating to wages and bonus and the matters enacted thereto or incidental thereto enacted an Act by the name and the nomenclature of the Code on Wages 2019 (No.29 of 2019), which received assent of the President on 8.8.2019 and was also gazetted on the same day. As per Sub-Section 2 read with 3 of Section 1 under Chapter I, it extends to the whole of India and it shall come into force on such date, as the Central Government may by notification in the official gazette appoint and the different dates may be appointed for different provisions of the Code and any reference in any such provisions to the commencement of the Code shall be construed as a reference to the coming into force of that provision. Section 5 of Chapter-II of the Code on Wages, 2019 provides that no employer shall pay to an employee wages less than the minimum rate of wages notified by the appropriate Government and so far as Section 6 is concerned, it provides the criteria and the basis of fixation of minimum rate of wages payable to the employees as whereas Section 7 envisages the composition of minimum rate of wages fixed or revised by appropriate rate of Government. Section 8 in extenso provides that in fixation of minimum rate of wages for the first time or revising minimum rates of wages, detailed criteria to be adhered to as clearly provided therein. Section 9 provides for power of the Central Government to fix floor wage and Section 10 provides for wages of employee, who works for less than normal working day and Section 11 provides for wages for two or more classes of work. Section 12 provides for minimum time rate for piece work and Section 13 provides for fixing hours for working for normal working day, and Section 14 provides for wages for overtime work.

28. As per Sub-Section (3) of Section 1 of **the Code on Wages, 201**9, the provisions contained therein would come into force on such date as the Central

Government by notification in the Official Gazette appoint, however, the same **has not been enforced till date, but it finds its presence in the statute book.**

29. **A cumulative reading of the Minimum Wages Act 1948, the Equal Remuneration Act, 1976 and the Code on Wages, 2019 itself shows that they are the beneficial legislations engrafted for the benefit and the welfare of the workers with relation to wages, minimum wages and ancillary benefits as available under Labour Laws. The aforesaid Acts enjoin an obligation upon the appropriate Government to modify or amend the same as and when it has occasioned in the light of the relevant factors as prevalent from time to time.**

30. The Hon'ble Apex Court in the case of ***Gujarat Majdoor Sabha and others vs. State of Gujarat, 2020(10) SCC 459*** had an occasion to consider the right of the workers belonging to unorganized sectors working in manufacturing units. The Hon'ble Supreme Court in **paragraphs-44, 45, 48 and 49** observed as under: -

"44. The Constitution is a charter which solemnized the transfer of power. But the constitutional vision of swarajya transcends the devolution of political power. The Fundamental Rights and Directive Principles of State Policy present a coherent vision of a welfare state that envisages justice- social, economic and political. Granville Austin, in his seminal work on the Indian Constitution, has collectively described them as "the conscience of the Constitution which connects India's future, present, and past by giving strength to the pursuit of social revolution in India". The colonial experience, and the poverty it sanctified as an incident of state policy, were the driving force in the Constituent Assembly's goal to achieve economic equality and independence. Although the Directive Principles were not intended to be capable of being independently enforced before the courts to invalidate a legislation, they inform state policies; act as a guidepost for legislation and provide sign posts for travelers engaged on the path of understanding the complexities which the Constitution unravels. Eminent legal scholar Upendra Baxi, while reviewing Granville Austin's work on the Indian Constitution had analysed the dichotomy of justiciability and non-justiciability of Fundamental Rights and Directive Principles. He had noted-

"..In no other area of constitutional scholarship, the need to ascend from the planet of platitudes to an analytic paradise is more compelling than in the study of directive principles. The fact that this distinction [in justiciability] is now a constitutional reality should not be allowed to obscure the more important fact that the directive principles and fundamental rights are both originally rooted in a vision of a new India. And though many writers on constitutional law have been led to draw a radical and sharp distinction between rights and principles, it is heartening that judicial decision-making has not failed to maintain the awareness of their basic unity".

45. The Factories Act is an integral element of the vision of state policy which seeks to uphold Articles 38, 39, 42, and 43 of the Constitution. It does so by attempting to neutralize the excesses in the skewed power dynamics between the managements of factories and their workmen by ensuring decent working conditions, dignity at work and a living wage. Ideas of "freedom' and "liberty' in the Fundamental Rights recognized by the Constitution are but hollow aspirations if the aspiration for a dignified life can be thwarted by the immensity of economic coercion.

48. The Constitution allows for economic experiments. Judicial review is

justifiably held off in matters of policy, particularly economic policy. But the Directive Principles of State Policy cannot be reduced to oblivion by a sleight of interpretation. To a worker who has faced the brunt of the pandemic and is currently laboring in a workplace without the luxury of physical distancing, economic dignity based on the rights available under the statute is the least that this Court can ensure them. Justice Patanjali Sastry immortalized that phrase of this court as the sentinel on the qui vive in our jurisprudence by recognizing it in State of Madras vs. V G Row, AIR 1952 SC 196,. The phrase may have become weather-beaten in articles, seminars and now, in the profusion of webinars, amidst the changing times. Familiar as the phrase sounds, judges must constantly remind themselves of its value through their tenures, if the call of the constitutional conscience is to retain meaning. The "right to life' guaranteed to every person under Article 21, which includes a worker, would be devoid of an equal opportunity at social and economic freedom, in the absence of just and humane conditions of work. A workers' right to life cannot be deemed contingent on the mercy of their employer or the State. The notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and right against forced labour that are secured by Articles 21 and 23 of the Constitution.

49. This Court is cognizant that the Respondent aimed to ameliorate the financial exigencies that were caused due to the pandemic and the subsequent lockdown. However, financial losses cannot be offset on the weary shoulders of the laboring worker, who provides the backbone of the economy. Section 5 of the Factories Act could not have been invoked to issue a blanket notification that exempted all factories from complying with humane working conditions and

adequate compensation for overtime, as a response to a pandemic that did not result in an "internal disturbance' of a nature that posed a " grave emergency' whereby the security of India is threatened. In any event, no factory/ classes of factories could have been exempted from compliance with provisions of the Factories Act, unless an "internal disturbance' causes a grave emergency that threatens the security of the state, so as to constitute a "public emergency' within the meaning of Section 5 of the Factories Act. We accordingly allow the writ petition and quash Notification No. GHR/ 2020/56/FAC/142020/346/M3 dated 17 April 2020 and Notification No. GHR/2020/92/FAC/142020/346/M3 dated 20 July 2020 issued by the Labour and Employment Department of the Respondent State."

31. Recently, the Hon'ble Apex Court in **Civil Appeal No. (S) 3153 of 2022, *Maniben Maganbhai Bhariya*** decided on 25.4.2022 in **paragraphs 40, 44, 52, 29, 31 and 32** observed as under:

"Rastogi, J.

.....

40. If we look towards the problems plaguing the Anganwadi workers/helpers, the first and foremost, they are not holders of civil posts due to which they are deprived of a regular salary and other benefits that are available to employees of the State. Instead of a salary, they get only a so called paltry "honorarium' (much lower than the minimum wages) on the

specious ground that they are parttime voluntary workers, working only for about 4 hours a day.

44. This appears to be the reason that on acknowledging their services on account of an exponential increase in Anganwadi centres/workers which has been recognized by Government of India, the opportunities are made available to Anganwadi workers/helpers being brought into the mainstream and to become Government employee, with a passage of time.

52. Before parting with the order, I would like to observe that the time has come when the Central Government/State Governments has to collectively consider as to whether looking to the nature of work and exponential increase in the Anganwadi centers and to ensure quality in the delivery of services and community participation and calling upon Anganwadi workers/helpers to perform multiple tasks ranging from delivery of vital services to the effective convergence of various sectoral services, the existing working conditions of Anganwadi workers/helpers coupled with lack of job security which albeit results in lack of motivation to serve in disadvantaged areas with limited sensitivity towards the delivery of services to such underprivileged groups, still being the backbone of the scheme introduced by ICDS, time has come to find out modalities in providing better service conditions of the voiceless commensurate to the nature of job discharged by them.

Abhay S. Oka, J.

29. The definition of ''wages' is very wide. It means all emoluments which are earned by an employee on duty. Thus, the honorarium paid to AWWs and AWHs will also be covered by the definition of wages. As AWWs and AWHs are employed by the State Government for wages in the establishments to which the 1972 Act applies, the AWWs and AWHs are employees within the meaning of the 1972 Act. In view of the said Rules of the Gujarat Government, the Anganwadi centres are not under the control of the *Central Government. Therefore, the State Government will be an appropriate Government within the meaning of clause (a) of Section 2 of the 1972 Act. Accordingly, a person or authority appointed by the appropriate Government for the supervision and control of AWWs and AWHs will be the employer within the meaning of clause (f) of Section 2.*

31. For the reasons recorded above, I have no manner of doubt that the 1972 Act will apply to Anganwadi centres and in turn to AWWs and AWHs. In the impugned Judgment, the Division Bench was swayed by the view taken by this Court in the case of Ameerbi which was followed by the Delhi High Court in the case of Akhil Bhartiya Anganwadi Kamgar Union (Regd.) (supra). These decisions, for the reasons recorded earlier, have no bearing on the issue involved in these appeals. The learned Single Judge was right in holding that the 1972 Act was applicable to AWWs and AWHs. The Controlling Authority has granted simple interest at the rate of 10% on the overdue gratuity amounts. All eligible AWWs and AWHs shall be entitled to the benefit of interest.

32. Hence, I allow the appeals and set aside the impugned Judgment dated 8th August 2017 of the Division Bench of Gujarat High Court and restore the Judgment of the learned Single Judge dated 6th June 2016 in Special Civil Application no. 1219 of 2016 and other connected

cases by holding that the provisions of the 1972 Act apply to AWWs and AWHs working in Anganwadi centres. Within a period of three months from today, necessary steps shall be taken by the concerned authorities in the State of Gujarat under the 1972 Act to extend benefits of the said Act to the eligible AWWs and AWHs. We direct that all eligible AWWs and AWHs shall be entitled to simple interest @ 10% per annum from the date specified under subsection 3A of Section 7 of the 1972 Act."

32. The Hon'ble Apex Court in the case of ***State of Punjab vs. Jagjit Singh***, reported in **2017(1) SCC 148** had an occasion to consider the **plight of daily wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees while holding that they are entitled to minimum of the regular pay-scale.** The Hon'ble Apex Court in paragraphs 43, 44, 54.3, 57 and 58 has observed as under:

"43. We shall now venture to summarize the conclusions recorded by this Court, with reference to a claim of pay parity, raised by temporary employees (differently designated as work-charge, daily-wage, casual, ad- hoc, contractual, and the like), in the following two paragraphs.

54.3. Based on the consideration recorded hereinabove, the determination in the impugned judgment rendered by the full bench of the High Court, whereby it classified temporary employees for differential treatment on the subject of wages, is clearly unsustainable, and is liable to be set aside.

57. There is no room for any doubt, that the principle of "equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India, under Article 141 of the Constitution of India. The parameters of the principle, have been summarized by us in paragraph 42 hereinabove. The principle of "equal pay for equal work' has also been extended to temporary employees (differently described as work-charge, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us, in paragraph 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us, yet again.

*58. In our considered view, **it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position.*** Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation."

(Emphasis supplied by us)

33. Following the judgment of Jagjit Singh (Supra) recently, the Hon'ble Apex Court in the case of ***Sabha Shanker Dube vs. Divisional Forest Officer and others, 2019(12) SCC 297*** has observed in paragraph-12 observed as under:-

*"12. In view of the judgment in **Jagjit Singh (supra)**, we are unable to uphold the view of the High Court that the Appellants-herein are not entitled to be paid the minimum of the pay scales. We are not called upon to adjudicate on the rights of the Appellants relating to the regularization of their services. We are concerned only with the principle laid down by this Court initially in **Putti Lal (supra)** relating to persons who are similarly situated to the Appellants and later affirmed in **Jagjit Singh (supra)** that temporary employees are entitled to minimum of the pay scales as long as they continue in service."*

34. Analysing the proposition of law as culled out in the above noted judgments irresistible conclusion can be safely drawn that the State being a model employer cannot act in such a manner, which not only creates disparity or tantamounts to encourage differential treatment in the matter of payment of remuneration, which might be in the form of honorarium as well as in the matters of working conditions. Here in the present case, it is the State Government, who by virtue of the Government Orders so issued from time to time as referred to above had made applicable the online platform by the name of GeM portal. It has been the consistent stand of the State that the payment of the remuneration should be as per the Minimum Wages Act, 1948 and working conditions should include number of working hours, days of working, maternity leave etc.

35. This Court further finds that the State of Uttar Pradesh and its functionaries have themselves rectified the defects and removed the lacunae, which were showing its presence in the Government Orders, while supplementing it with positive vibes, which were in the shape of a chariot bestowing benefits, which are legally admissible to the outsourced employees, who belong to unorganized sector.

36. In view of the foregoing discussions, the writ petition is **partly allowed** and **disposed of with the following directions**: -

(a) The respondents (State of Uttar Pradesh and its instrumentalities) shall strictly adhere to and comply with the Government Orders dated 7.12.2021, 5.4.2022 and 26.4.2022.

(b) If so occasioned in the light of the relevant factors, which include elevation of minimum wages, coupled with the benefits, which would be admissible from time to time, to the outsourced employee, the Government Orders may be amended/ modified from time to time.

(c) The State being a model employer must also make endeavours to issue appropriate Government Orders containing the aforementioned working conditions and maintaining uniformity in the payment of remuneration / honorarium in other departments through out the State of U.P.

(d) Needless to point out that whenever any modification / amendment is being made in the Government Orders, then they should be uploaded on the website so

as to make it accessible to general public making them aware about rights and the privileges so conferred upon them.

(e) Once the Parliament of India has enacted the Code on Wages 2019 (No.29 of 2019), which has received the assent of the President and has been Gazetted on 8.8.2019 providing for amending and consolidating the law relating to wages and bonus and matters connected thereto and incidental thereto, then in view of the provisions contained under Sub-Section 3 of Section 1 of the Code on Wages 2019, this Court hopes and trust that the Central Government will expeditiously take steps to enforce the provisions of the Code on Wages, 2019.

(2022)06ILR A249

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 20.05.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-C No. 25042 OF 2011

Smt. Manu Kumari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Sahai

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Forest Act, 1927 – UP Establishment and Regulation of Saw Mills Rules, 1978 – R. 3(1) – Establishment of Saw Mill – Rule imposes the condition that the Mill should not be within 10 kms of the forest – Non-fulfillment of the condition – Effect – Notice issued requiring the petitioner to remove Saw Mill – Legality challenged – Held, the relief so claimed by the petitioner cannot be granted to it as admittedly the petitioner's Saw Mill is within 10 kms of the forest land and the said fact has also not been disputed by the petitioner. (Para 10, 15 and 17)

Writ petition dismissed (E-1)

List of Cases cited :-

1. T.N Godavarman Thirumulkpad Vs U.O.I. & ors. (1997) 5 SCC 760

2. Pradeep Kumar Saxena Vs St. of U.P. & ors. 2015 (7) ADJ 615

(Delivered by Hon'ble Vivek Kumar Birla, J. & Hon'ble Vikas Budhwar, J.)

1. Today when the matter was taken up a request was made on behalf of the Sri Rahul Sahai, learned counsel for the petitioner for adjourning the matter. However, this Court finds that present petition is of the year 2011 and the petitioner has not been able to obtain any interim order.

2. Accordingly, present writ petition is being decided on the basis of pleadings so available on record and after hearing Sri Sharad Srivastava, learned Standing Counsel.

3. This is a petition under Article 226 of the Constitution of India seeking following reliefs:-

"1. Issue a writ, order or direction in the nature of certiorari for quashing the impugned order dated 4.4.2011 passed by the respondent no. 4 vide Patrank No. 4126/22-18 (Annexure-1 to the Writ Petition).

2. Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent authorities not to interfere in the peaceful running and functioning of the Saw Mill of the petitioner situated at Lalpur, Chitaula, Arniya, Bulandhshahar."

4. Perusal of relief as sought in the present writ petition reveals that the petitioner herein is challenging the order / notice dated 4.4.2011 issued by the fourth respondent, whereby the petitioner was required to shift its Saw Mill within a period of seven days. Further relief has also been sought in the nature of mandamus commanding the respondents herein not to interfere in the peaceful running and functioning of the Saw Mill of the petitioner situated at Lalpur, Chitaula, Arniya, Bulandhshahar.

5. As per the pleading so set forth in the present writ petition, which reveals that the petitioner was running the abovenoted Saw Mill with one Madan Pal Singh s/o Hardev Singh since 1987. A license to the said effect was issued in favour of Sri Madan Pal Singh bearing No. 205/2003 Arniya. It has also been pleaded that an agreement was also entered between the petitioner and Madan Pal Singh. However, as stated in paragraph 5 of the writ petition on 16.11.2004 Sri Madan Pal Singh s/o Hardev Singh transferred the license in favour of the petitioner. A copy of the license dated 16.11.2004 has been appended as Annexure-2 at page 21 of the paperbook in which there is a specific condition mentioned therein that the Saw Mill should not fall within 10 kms of existing forest.

6. Sofar as the procedure and the manner according to which licenses as well as ancillary and incidental issues are to be governed with respect of Saw Mills it is clearly provided by the Rule by name and the nomenclature of Uttar Pradesh Establishment and Regulation of Saw Mills Rules, 1978, which has been enacted in exercise of the powers under Clause (a) of Section 51-A of the Indian Forest Act, 1927.

7. As a matter of fact, in the case of **T.N Godavarman Thirumulkpad vs. Union of India and others (1997) 5 SCC 760** the Hon'ble Apex Court in proceedings under Article 32 of the Constitution of India in Writ Petition (C) No. 202 of 1995 had issued certain directions vide order dated 8.5.1997, however, sofar as the same pertains to state of Uttar Pradesh. The same is being quoted as under:-

"1. After hearing the learned amicus curiae, the learned Attorney General and the other learned counsel, we direct as under:

A. In the State of Uttar Pradesh the following is permitted-

1. The Principal Chief Conservator of Forest (PCCF) may, on a case-to-case basis, consider grant of permission to an existing licensed saw mill to relocate itself, provided that the relocated site is not within 10 kms of any existing forest.

2. To alleviate the unintended hardship which may be caused to the ordinary populace in the hill areas who need forest produce for their survival, it is clarified as under:-

(a) Nothing contained in the orders passed by this Court would prevent the U.P. Forest Corporation from directly undertaking the exercise of collecting forest produce including fallen wood (but not any felling or cutting of trees or timber) to the extent strictly necessary, and disturbing the

same ex depot to the people living in the hill areas. (b) The Forest Corporation may, with the prior permission of the PCCF, remove dead or dry trees for supply in the same manner ex depot to people residing in those areas. The Forest Corporation shall (i) undertake such activity itself without engaging any outside agencies, and (ii) keep an account of the dead and dry trees felled and removed by them, and shall by way of an affidavit file the same in this Court."

8. In pursuance of the directions so issued by the Hon'ble Hon'ble Apex Court in the abovequoted decision on 8.5.1997 it was mandated that the Principal Chief Conservator of Forest (PCCF) may on case-to-case basis consider grant of permission to an existing license Saw Mill to relocate itself provided that the relocated existing area is not within 10 kms of any existing forest.

9. In the aforesaid factual backdrop, it appears that the respondents herein conducted survey for the purposes of determining the distance of the existing Saw Mill vis-a-vis the forest area so earmarked therein. It is come on record that on 28.2.2011 a communication has been issued under the signature of the respondent no. 2 addressed to Forest Conservator and Regional Director Forest, Meerut Area, Meerut, which is Annexure-9 to the writ petition at page 57 of the paperbook, wherein the details of the petitioner finds place at Sl. No. 11, according to which it is just 6.47 kms within the area earmarked as forest.

10. Consequently, a notice was issued on 4.4.2011, which is under challenge, by the respondent no. 4 requiring the petitioner to remove the Saw Mill, which is existing as continuance of the same would be in defiance of the orders / directions issued by the Hon'ble Apex Court.

11. Challenging the same, now the petitioner is before this Court.

12. This Court on 4.5.2011 connected the present petition with Writ C No. 23131 of 2011 (Subhash Chandra And Others vs. State of U.P. and others) in which on 22.4.2011 the following order was passed:-

"Connect and list this petition with Writ Petition 23131 of 2011."

13. Subsequently, Writ C No. 23131 of 2011 (Subhash Chandra And Others vs. State of U.P. and others) came to be dismissed vide order dated 22.11.2018 on the ground that as now no cause of action survives. The aforesaid order dated 22.11.2018 is also quoted as under:-

"Heard Sri R. K. Sharma, learned counsel for the petitioners and learned Standing Counsel for the State.

Learned counsel for the petitioners Sri R. K. Sharma submits that he does not wish to press the writ petition as no cause of action now survives.

The writ petition is, accordingly, dismissed."

14. This Court further finds that Uttar Pradesh Establishment and Regulation of Saw Mill Rules, 1978 under went amendment on 4.12.2017 the Uttar Pradesh Establishment and Regulation of Saw Mills (6th Amendment) Rules, 2017 have come into existence. The aforesaid amended Rules 2017 are quoted as under:-

"Uttar Pradesh Shasan
Van Avam Vanya Jeev Anubhag-2

The Governor is pleased to order the publication of the following English translation of Notification no. 2903 /14-2-2017-165G/2017, dated 04 December, 2017 for general information.

NOTIFICATION
No. 2903 /14-2-2017-165G/2017
Lucknow, Dated 04 December, 2017

In exercise of the powers under clause (a) of section 51-A of the Indian Forest Act, 1927 (Act no. 16 of 1927), read with section 21 of the General Clauses Act, 1897, (Act no. X of 1897), the Governor is pleased to make the following rules with a view to amending the Uttar Pradesh Establishment and Regulation of Saw Mills Rules, 1978 :-

THE UTTAR PRADESH ESTABLISHMENT AND REGULATION OF SAW MILLS (SIXTH AMENDMENT) RULES, 2017

Short title and Commencement		1 (1) These rules may be called the Uttar Pradesh Establishment and Regulation of Saw Mills (Sixth Amendment) Rules, 2017. (2) They shall extend to the whole of Uttar Pradesh. (3) They shall come into force with effect from the date of their publication in the official
General Amendment		2. In the Uttar Pradesh Establishment and Regulation of Saw Mills Rules, 1978, hereinafter referred to as the said rules for the words "Establishment and Regulation of Saw Mills" the words "Wood-Based Industries (Establishment and Regulation)", wherever occurring including heading shall be substituted.
Amendment of rules 2 to 12		3. In the said rules for rules, 2, 3, 4, 5, 5A, 6, 7, 8, 9, 10, 11, 11A and 12 set out in column-1 below the rules as set out in column-2 shall be substituted , namely:-

Column-1 Existing rules			**Column-2** Rules as hereby substituted
Definitions	2. In these rules, unless the context otherwise requires :- (a) "Saw mills" means and includes any mechanical devices whether operating with electric power, fuelpower or man power for the purpose of cutting, sawing or converting timber and wood into pieces or the like acts, but shall not include such mechanical devices whose engine power is up to 3 H.P.* (*Substituted by Notification No. 4219/14-2-98-405(209)96TC II dated	Definitions	2. (1) In these rules, unless the context otherwise requires :- (a) "Industrial Estate' means areas notified by the State Government for establishment of Wood Based Industries. (b) "License' means a license granted under the rules notified by the State in pursuance of these Rules. (c) "Principal Chief Conservator of Forests' means a Forest officer of the rank of Principal Chief

	26.06.1998) (b) 'One unit of saw-mill' shall be taken as equivalent to 25 H.P. engine or any part thereof. (Thus a saw mill using 65 H.P. engines will be deemed as equivalent to 3 units).		Conservator of Forests and it also includes an officer designated as a Head of Forest Department in the State. (d) "Round log' means a piece of wood in its natural form, having mid girth of thirty centimeter or more under bark and it includes such round log even after its bark has been removed or its surface has been dressed, manually or by using a band saw or any other machine or equipment to make its cross section square or near-square for the purpose of ease in its transportation and/or storage. (e) "Saw Mill', means plants and machinery in a fixed structure or enclosure, for conversion of round logs into sawn timber. (f) "Sawn				timber' means beams, scantlings, planks, battens and such other product obtained from sawing of a round log. (g) "State Level Committee' means a Committee constituted by the State Government under para 12 (i) of these Rules. (h) "wood based industry' means any industry which processes wood as its raw material (Saw mills/veneer/ plywood or any other form such as sandal, katha wood etc.). (2) Words and expressions used but not defined under these Rules and defined in the Indian Forest Act, 1927 or the relevant local Forest Act as applicable in the State, and the Rules framed there under shall have the meaning

			assigned to them in such Act or Rules. (3) In case of any dispute regarding interpretation of any word or expression, the decision of the Ministry of Environment, Forest and Climate Change shall be final.
Restriction of Establishment of Saw Mills	3.Within the limits of any reserved or protected forests and within a radius of 80 Kilometers of such limits No person shall establish, erect or operate any saw mill or machinery for converting or cutting timber and wood obtaining a license from the Divisional Forest Officer concerned.* *Substituted by Notification No. 1117/XIV-3-32-73 dated June 6,1990	Restriction on location of Wood Based Industries	3- (1) In respect of distance from the boundary of nearest notified forests or protected areas, Wood Based Industries shall be allowed to operate as per State-specific order/approval of the Hon'ble Supreme Court/Hon'ble High Court of the concerned state/Central Empowered Committee: or, beyond ten kilometres of aerial distance from the boundary of nearest notified forests or protected areas, excluding roadside/railway side/canal side plantations, whichever is less. (2) A Wood Based Industries can be established in an industrial Estate or a Municipal area, irrespective of the aerial distance from the boundary of nearest notified forest or protected area.
Application for obtaining license	4. Any person desiring to establish, erect or operate any existing saw mill shall make an application in that behalf to the Divisional Forest Officer concerned for obtaining a license in the form given in the Schedule I appended to these Rules.	Application for obtaining license	4- Any person desiring to establish, erect or operate any wood based industry shall make an application in that behalf to the State Level Committee for obtaining a license in e-format prescribed by the State Level Committee. The application shall be made and disposed off through online system only as developed by U.P. Forest Department

			on behalf of State Level Committee. No application shall be disposed off manually. This online system shall be developed to facilitate public viewing and tracking status of application and their disposal.
Grant of license	5. On receipt of an application under rule 4, the Divisional Forest Officer shall acknowledge the same and thereafter shall make such enquiries as he may deem fit and after satisfying himself with regard to following factors, grant the license in the form given in Schedule II appended to these Rules:- (i) that the required quantity of timber through legitimate means would be available at the proposed venue of the Saw Mill without causing any damage to the tree growth in the forests under the control of the Government and the adjacent rural areas; (ii) that the applicant has acquired or is in a position to acquire necessary area for erecting and running a saw mill in accordance with the conditions specified in the license; (iii) that the necessary machinery, power etc, is available or is likely to be available to the applicant, (iv) that the applicant has obtained a "No objection Certificate" from the District Magistrate concerned for erecting and running the saw mill, In case the Divisional Forest Officer is not satisfied he may reject the application.	Grant of license	5- On receipt of an application under rule 4, the State Level Committee shall acknowledge the same and thereafter shall make such enquiries as it may deem fit and after satisfying itself State Level Committee shall approve the license. After approval from the State Level Committee the Divisional Forest Officer shall grant the license, in the format prescribed by the State Level Committee, through online system only. In case, the State Level Committee is not satisfied, it may reject the application. The applicant must have facility to track status of the application thereof and receive the license or rejection through online system only.
Re-location of Saw Mills	5A- The Principal Chief Conservator of Forests, Uttar Pradesh, on an application and after such	Re-location of Wood Based Industries	5A- Any person desiring to relocate any wood based industry shall give an

	inquiry as he deems fit, may order for Relocation of an existing Saw mill from one place to another within the State.		application to the Divisional Forest Officer or equivalent officer concerned in regard to re-location. Divisional Forest Officer or equivalent officer as the case may be on the receipt of an application shall give his comments to Conservator of Forests/Zonal Chief Conservator of Forests who may submit the application along with his comments to the State Level Committee, which may enquire, or if it deems right may allow re-location of wood based industry from one place to another.
Period of validity of license	6 - Every license granted under rule 5 or renewed under rule 7 shall remain valid for such period not exceeding five year from the date of issue or renewal as may be specified in the license.	Period of validity of license	6- Any Wood Based Industries license granted shall remain valid for such period not exceeding five year from the date of issue or renewal as
	Provided that in case of a license referred to in the proviso to rule 5 or rule 7 the period of validity shall be five year.		may be specified in the license.
Renewal of license	7- On the application made to the Divisional Forest Officer concerned for renewal of the license granted under rule 5, he may renew the same indicating thereon the period for which it has been renewed. The renewed application for license shall be disposed off within sixty days of its receipt. Provided that in case the application is not disposed off within sixty days, from the date of the receipt of the application by the Divisional Forest Officer, the license shall be deemed to have been renewed for a period of three years: Provided further that aforesaid proviso shall not apply to saw mills	Grant or renewal of a license to a wood based industry	7- No license to a wood based industry shall be granted or renewed without obtaining prior approval of the State Level Committee. However, a State Level Committee may delegate the power of renewal of license to a wood based industry to the Divisional Forest Officers of the concerned Forest Divisions. The renewal of license shall be done through online system only.

	situated within ten kilometers of any existing forest. Explanation- In this rule existing forest shall not include trees situated on either side of the roads and the railway tracks. Failure to get the license renewed before the expiry of date, will make the licensee liable to punishment in accordance with Section 77 of the Indian Forest Act, 1927 for operating the saw mill without license.		
Revocation of the license	8- Notwithstanding anything contained in the foregoing Rules, the Divisional Forest Officer concerned may, where he has reason to believe that a licensee is operating the saw mill in contravention of the provisions of these Rules or conditions of license or the licensee is involved in activities	Revocation of the license	8- Notwithstanding anything contained in the foregoing Rules, the Divisional Forest Officer concerned may, where he has reason to believe that a licensee is operating wood based industry in contravention of the provisions of these Rules or conditions of license or the licensee is involved in

	prejudicial to the interests of forest conservancy at any time, after giving revoke the license granted under rule 5 or renewed under rule 7.		activities prejudicial to the interests of forest conservancy at any time, revoke the license granted after giving one month notice.
Procedure of renewal non-renewal or revocation of license	9- Where the concerned Divisional Forest Officer refuses to issue or renew the license, he shall send intimation thereof to the applicant or the holder of the license, as the case may be giving reasons therefore.		
Appeal against refusal to issue or renew or revoke license	10- Any person aggrieved by an order of the Divisional Forest Officer under rule 9, may within 30 days of the service of the order on him, appeal to the concerned Conservator of Forests. The Conservator of forest there upon shall decide the appeal after giving the Divisional Forest Officer and or appellant, an opportunity of being heard. The decision of	Appeal against revocation of license	9- Any person aggrieved by an order of the Divisional Forest Officer under rule 8, may within 30 days of the service of the order on him, appeal to the concerned Conservator of Forests/Zonal Chief Conservator of Forests. The Conservator of Forests/Zonal Chief Conservator of Forests there upon shall decide the appeal

	the Conservator of Forest on such appeal shall be final.		after giving the Divisional Forest Officer and or appellant, an opportunity of being heard. The decision of the Conservator of Forests/Zonal Chief Conservator of Forests on such appeal shall be final.
Fees for grant and renewal of license	11- Fees for grant and renewal of license- An annual fee for grant or renewal of licenses per unit shall be payable by the applicants/ licensees as below:- **Unit** / **Annual fee** Saw Mill / Rs. 25,000/- per unit Veneer / Rs. 25,000/- per unit Plywood / Rs. 50,000/- Veneer & Plywood / Rs. 75,000/- per unit	Fees for grant and renewal of license	10- Annual fees for applicants/license holder shall be paid by them as per decisions taken by State Level Committee from time to time. The fees shall be deposited online only.

A relocation fee per unit for transfer of saw mill/veneer/ply wood unit shall be payable by the applicants/ licensees as below:-

Propose relocated site	Fee
Rural area	Rs. 50,000/-
District Headquarter	Rs, 1,00,000/-
Commissionery Headquarter	Rs. 2,00,000/-
Mahanagar area	Rs. 5,00,000/-

Power of exempt from the provision and Rules	11A. Where the State Government is satisfied that the operation of the timber based industries, such as, Plywood Mill, Veneer Mill, Katha industries, Paper and Pulp industries and Cooling towers manufacturing industries and like industries whose final product is not timber and also the machinery used as saw mills are integral parts of their production process, is not possible due to application of all or any of the provisions of these rules, the State Government may, by notifications, for reasons to be recorded, exempt such industries from the operation of such rules subject to such conditions, as it may deem fit, for the conservation of the tree-growth in the forests under the control of the Government and in the areas adjacent thereto.	Constitution of the State Level Committee	11- (1) State Level Committee shall consist of the following members a Principal Chief Conservator of Forests /Head of Forest Department Chairperson b A representative of the Regional Office of the Ministry of Environment, Forest and Climate Change Member c A representative of the State Forest Department not below the rank of a Conservator of Forests dealing with preparation of Working Plans/ Working Member d Director/Additional Dir Member

				ector of Department of Industries					Committee may co-opt an officer from Territorial wing of the Forest Department not below the rank of Conservator of Forest and officers from Department of Agriculture and Department of Revenue of the State Government. (3) The State Level Committee shall meet at least once in three months. (4) The quorum of the State Level Committee meeting shall be at least fifty percent of these members. (5) State Level Committee will invite one representative of the industry nominated by the saw-mill association as a special invitee to every meeting of the State Level Committee.
				e	Representative of the Forest Development Corporation	Member			
				f	An officer not below the rank of Conservator of Forests working in the Forest Head Quarters	Member Secretary			
				(2) The State Level					
							Savings	12- Nothing	Powers	12- The State

	contained in these Rules shall apply to the ordinary operations of domestic carpentry or to other similar works on small-scale.	and functions of the State Level Committee	Level Committee State Level Committee shall:- (a) assess the availability of timber in the State by way of appropriate study in demand and supply as and when it decide. State Level Committee shall devise suitable mechanism for sustainable use of timber in a way that does not affect the forests of the area adversely; (b) approve the names of Wood Based Industries which may be considered for grant of fresh license or enhancement of the existing licensed capacity in case the State Level Committee is satisfied that timber is available legally for the said new Wood Based Industries (such as Trees outside forest,				Forests etc.); (c) ensure that the amount lying with the respective State Forest Department (recovered from Wood Based Industries) is utilized for the purpose of afforestation only; (d) examine and make appropriate recommendations or any other matter referred to by the State Government to the Ministry of Environment, Forest and Climate Change.
						Appeal against the decision of the State Level Committee	13 (1) Any person aggrieved by the decision taken by the State Level Committee may file an appeal before the concerned Regional Office of the Central Government in the Ministry of Environment, Forest and Climate Change seeking appropriate

			relief within 60 days. (2) Head of Regional Office shall within 60 days of filing the appeal pass appropriate order. (3) If, for any reason, any person is aggrieved by the orders so passed in the appeal, he may prefer an appropriate petition/application/ appeal in the High Court.				bamboo, reed, plywood, veneers or imported wood, procured for legitimate sources. (b) Block board, MDF or similar wood-based products, procured from legitimate sources. (c) Round log/timber form species declared as agro-forestry/agricultural crops and/or exempted from the purview of the felling and transit regime in the State, and procured form legitimate sources. However, State Level Committee of the State may allow installation of circular saw of diameter upto 60 centimeter in such industries having specialized requirement. Such industries shall be
		Records to be maintained by Wood Based Industries	14- Each wood based industry shall maintain and regularly update records as prescribed by State Level Committee.				
		Savings	15- Industries/processing plants not using round logs of domestic origin or operating without a band saw or re-saw or circular saw of more than thirty centimeter diameter shall not require license. (a) Sawn timber, cane,				

			registered with the Forest Department of the State and shall be regulated, details of which are to be prescribed by the State. Transfer of license on sale/succession etc shall be done only with the approval of State Level Committee.

By Order,

(Renuka Kumar)
Principal Secretary"

15. As per the amended Rule 3(1) the restriction with regard to establishment of Saw Mill is to be not within 10 kms of the forest. Here as per the onshowing of the petitioner as apparent from the document dated 16.11.2004 for transferring the license in favour of the petitioner, wherein one of the condition was to the extent that Saw Mill should not be within 10 kms of the forest and moreover a communication dated 28.2.2011, which has been the basis for passing of the order dated 4.4.2011 has also not been challenged by the petitioner, which itself shows that the distance of the petitioner's Saw Mill is 6.47 kms from the forest, which is within the restricted area. It has also come on record as per onshowing of the petitioner in paragraph 11 of the writ petition that the license of the petitioner had been extended for the period from February, 2010 to 31.12.2010 and there is nothing to show that the same has been extended beyond that.

16. A Division Bench of this Court had an occasion to consider the said contingency that certain existing Saw Mill was within 10 kms of the forest and this Court after considering the judgment of Hon'ble Apex Court in the case of **T.N Godavarman Thirumulkpad (supra)** had proceeded to pass the order dated 21.7.2015 in the case of **Pradeep Kumar Saxena vs. State of U.P. and others, 2015 (7) ADJ 615** , which reads as under:-

"In these proceedings, the petitioner has called into question an order dated 3 December 2011 passed by the Principal Chief Conservator of Forest, holding that the licence granted to the petitioner for conducting a saw mill stands cancelled since the distance between the saw mill and the reserved forest is 4.66 kms. However, liberty was granted to the petitioner, should he desire to relocate the saw mill beyond the distance of 10 kilometres, to submit a fresh application for consideration.

The basis of the order of the Principal Chief Conservator of Forest was a direction issued by the Supreme Court in T N Godavarman Thirumulkpad v. Union of India1. Insofar as is material to these proceedings, the direction issued by the Supreme Court is as follows:

"A. In the State of Uttar Pradesh the following is permitted -

1. The Principal Chief Conservator of Forest (PCCF) may, on a case-to-case basis, consider grant of permission to an existing licensed saw mill to relocate itself, provided that the relocated site is not within 10 kms of any existing forest."

In the counter affidavit filed by the Principal Chief Conservator of Forest on 28 February 2012, it has been stated that the petitioner purchased a saw mill licence bearing 47/92/Atrauli and by a communication dated 30 November 2004

of the Principal Chief Conservator of Forest, the saw mill was relocated to plot no.99, khasra 382 Quarsi Road, Ram Ghat, Aligarh with a condition that the relocated site should not be within 10 kms from an existing forest. The Divisional Forest Officer, Aligarh issued a saw mill licence No.64/2009 on 6 September 2009. The Principal Chief Conservator of Forest, by a letter dated 29 April 2011, reiterated that in view of the order of the Supreme Court dated 8 May 1997, the relocated saw mill should not be within 10 kms from the existing forest. The saw mill of the petitioner was found to be within 4.66 kms from the nearest forest block on the basis of the following GPS data:

Division	Name of Saw Mill owner	GPS reading of relocated saw mill	GPS reading of nearest forest block	Distance from nearest forest block (in Km)
Aligarh	Pradeep Kumar Saxena	27°54'64.0"N 078°06'59.5"E	27°57'36.6"N 78°5'3.30"E	4.66 Km

It has been stated in the counter affidavit that the Divisional Forest Officer has afforded sufficient opportunity to the petitioner for a personal hearing and to present a written statement by a letter dated 20 May 2011. In response to the letter, the petitioner presented a written statement on 27 May 2011. A personal hearing was also held on 27 May 2011. It was found that the petitioner had not substantiated the case that the saw mill was not located within 10 kms from the nearest Chherat forest block or that it was outside the limits of the Nagar Nigam. Following this, the Principal Chief Conservator of Forest, revoked the order dated 30 November 2004 on 21 November 2011. While directing a closure of the operation of the saw mill, it has been provided that in case, the saw mill owner is willing to shift his saw mill beyond 10 kms from the forest area, a relocation proposal may be sent.

In the counter affidavit, it has been stated that the GPS data was relied upon to compute the distance between the relocated site of the saw mill and the existing forest. In this regard, during the course of the submissions, a reference has been made to the provisions contained in Section 11 of the General Clauses Act, 1897 under which measurement of distances for the purposes of any Act or Regulation made after the commencement of the said Act shall, unless a different intention appears, be measured in a straight line on a horizontal plane. This principle was accepted in a judgment of a Full Bench of the Andhra Pradesh High Court in Shaik Hussain v. Divisional Forest Officer, Proddatur2.

Though it has been urged on behalf of the petitioner that the conclusion of the Principal Chief Conservator of Forest to the effect that the saw mill of the petitioner was within a distance of 10 kms is not correct, absolutely no material has been placed on the record or drawn to the attention of the Court during the course of these proceedings to displace the finding of fact. Learned counsel appearing on behalf of the petitioner has placed reliance on the judgment delivered by the Supreme Court in Lafarge Umiam Mining Pvt. Ltd. v. Union of India3 in support of the submission that the Supreme Court has expected that there should be regular updating and creation of a GIS based decision support database.

The basic issue is that, if the petitioner was aggrieved by the finding that the distance of his saw mill from the reserved forest was not beyond the distance of 10 kms, as mandated in the order of the

Supreme Court dated 8 May 1997, at least some cogent material ought to have been placed on the record which would have warranted the Court to scrutinize the matter. In the absence thereof, the Court cannot proceed either on the basis of hypothesis or surmise or come to a conclusion that the finding of fact recorded by the Principal Chief Conservator of Forest was erroneous.

For these reasons, we see no reason to entertain the writ petition. The petition is, accordingly, dismissed. There shall be no order as to costs."

17. Looking into the facts of the case as well as the judgment of Hon'ble Apex Court as referred above and the judgment of coordinate Bench of this Court this Court finds that the relief so claimed by the petitioner cannot be granted to its as admittedly the petitioner's Saw Mill is within 10 kms of the forest land and the said fact has also not been disputed by the petitioner and further the issue relating to the direction of the Hon'ble Apex Court contained in the order dated 8.5.1997, the amendment so made in Uttar Pradesh Establishment and Regulation of Saw Mills (6th Amendment) Rules, 2017 and in the light of the fact that writ petition pertains to the year 2011 and we are in 2022 as much water has flown therefrom.

18. Resultantly, present petition is dismissed. However, leaving it open to the petitioner to approach the competent authorities for the grant of license as per the Uttar Pradesh Establishment and Regulation of Saw Mills Rules 1978 as amended from time to time and in vogue for the grant of license of running Saw Mills and in case the petitioner approaches the competent authority as envisaged in the Uttar Pradesh Establishment and Regulation of Saw Mills Rules, 1978 as amended from time to time as in vogue after completing the formalities so prescribed therein this Court has no reason to disbelieve the fact that the application so preferred by the petitioner shall be considered in accordance with law.

19. With the aforesaid observations, present petition stands dismissed.

(2022)06ILR A265
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 25616 OF 2021

Smt. Jhinka Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailendra Kumar Pandey, Sri Piyush Shukla

Counsel for the Respondents:
C.S.C., Sri Pankaj Kumar Gupta, Sri Shrawan Kumar Tripathi

A. Constitution of India – Article 226 – UP Revenue Code, 2006 – Sections 24(4) & 210 – Writ – Maintainability – Alternative remedy of revision u/s 210 – Amendment in 2019 – Where the amended provision of S. 24(4) provide `the order of Commissioner shall be final subject to provision of S. 210, unamended provision provide it without any subjection – Apparent conflict, how far restrict the revisional power of Board of Revenue – Held, mere fact that there is no further appeal against the order passed by the Commissioner in an appeal under sub-section (4) of Section 24 would not be held to create a bar in invocation of the

revisional jurisdiction of the Board of Revenue under section 210 of the Code – The provision 'the order of Commissioner shall be final' only mean that the order passed in appeal under sub-section (4) would not be subject to any second appeal – High Court held writ petition not maintainable on the ground of alternative remedy of revision. (Para 21, 22, 48, 49 and 66)

B. Interpretation of statute – Conflicting statutory provisions – Harmonious construction – Applicability – The provisions of a statute are to be read in a way that renders them compatible and not contradictory – While interpreting two inconsistent, or, obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.(Para 29 and 31)

C. Interpretation of statute – Conflicting statutory provisions – Rule of *ex visceribus actus* – Presumption against inconsistency – Rule of *ex visceribus actus* helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute – It essentially means that every part of a statute must be construed within its four corners and no provision should be interpreted in isolation – In case of any doubt, a statute is to be so construed as to be consistent with itself throughout its extent so as to harmonize with the other laws and be in consonance with the legislative purpose. (Para 53 and 60)

Writ petition dismissed (E-1)

List of Cases cited :-

1. Vijay Kumar & ors. Vs St. of U.P. & ors. 2020 146 RD 207

2. Krishan Kumar Vs St. of Raj. & ors. (1991) 4 SCC 258

3. Sultana Begum Vs Prem Chand Jain; (1997) 1 SCC 373

4. Jagdish Singh Vs Lt. Governor, Delhi & ors. (1997) 4 SCC 435

5. Anwar Hasan Khan Vs Mohd. Shafi & ors. (2001) 8 SCC 540

6. British Airways Plc. Vs U.O.I. & ors. (2002) 2 SCC 95

7. D.R.Yadav & anr. Vs R.K.Singh & anr.; (2003) 7 SCC 110

8. Suresh Nanda Vs C.B.I.; (2008) 3 SCC 674

9. Gujrat Urja Vikas Nigam Ltd. Vs Essar Power Ltd.; (2008) 4 SCC 755

10. Sanjay Ramdas Patil Vs Sanjay & ors. (2021) 10 SCC 306

11. Venkataramana Devaru Vs St. of Mysore; AIR 1958 SC 255

12. Canada Sugar Refining Co. Vs R.; 1898 AC 735

13. M. Pentiah Vs Muddala Veeramallappa; AIR 1961 SC 1107

14. Gammon India Ltd. Vs U.O.I.; (1974) 1 SCC 596

15. Mysore SRTC Vs Mirja Khasim Ali Beg; (1977) 2 SCC 457

16. V. Tulasamma Vs Sesha Reddy; (1977) 3 SCC 99

17. Punjab Beverages (P) Ltd. Vs Suresh Chand; (1978) 2 SCC 144

18. CIT Vs National Taj Traders; (1980) 1 SCC 370

19. Calcutta Gas Co. (Proprietary) Ltd. Vs State of W.B.; AIR 1962 SC 1044

20. J.K. Cotton Spg. & Wvg. Mills Co. Ltd. Vs State of U.P.; AIR 1961 SC 1170

21. Union of India Vs Filip Tiago De Gama of Vedem Vasco De Gama; (1990) 1 SCC 277

22. Towne Vs Eisner; 245 US 418, 425 (1918)

24. Lenigh Valley Coal Co. Vs Yensavage; 218 FR 547,553

25. Commissioner of Income Tax Vs Hindustan Bulk Carriers; (2003) 3 SCC 57

26. Whitney Vs IRC; 1926 AC 37

27. CIT Vs S. Teja Singh; AIR 1959 SC 352

28. Gursahai Saigal Vs CIT; AIR 1963 SC 1062

29. Salmon Vs Duncombe; (1886) 11 AC 627

30. Curtis Vs Stovin; (1889) 22 QBD 513

31. S. Teja Singh case,

32. Nokes Vs Doncaster Amalgamated Collieries; (1940) 3 All ER 549

33. Pye Vs Minister for Lands for NSW; (1954) 3 All ER 514

34. Mohan Kumar Singhania Vs U.O.I; 1992 Supp (1) SCC 594

35. R.S. Raghunath Vs St. of Karn.; (1992) 1 SCC 335

36. Shah Chaturbhuj Vs Mauji Ram; AIR 1938 All. 456 (FB)

37. Smt. Krishna Devi Vs Board of Revenue; 1972 RD 228

38. Caesar Griffin's case; Fed. Cas. No. 5,815

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

1. Heard Sri Piyush Shukla appearing along with Sri Shailendra Kumar Pandey, learned counsel for the petitioner, Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, Sri J.P.N.Raj, learned Additional Chief Standing Counsel and Sri Surya Bhan Singh, learned Standing Counsel for the State respondents, Sri Pankaj Kumar Gupta, learned counsel for the respondent no. 4 and Sri Shrawan Kumar Tripathi, learned counsel for the respondent no. 5.

2. The present petition has been filed seeking to assail the order dated 08.09.2021 passed by the Commissioner Basti, Division Basti/respondent no. 2 in an appeal filed under sub-section (4) of Section 24 of the U.P. Revenue Code, 20061 being Appeal No. 00631/2020 and the earlier order dated 26.10.2019 passed by the Sub-Divisional Magistrate Tehsil Harraiya, District Basti/respondent no. 3 in Case No. 06482/2019 under Section 24 of the Code whereby the application of the respondent no. 5 under Section 24 of the Code has been allowed.

3. An objection with regard to the entertainability of the writ petition was raised on behalf of the State respondents by pointing out that the order passed in appeal under sub-section (4) of Section 24 of the Code is subject to the remedy of revision under Section 210 of the Code.

4. Counsel for the petitioner has sought to refute the aforesaid contention by submitting that the remedy of revision under Section 210 of the Code is available only in a situation where no appeal lies and in the instant case since the petitioner is seeking to assail an order passed in appeal under sub-section (4) of Section 24, the remedy of revision would not be available.

5. The question which thus falls for consideration in the present case is as to whether an order passed in an appeal under sub-section (4) of Section 24 of the Code, would be subject to a revision under Section 210 of the Code,

6. Counsel for the parties have referred to the relevant statutory provisions under the Uttar Pradesh Revenue Code, 2006 and the amendments made to the Code in terms of U.P. Revenue Code (Amendment) Act, 2016 [U.P. Act No. 4 of 2016] and the U.P. Revenue Code

(Amendment) Act, 2019 [U.P. Act No. 7 of 2019]. For ease of reference the relevant statutory provisions under the U.P. Revenue Code, 2006 together with their legislative history, would be required to be adverted to.

7. The Uttar Pradesh Revenue Code Bill, 2006 was passed by the Uttar Pradesh Legislative Assembly and assented to by the President on 29 November, 2012 and published in the U.P. Gazette (Extra.), Part I, Section (ka) on 12 December 2012, vide *Vishay Anubhag*-1-Noti. No. 1044 (2) 179-v-12-1 (ka) 33/2006, dated 12 December, 2012 as U.P. Act No. 8 of 2012. Vide Noti. No. 1879/1-1-2015-15(1)/1998-19T.C.III dated 18 December 2015, Sections 1, 4-19, 233 and 234 of the U.P. Revenue Code, 2006 (U.P. Act No. 8 of 2012) came into force on 18 December, 2015 and the remaining provisions of the said Act came into force on 11 February 2016.

8. The provisions with regard to settlement of boundary disputes are contained under Section 24 of the Code. Section 24 of the Code, as it originally stood, is being extracted below :-

"**24. Disputes regarding boundaries**.—(1) The Sub-Divisional Officer may, on his own motion or on an application made in this behalf by a person interested, decide, by summary inquiry, any dispute regarding boundaries on the basis of existing survey maps or, where they have been revised in accordance with the provisions of the Uttar Pradesh Consolidation of Holdings Act, 1953, on the basis of such maps, but if this is not possible, the boundaries shall be fixed on the basis of actual possession.

(2) If in the course of an inquiry into a dispute under sub-section (1), the Sub-Divisional Officer is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupant, the Sub-Divisional Officer shall—

(a) in the first case, ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) in the second case, put the person so dispossessed in possession, and for that purpose use or cause to be used such force as may be necessary and shall then fix the boundary accordingly.

(3) Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within six months from the date of the application.

(4) Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within 30 days of the date of such order. The order of the Commissioner shall be final."

9. The Uttar Pradesh Revenue Code Rules, 20162 were made in exercise of powers under Section 233 of the U.P. Revenue Code, 2006 [U.P. Act No. 8 of 2012], read with Section 21 of the U.P. General Clauses Act, 1904. The English translation of the Rules, 2016 was published in the U.P. Gazette, Part 4, Section (Kha) dt. 10.02.2016. Rule 22 of the aforesaid Rules, which relates to settlement of boundary dispute, is as follows :-

"22. **Settlement of boundary dispute (Section 24)**.- (1) Every application for settlement of boundary dispute under Section 24 (1) of the Code shall be made to the Sub-Divisional-Officer and it shall contain the following, particulars:

(a) The names, parentage and addresses of the parties;

(b) Plot number, area and boundaries of the land, along with its location;

(c) Precise nature of the dispute.

(2) No application for demarcation of boundaries under Section 24 (1) of the Code shall be entertained unless it is accompanied by certified extracts from the maps, khasras and Record-of-Rights (khatauni) on the basis of which demarcation is sought, and the required amount calculated at the rate of Rs. 1000/- per survey number of the applicant as fee for demarcation has been paid by the applicant.

(3) If the application is for demarcation of two or more than two adjoining plots, only one set of demarcation fee shall be payable but where the survey numbers sought to be demarcated are not adjoining, separate sets of demarcation fee shall be paid.

(4) On the receipt of the application the concerned official shall check the application as to whether the requirements have been fulfilled or not. If there is any defect of formal nature, the applicant or his counsel shall be permitted to remove the defect at once but where the requirements of the application have not been fulfilled, the applicant shall be afforded opportunity as sought for to fulfil the requirements.

(5) As soon as the requirements are fulfilled the official concerned shall register the application in the register concerned and put up the same before the Sub-Divisional-Officer for appropriate order.

(6) The Sub-Divisional-Officer shall pass order on the same day or on the next working day, directing the Revenue Inspector or other revenue officer to demarcate the plot or plots as the case may be after fixing a date and serving the notice in respect thereof to all the tenure-holders concerned. This exercise shall be completed within a period of one month from the date of order passed by Sub-Divisional-Officer.

(7) The notice under sub-rule (6) of this rule shall be served on the concerned tenure-holder or in his absence on his adult family member. The notice shall also be served on the Chairman of the Land Management Committee.

(8) At the time of demarcation of the plot the spot-memo shall be prepared by the Revenue Inspector or other Revenue Officer and the same shall be signed by all the parties concerned and by the Chairman of the Land Management Committee or any two independent witnesses present at the time of the demarcation. If any party refuses to sign the spot-memo, the endorsement to the effect shall be made by the Revenue Inspector.

(9) The Revenue Inspector or other Revenue Officer shall submit his report of demarcation with spot-memo within a period of fifteen days from the date of demarcation. The name and address of the every affected party shall be disclosed in the report.

(10) On receipt of the report under sub-rule (9), the notices shall be issued within one week to all the affected parties inviting the objections on the report and the date shall be fixed which shall not be later than 15 days from the date of issuing the notice.

(11) On the date fixed or on any other date to which the hearing is adjourned, the Sub-Divisional Officer shall decide the dispute regarding the boundaries in accordance with the provisions of the sub-section (2) of the Section 24 of the Code and pass the appropriate order after

considering the report and the objections, if any, filed against the report and affording opportunity of hearing to the parties concerned.

(12) If the report is confirmed by the Sub-Divisional Officer, the boundary pillars shall be fixed accordingly within a period of one week and report in respect thereof shall be submitted which shall be part of the record.

(13) Where boundaries of plots/survey numbers are not identifiable or damaged, due to alluvion or diluvion or heavy rain or for any other reasons, the Sub-Divisional Officer may, on the application of the Chairman of the Village Revenue Committee of the village or on the report of Revenue Inspector or Lekhpal of the Circle or on the joint application signed by all the tenure-holders concerned, direct, by general or special order in writing, the Revenue Inspector or Lekhpal concerned to demarcate the boundaries on the spot on the basis of the existing survey map or where it is not possible, on the basis of the possession and to redress the grievance, if any, on the basis of the conciliation in consultation with the Village Revenue Committee. The Revenue Inspector or the Lekhpal shall comply with the such order within two weeks from the date of the order and submit the report thereof to the Sub-Divisional Officer.

(14) If any party is aggrieved by the demarcation under sub-rule (13) of this rule, he may move application for demarcation of the boundaries under sub-section (1) of Section 24 of the Code and the demarcation under sub-rule (13) will be subject to demarcation under sub-section (1) of Section 24 of the Code.

(15) The Sub Divisional Officer, at the time of passing the order for the demarcation under section 24 of the Code or under sub-rule (13) of this rule, may direct the Station Officer of the police station concerned to make the police force available for maintaining the law and order on the spot at the time of demarcation.

(16) The Sub-Divisional Officer shall make an endeavour to conclude the proceeding within the period specified in Section 24 (3) and if the proceeding is not concluded within such period the reason for the same shall be recorded."

10. The power to call for the records, conferred on the Board of Revenue3 or the Commissioner, in respect of any suit or proceedings decided by any subordinate revenue court, is provided for under Section 210 of the Code. Section 210 of the Code, as it originally stood, is as follows :-

"**210 Power to call for the records.—**The Board or the Commissioner may call for the record of any suit or proceeding decided by any sub-ordinate revenue court in which no appeal lies, or where an appeal lies but has not been preferred, for the purpose of satisfying itself or 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 such jurisdiction illegally or with material irregularity;

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

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

(3) No application under this section shall be entertained after the expiry of a period of thirty days from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later."

11. The Uttar Pradesh Revenue Code, 2006 was amended in terms of the Uttar Pradesh Revenue Code (Amendment) Act, 2016 [U.P. Act No. 4 of 2016]. The amendments made to Section 24 and Section 210 in the amending Act of 2016 are as follows :-

"1**8. Amendment of Section 24**.— In Section 24 of the said Code—

(a) in Hindi version, in sub-section (1), for the word "स्व–प्रेरणा" the word "स्व–प्रेरणा" and for the words "जांच द्वारा विनिश्चय कर सकता है" the words "जांच द्वारा कर सकता है" shall be substituted;

(b) in sub-section (3), for the words "six months" the words "three months" shall be substituted."

"**162. Amendment of Section 210**.— In Section 210 of the said Code—

(a) for the figures and words "210. The Board" the figures, brackets and words "210. (1) The Board" shall be substituted.

(b) in sub-section (1), the words and punctuation mark "or where an appeal lies but has not been preferred," shall be omitted;

(c) after sub-section (2) and before sub-section (3), the following explanation shall be inserted, namely —

Explanation.— For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.

(d) in sub-section (3), for the words "thirty days" the words "sixty days" shall be substituted."

12. The provisions under Section 24 and Section 210 consequent to the amendment made in terms of the U.P. Act No. 4 of 2016, stood as follows :-

"**24. Disputes regarding boundaries.—(1)** The Sub-Divisional Officer may, on his own motion or on an application made in this behalf by a person interested, decide, by summary inquiry, any dispute regarding boundaries on the basis of existing survey map or, where the same is not possible in accordance with the provisions of the Uttar Pradesh Consolidation of Holdings Act 1953, on the basis of such maps.

(2) If in the course of an inquiry into a dispute under sub-section (1), the Sub-Divisional Offices is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupant, the Sub-Divisional Officer shall—

(a) in the first case, ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) in the second case, put the person so dispossessed in possession, and for that purpose use or cause to be used such force as may be necessary and shall then fix the boundary accordingly.

(3) Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within three months from the date of the application.

(4) Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within 30 days of the date of such order. The order of the Commissioner shall be final."

"210 Power to call for the records.- (1) The Board or the Commissioner may call for the record of any suit or proceeding decided by any sub-ordinate Revenue Court in which no appeal lies, for the purpose of satisfying itself or 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 such jurisdiction illegally or with material irregularity;

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

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

Explanation.- For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.

(3) No application under this section shall be entertained after the expiry of a period of sixty days from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later."

13. The U.P. Revenue Code, 2006 was subject to further amendments made in terms of the Uttar Pradesh Revenue Code (Amendment) Act, 2019 [U.P. Act No. 7 of 2019], which was deemed to come into force on March 10, 2019.

14. In terms of the aforesaid amending Act of 2019, the amendment of Section 24 of the U.P. Act No. 8 of 2012 was made in the following terms :-

"2. In Section 24 of the Uttar Pradesh Revenue Code, 2006 hereinafter referred to as the principal Act, in sub-section (4) for the words, "the order of the Commissioner shall be final," the words "The order of the Commissioner shall, subject to the provisions of Section 210, be final" shall be substituted."

15. There was some inconsistency in the Hindi version of the language of Section 210 inasmuch as the words used in sub-Section (1) where "कोई अपील नहीं हुई" as against the language in the English version which was "in which no appeal lies". The aforesaid inconsistency was removed by making suitable amendment in the Hindi version of Section 210 of the principal Act by providing as follows :-

"19. In Section 210 of the principal Act, in the Hindi version, in sub-section (1) for the words "कोई अपील नहीं हुई" the words "कोई अपील नहीं हो सकती" shall be substituted."

16. The provisions contained under Section 24 and Section 210 consequent to the amendments made as per the terms of the U.P. Act No. 7 of 2019 now stand as under :-

"**24. Disputes regarding boundaries**.— (1) The Sub-Divisional Officer may, on his own motion or on an application made in this behalf by a person interested, decide, by summary inquiry, any dispute regarding boundaries on the basis of existing survey map or, where the same is not possible in accordance with the provisions of the Uttar Pradesh Consolidation of Holdings Act 1953, on the basis of such maps.

(2) If in the course of an inquiry into a dispute under sub-section (1), the Sub-Divisional Offices is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupant, the Sub-Divisional Officer shall—

(a) in the first case, ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) in the second case, put the person so dispossessed in possession, and for that purpose use or cause to be used such force as may be necessary and shall then fix the boundary accordingly.

(3) Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within three months from the date of the application.

(4) Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within 30 days of the date of such order. The order of the Commissioner shall, subject to the provisions of Section 210, be final."

"**210 Power to call for the records**.—The Board or the Commissioner may call for the record of any suit or proceeding decided by any sub-ordinate revenue court in which no appeal lies, for the purpose of satisfying itself or 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 such jurisdiction illegally or with material irregularity;

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

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

Explanation.- For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.

(3) No application under this section shall be entertained after the expiry of a period of sixty days from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later."

17. Learned counsel for the petitioner has made his submissions as under :-

17.1 As per the unamended provisions, sub-section (4) of Section 24 of the Code provided the remedy of an appeal against the order of the Sub-Divisional Officer passed under Section 24 and the order passed in appeal by the Commissioner was to be final. The remedy of revision under Section 210 of the Code was available only in a case in which no appeal lies, and

therefore since sub-section (4) of Section 24 provided for an appeal, there was to be no further remedy of a revision available thereagainst under Section 210 of the Code.

17.2. Consequent to the amendment made to sub-section (4) of Section 24 as per the U.P. Act No. 7 of 2019, the finality attached to the order of the Commissioner continues subject to the provisions of Section 210 of the Code. The order of the Commissioner under sub-section (4) of Section 24 has been made subject to the provisions of Section 210 of the Code and as per terms of Section 210 the remedy of revision being available only in a case where no appeal lies, the order passed by the Commissioner under sub-section (4) of Section 24 would not be amenable to a further remedy of revision under Section 210 of the Code.

18. Learned counsel for the petitioner has sought to refer to the corresponding provisions with regard to settlement of boundary disputes under Section 41 of the U.P. Land Revenue Act, 1901 (now repealed) and the provisions with regard to the remedy of revision under Section 219 of the aforesaid Act to contend that even under the earlier statutory provisions, the order passed under Section 41 relating to a boundary dispute was subject to an appeal under Section 210 and the remedy of revision under Section 219 was not available thereafter. To support his submissions, reliance has been placed upon the judgment in the case of **Vijay Kumar and others Vs. State of U.P. and others**4

19. Controverting the aforesaid submissions, learned Additional Advocate General appearing for the State respondents has submitted as under :-

19.1 Even under the unamended provisions, the finality attached to the order passed by the Commissioner in an appeal under sub-section (4) of Section 24 could not be held to restrict the revisional jurisdiction conferred on the Board under Section 210; the order of the Commissioner which was held to be final only meant that there was no further right of an appeal against such an order.

19.2 The amending Act of 2019 has made the order of the Commissioner subject to the provisions of Section 210, which clearly goes to show that the finality attached to the order of the Commissioner passed in appeal has been made subject to the exercise of the revisional powers by the Board under Section 210.

19.3 The amending Act of 2019 has clarified the position by providing in explicit terms that the order of the Commissioner passed in an appeal under sub-section (4) of Section 24, is final, subject to the revisional powers to be exercised by the Board under Section 210.

19.4 The restriction contained under Section 210 providing for the remedy of a revision only in a case "in which no appeal lies" would not be attracted since the question under consideration is with regard to the availability of the remedy of a revision against the order passed in appeal under sub-section (4) of Section 24 against which no further appeal lies. In this regard attention is drawn to the Third Schedule of the U.P. Revenue Code, 2006 to point out that in respect of proceedings relating to disputes regarding boundaries under Section 24, the order of the Sub-Divisional Officer is subject to an appeal before the Commissioner and there is no provision with regard to a further appeal. It is therefore contended that since no appeal lies against the appellate order of the Commissioner under sub-section (4) of

Section 24, the remedy of revision under Section 210 would not be barred.

19.5 The decision in the case of **Vijay Kumar and others (supra)**, sought to be relied upon by the petitioner, has been rendered in the context of the provisions under the U.P. Land Revenue Act 1901 (now repealed). The scheme of the statutory provisions under the U.P. Revenue Code 2006, consequent to the amendments made in the year 2019, being entirely different the aforesaid decision would not be applicable in the facts of the present case.

20. Learned Additional Advocate General has further placed reliance on the settled principle of statutory construction that even in a case where there appears to be some inconsistency between two statutory provisions, the principle of harmonious construction would have to be applied so as to avoid a head on clash and the provisions of one section of a statute cannot be read in a manner so as to render the provisions under the other section as otiose. It is also contended that the provisions under Section 210 pertaining to the revisional powers of the Board are of a general nature and the same cannot be held to override the provisions under Section 24 (4) which are of a special nature and relate specifically to the subject matter relating to boundary disputes. To support the aforesaid submissions, reliance is placed upon the decisions in **Krishan Kumar Vs. State of Rajasthan and others, Sultana Begum Vs. Prem Chand Jain, Jagdish Singh Vs. Lt. Governor, Delhi and others, Anwar Hasan Khan Vs. Mohd. Shafi and others, British Airways Plc. Vs. Union of India and others, D.R.Yadav and another Vs. R.K.Singh and another, Suresh Nanda Vs. Central Bureau of Investigation, Gujrat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. and Sanjay Ramdas Patil Vs. Sanjay and others.**

21. In order to appreciate the rival contentions, the provisions contained under sub-section (4) of Section 24, as they stood prior to the amendment brought about by the U.P. Act No. 7 of 2019 and post the amendment, would have to be considered in juxtaposition, as follows :-

Pre-amendment	**Post-amendment**
Section 24 (4).—Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within 30 days of the date of such order. The order of the Commissioner shall be final.	**Section 24 (4).**—Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within 30 days of the date of such order. The order of the Commissioner shall **subject to the provisions of Section 210** be final.

22. Under the pre-amended provision the order of the Commissioner passed in an appeal under sub-section (4) of Section 24, against the order of the Sub-Divisional Officer under sub-section (1) of Section 24, was to be final. The amending Act of 2019 has made the finality attached to the order of the Commissioner under sub-section (4) subject to the provisions of Section 210.

23. Section 210, as it stands after the amendment brought about by the U.P. Act No. 4 of 2016, empowers the Board or the Commissioner to call for the record of any suit or proceedings decided by any

subordinate revenue court "in which no appeal lies" for the purpose of satisfying itself as to the legality or propriety of any order passed in such suit or proceedings.

24. The Board or the Commissioner, may pass such order in the case as it thinks fit, if the 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 such jurisdiction illegally or with material irregularity.

25. It would therefore be seen that under Section 210, the Board or the Commissioner, may exercise the power to call for the record of any suit or proceedings decided by any subordinate revenue court, under the following conditions :-

(i) where no appeal lies; and

(ii) the 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 such jurisdiction illegally or with material irregularity.

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

26. A plain reading of the aforesaid provisions at first blush would suggest that the remedy of a revision under Section 210 being available in a case where no appeal lies, the order passed by the Commissioner under sub-section (4) of Section 24 would not be revisable before the Board under Section 210.

27. The aforesaid proposition, though seemingly attractive, would have to be examined in the context of the amendment made to sub-section (4) of Section 24 by the amending Act of 2019 in terms of which the finality attached to the order of the Commissioner passed in the appeal has been made subject to the provisions of Section 210.

28. The provisions contained under sub-section (4) of Section 24, as they stand post the amendment of the year 2019, whereby the finality attached to the order passed by the Commissioner in appeal has been made subject to the provisions of Section 210, has to be read together with the apparently conflicting provisions under Section 210 which contains an interdict that the revisional powers thereunder are to be exercised where no appeal lies.

29. It is a settled principle of statutory construction that the provisions of a statute are to be read in a way that renders them compatible and not contradictory.

30. The applicability of the principle of harmonious construction came up for consideration in **Krishan Kumar Vs. State of Rajasthan and others**5, in the context of some apparent conflict between two provisions of the Motor Vehicles Act, 1988 and referring to an earlier decision in **Venkataramana Devaru v. State of Mysore**,14 it was observed as follows :-

"11. It is settled principle of interpretation that where there appears to be inconsistency in two sections of the same Act, the principle of harmonious

construction should be followed in avoiding a head on clash. It should not be lightly assumed that what the Parliament has given with one hand, it took away with the other. The provisions of one section of statute cannot be used to defeat those of another unless it is impossible to reconcile the same. In Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255, 268, this Court observed: (AIR p. 268)

"The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is what is known as the rule of harmonious construction."

The essence of harmonious construction is to give effect to both the provisions..."

31. The principle of harmonious construction as a basic rule of interpretation again fell for consideration in **Sultana Begum Vs. Prem Chand Jain**6 and it was held that the rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose. The observations made in the judgment are being extracted below :-

"10...That being so, the rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.."

32. The observations made by **Lord Davy in Canada Sugar Refining Co. vs. R.**15 which was referred to in this regard are as follows :-

"12. In ***Canada Sugar Refining Co. v. R***., Lord Davy observed:

"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

33. In the aforesaid decision in the case of **Sultana Begum (supra)** the earlier decisions in **M. Pentiah v. Muddala Veeramallappa**16, **Gammon India Ltd. v. Union of India**,17 **Mysore SRTC v. Mirja Khasim Ali Beg,**18 **V. Tulasamma v. Sesha Reddy**,19 **Punjab Beverages (P) Ltd. v. Suresh Chand,**20 **CIT v. National Taj Traders**,21 **Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B.**22 and **J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P**.23 were referred and the principles were summarized as follows :-

"14. This rule of construction which is also spoken of as "ex visceribus actus" helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute.

15. On a conspectus of the case-law indicated above, the following principles are clearly discernible:

(1) It is the duty of the courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both.This is the essence of the rule of "harmonious construction".

(4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose."

34. The principle of applicability of a harmonious construction in the context of construing conflicting statutory provisions was emphasized in the case of **Jagdish Singh vs. Lt. Governor Delhi**7 and it was stated thus :-

"It is a cardinal principle of construction of a statute or the statutory rule that efforts 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. Further a statute or a rule made thereunder should be read as a whole and one provision should be construed with reference to the other provision so as to make the rule consistent and any construction which would bring any inconsistency or repugnancy between one provision and the other should be avoided. One rule cannot be used to defeat another rule in the same rules unless it is impossible to effect harmonisation between them. The well-known principle of harmonious construction is that effect should be given to all the provisions, and therefore, this Court has held in several cases that a construction that reduces one of the provisions to a "dead letter" is not a harmonious construction as one part is being destroyed and consequently court should avoid such a construction."

35. The basic rule of applying the principles of harmonious construction in a manner so as to give effect to all the provisions so as to ensure their consistency with the object sought to be achieved was reiterated in the case of **Anwar Hasan Khan Vs. Mohd. Shafi and others**8 and referring to the earlier decisions in **Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama**24 and also the observations of **Justice Holmes in Towne Vs. Eisner**25 and **Learned Hand J. in Lenigh Valley Coal Co. Vs. Yensavage**26, it was observed as follows :-

"8. It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statute. It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well-known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead

letter" is not harmonious construction. With respect to law relating to interpretation of statutes this Court in *Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277* held: (SCC p. 284, para 16)

"16. The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose. A statute is neither a literary text nor a divine revelation. "Words are certainly not crystals, transparent and unchanged' as Mr Justice Holmes has wisely and properly warned. (Towne v. Eisner [245 US 418, 425 (1918)]) Learned Hand, J., was equally emphatic when he said: "Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.' (Lenigh Valley Coal Co. v. Yensavage [218 FR 547, 553]).".

36. A similar view with regard to applying the principles of harmonious construction so as to give effect to all the provisions and to make them workable was taken in **British Airways Plc. Vs. Union of India and others**9 and it was stated thus :-

"8. While interpreting a statute the court should try to sustain its validity and give such meaning to the provisions which advance the object sought to be achieved by the enactment. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting which make its working impossible. 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. A particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. It is the duty of the court to make such construction of a statute which shall suppress the mischief and advance the remedy. While interpreting a statute the courts are required to keep in mind the consequences which are likely to flow upon the intended interpretation."

37. The principle of harmonizing various provisions of the Act and the legislative intent was reiterated in the decision in **Commissioner of Income Tax Vs. Hindustan Bulk Carriers**,27 in the context of considering a question with regard to liability to pay interest under certain provisions of the Income Tax Act and referring to **Broom's Legal Maxims (10th Edn.), p.361, Craies on Statutes (7th Edn.), p. 95 and Maxwell on Statutes (11th Edn.) p.22**1 and the earlier decisions in **Whitney v. IRC28, CIT v. S. Teja Singh**29, **Gursahai Saigal v. CIT**30, **Salmon v. Duncombe**31, **Curtis v. Stovin**,32 **S. Teja Singh case, Nokes v. Doncaster Amalgamated Collieries**,33 **Pye v. Minister for Lands for NSW**,34 Mohan Kumar Singhania v. Union of India,35 **R.S. Raghunath v. State of Karnataka**36 and **Sultana Begum v. Prem Chand Jain**,6 it was observed as follows :-

"14. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein

must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See Broom's Legal Maxims (10th Edn.), p. 361, Craies on Statutes (7th Edn.), p. 95 and Maxwell on Statutes (11th Edn.), p. 221.]

15. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. (See Whitney v. IRC, 1926 AC 37 referred to in CIT v. S. Teja Singh, AIR 1959 SC 352 and Gursahai Saigal v. CIT,AIR 1963 SC 1062.

16. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See Salmon v. Duncombe, (1886) 11 AC 627, Curtis v. Stovin (1889) 22 QBD 513 referred to in S. Teja Singh case AIR 1959 SC 352.

17. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See Nokes v. Doncaster Amalgamated Collieries (1940) 3 All ER 549 referred to in Pye v. Minister for Lands for NSW (1954) 3 All ER 514. The principles indicated in the said cases were reiterated by this Court in Mohan Kumar Singhania v. Union of India,1992 Supp (1) SCC 594

18. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

19. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See R.S. Raghunath v. State of Karnataka (1992) 1 SCC 335. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head-on clash between two sections of the same Act. (See Sultana Begum v. Prem Chand Jain (1997) 1 SCC 373 .

20. Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.

21. The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not a harmonised construction. To harmonise is not to destroy."

38. The principle of harmonizing the laws has been elucidated in the legal treatise "**Construction and Interpretation of the Laws by Henry Campbell Black**,"37 by stating that statutes should be so construed so as to give effect to all of their clauses and provisions and each statute should receive such a construction as will harmonize it with the pre-existing body of law.

39. Reverting to the controversy at hand, the order of the Commissioner under sub-section (4) of Section 24, as per unamended provisions, was to be final. This finality attached to the order of the Commissioner was in the sense that there was no provision of a further appeal against the said order. A question would arise as to whether such finality could be held to restrict the revisional jurisdiction conferred upon higher courts.

40. A Full Bench of this Court in **Shah Chaturbhuj Vs. Mauji Ram**38, had the occasion to interpret a similar provision "the decision of the revenue court shall be final" occurring in Section 5 of the U.P. Agriculturists Relief Act, 1934, and it was held that the provision with regard to finality of the decision of the revenue court only meant that that there was no further right of appeal against such an order. The observations made in this regard are as follows :-

"In our judgment the provision in Clause (2) of Section 5 that "the decision of the Appellate Court shall be final" means no more than this that the order passed by the Appellate Court cannot be made the subject of a second appeal....The provision about the finality of the decision of the Appellate Court contained in Clause (2), Section 5 cannot therefore warrant the inference that the Legislature intended in any way to limit or control the revisional jurisdiction conferred on this Court by Section 115, Civil P.C."

41. A similar situation arose in the case of **Smt. Krishna Devi Vs. Board of Revenue**39, wherein the question of maintainability of a revision before the Board under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 195040, against an order passed by the Assistant Collector exercising powers under Rule 115-N (3) of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, in view of the finality attached to the said order, was subject matter of consideration. Following the Full Bench decision in the case of **Shah Chaturbhuj Vs. Mauji Ram (supra)** it was held that the finality mentioned under sub-rule (3) of Rule 115-N cannot whittle down the revisional power conferred upon the Board by Section 233 of the Act, 1950. It was stated thus :-

"11. It is true that Rule 115-N (3) provides that the decision of the Assistant Collector shall be final. It is well-settled that such finality does not restrict the revisional jurisdiction conferred upon higher courts. In the case of Shah Chaturbhuj v. Mauji Ram, 1938 A.W.R. 437 a Full Bench of this Court interpreted the phrase "the decision of revenue court shall be final" occurring in Section 5 of the U.P. Agriculturists Relief Act, 1934, as not depriving the higher courts of revisional powers under Section 115 of the C.P.C. The Full Bench held that the finality mentioned in the provision only meant that there was no right of appeal vesting in the litigants against such an order. In our opinion, this Full Bench decision equally applies to Section 333. The finality mentioned by sub-Rule (3) of Rule 115-N cannot whittle down the amplitude of the revisional power conferred upon the Board of Revenue by section 333 of the Z.A. and L.R. Act."

42. The "Revenue Court" as defined under Section 4 (16) of the Code means all or any of the following authorities, that is to say, the Board and all members thereof, Commissioners, Additional

Commissioners, Collectors, Additional Collectors, Assistant Collectors, Settlement Officers, Assistant Settlement Officers, Record Officers, Assistant Record Officers, Tahsildar and Naib-Tahsildar. The term "Revenue Officer" has been defined under Section 4 (17) of the Code to mean the Commissioner, an Additional Commissioner, the Collector, an Additional Collector, the Sub-Divisional Officer and Assistant Collector, Settlement Officer, an Assistant Settlement Officer, Record Officer, an Assistant Record Officer, the Tahsildar, Tahsildar (Judicial), the Naib-Tahsildar or the Revenue Inspector.

43. A conjoint reading of the definitions of the aforesaid terms "Revenue Court" and "Revenue Officer" would indicate that some persons who act as Revenue Courts also act as Revenue Officers ─ where a Revenue Officer deals with judicial matters in revenue, he acts as a Revenue Court, which is under the control and supervision of the Board of Revenue; on the other hand, where a Revenue Officer deals with non-judicial matters in revenue, he acts under the control and supervision of the State Government. The functions of the Revenue Officer regarding the land revenue administration may be classified as judicial and non-judicial depending on the nature of the functions being discharged.

44. Section 234 (1) (v) of the U.P. Land Revenue Act, 1901 (now repealed) empowered the State Government to define the matters or proceedings which were deemed to be judicial or non-judicial. In terms of the aforestated provision, para 911 of the Revenue Manual, provided for certain matters to be deemed to be judicial. This included cases relating to settlement of boundary disputes under Sections 41 and 51 of the Land Revenue Act, 1901.

45. The Board of Revenue constituted under Section 7 of the U.P. Revenue Code, 2006, as per Section 8 thereof, is to be the chief controlling authority in all matters relating to disposal of cases, appeals or revisions. The revisional jurisdiction of the Board is provided for by Section 210 of the Code, and in terms thereof it is empowered to exercise revisional jurisdiction by calling for the record of any suit or proceedings decided by any subordinate court, in which no appeal lies, for the purpose of satisfying itself as to the legality or propriety of any order passed in such suit or proceedings, provided the conditions laid down under clause (a) or clause (b) or clause (c) of sub-section (1) of the section are satisfied. The language of the section is one of wide amplitude and embraces within its fold all cases decided by courts subordinate to the court.

46. Section 210 whereunder the Board is empowered to call for the records of any suit or proceedings "decided" by any "subordinate revenue court", indicates the legislative intent that a revision would lie against judicial adjudications of suits and proceedings; administrative proceedings conducted by those very authorities being not within the purview of Section 210. The Sub-Divisional Officer, acting under sub-section (1) of Section 24, is empowered to "decide" any "dispute" regarding boundaries, and the order passed by the Sub-Divisional Officer is subject to an appeal under sub-section (4) before the Commissioner; the order of the Commissioner thereafter is to be final. The provisions contained sub-section (1) and sub-section (4) of Section 24 leave no room for doubt that the Sub-Divisional Officer and also the Commissioner exercising powers thereunder, discharge judicial functions.

47. The Sub-Divisional Officer while deciding the dispute regarding boundaries in exercise of powers under sub-section (1) of Section 24 of the Code, which corresponds to Section 41 of the U.P. Land Revenue Act (repealed), acts as a "Revenue Court". The Commissioner while deciding an appeal under sub-section (4) against an order passed by the Sub-Divisional Officer, also acts as a "Revenue Court", and as such would be a court subordinate to the Board of Revenue and subject to its revisional jurisdiction.

48. The mere fact that there is no further appeal against the order passed by the Commissioner in an appeal under sub-section (4) of Section 24 would not be held to create a bar in invocation of the revisional jurisdiction of the Board of Revenue under section 210 of the Code. The jurisdiction conferred on the Board under Section 210 to revise the orders passed by the subordinate revenue courts would not be dependent on a motion being made by a party to the case inasmuch as the section confers power upon the Board to exercise revisional jurisdiction independent of any such motion having been made. The fact that a right of appeal is not given to the party concerned would therefore not be held to affect the jurisdiction vested in the Board under Section 210.

49. The provision under sub-section (4) of Section 24, as it existed, prior to the amending Act of 2019, that "the order of the Commissioner shall be final" would therefore be held to mean no more than that the order passed in appeal under sub-section (4) would not be subject to any second appeal. The provision with regard to finality attached to the order of the Commissioner under sub-section (4) would not in any manner be held to limit or control the revisional jurisdiction conferred upon the Board under Section 210.

50. In terms of the amendment made to sub-section (4) of Section 24 by the U.P. Act No. 7 of 2019, the finality attached to the order passed by the Commissioner in appeal has been made subject to the provisions of Section 210, and as per terms of Section 210, the power of the Board to call for the record of any subordinate court would be exercisable in case where no appeal lies.

51. The order of the Commissioner passed in exercise of powers under sub-section (4) of Section 24 is an order in appeal against the order of the Sub-Divisional Officer passed under sub-section (1) of Section 24, and this order is not subject to any second appeal under the Code. This is further clear from a reading of the Third Schedule of the Code wherein in respect of the provisions contained under Section 24 relating to disputes regarding boundary and boundary marks the court of original jurisdiction has been specified in column 3 as the court of Sub-Divisional Officer and the court of first appeal is mentioned in column 4 as the court of Commissioner; further column 5 pertaining to the second appeal is left blank. This goes to show that the order passed by the Commissioner in appeal under sub-section (4) of Section 24 against the order of the Sub-Divisional Officer acting as a court of original jurisdiction under sub-section (1) of Section 24, has a finality attached to it inasmuch as there is no provision of a second appeal against the said order.

52. By virtue of the amendment made to sub-section (4) of Section 24 in terms of U.P. Act No. 7 of 2019 the finality attached to the order of the Commissioner in appeal,

has now been made subject to Section 210. There being no provision under the Code for a second appeal against the order of the Commissioner passed under sub-section (4) of Section 24, it can be said that against the order of the Commissioner in appeal, no further appeal lies, and therefore the necessary condition for invocation of the powers of the Board under Section 210 for calling the records and exercising revisional powers against the order passed by the Commissioner in appeal under sub-section (4) of Section 24, stands fulfilled.

53. A rule of construction, spoken of as, ex visceribus actus, helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute. It essentially means that every part of a statute must be construed within its four corners and no provision should be interpreted in isolation.

54. **Craies on Statute Law**41 has explained the rule of ***ex visceribus actus*** by stating as follows :-

"...there is a general rule of construction applicable to all statutes alike, which is spoken of as construction ***ex visceribus actus***— within the four corners of the Act. "The office of a good expositor of an Act of Parliament," said Coke in the ***Lincoln College Case***42, "is to make construction on all parts together, and not of one part only by itself—Nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit." And again he says : It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers.... and this exposition is ***ex visceribus actus***."

55. The finality attached to the provisions of sub-section (4) of Section 24, having been made subject to Section 210, by virtue of the amending Act of 2019, it would be presumed that the legislature was conscious of the existing provisions of Section 210 whereunder in order to invoke revisional powers of the Board the necessary condition is "where no appeal lies".

56. In this regard it may be noted that there is a general presumption that the legislature is aware of the existing law when it passes a legislation seeking to amend the earlier law. The legislature would therefore also be presumed not to intend to create any confusion in the law by creating a provision which is in conflict with the existing law.

57. The principle to be followed with regard to interpretation of an amending Act in the context of a pre-existing law was subject mater of consideration in **Caesar Griffin's**43 case, wherein it was observed as follows :-

"...Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the constitution."

58. In this regard, reference may be had to the legal treatise "**The Written Laws and Their Interpretation**" by **Joel Prentiss Bishop**44 wherein it has been stated as follows :-

"...A new statutory provision, cast into a body of written and unwritten laws, is not

altogether unlike a drop of coloring matter to a pail of water. Not so fully, yet to a considerable extent, it changes the hue of the whole body; and how far and where it works the change can be seen only by him who comprehends the relations of the parts, and discerns how each particle acts upon and governs and is governed by the others....Every statute operates to modify or confirm something in the law which existed before. No statute is written, so to speak, upon a blank in the institutions of society. No such blank exists or can exist...In every case, it is a thread of woof woven into a warp which before existed. It is never to be contemplated as a thing alone, but always as a part of a harmonious whole."

59. In construing a statute there is a general presumption against inconsistency. The mind of the legislature is presumed to be consistent and in a case of any apparent ambiguity, such a construction is to be adopted as would make all the provisions of the statute consistent with each other and with the pre-existing body of law.

60. It would also be presumed that the legislature does not intend to be inconsistent with itself and that it does not intend to make unnecessary changes in the existing laws. Hence in case of any doubt, a statute is to be so construed as to be consistent with itself throughout its extent so as to harmonize with the other laws and be in consonance with the legislative purpose, provisions and scheme of the enactment. ***Interpretare et concordare leges legibus, est optimus interpretandi modus***, that is, to interpret and in such a way as to harmonize laws with laws is the best mode of interpretation.

61. The presumption against inconsistency would lead to an inference that the legislature while bringing about the amendment to the provisions of sub-section (4) of Section 24 did not intend to create a conflict with the pre-existing provisions of Section 210, and it would be necessary to construe the two provisions harmoniously so as to make them workable.

62. Construing the provisions of sub-section (4) of section 24 and Section 210 in the aforesaid manner and by applying the principle of harmonious construction the apparent conflict between the two provisions would be reconciled and the provisions of the two sections can be read in a manner so as to give full effect to both the provisions without rendering either of them redundant or otiose.

63. It would therefore follow as a necessary consequence that the order passed by the Commissioner in appeal under sub-section (4) of Section 24, which is final in the sense that there is no further appeal thereagainst, would be subject to the revisional powers of the Board to be exercised under Section 210.

64. As regards the decision in the case of **Vijay Kumar and others (supra)**, sought to be relied upon on behalf of the petitioner, it may only be noted that the aforestated decision, was rendered in the context of the provisions of the U.P. Land Revenue Act 1901, (now repealed). The statutory scheme under the U.P. Revenue Code, being entirely different, particularly consequent to the amendments made in the year 2019 whereby the order passed in an appeal under sub-section (4) of Section 24 has been made subject to the provisions of Section 210, the aforesaid decision would have no applicability in the facts of the present case.

65. Having come to the aforesaid conclusion, the objection raised on behalf

of the State respondents with regard to the availability of a statutory remedy against the order passed by the Commissioner in an appeal under sub-section (4) of Section 24 of the Code, is sustained.

66. The writ petition is not entertained for the reason of existence of an alternative statutory remedy.

67. The petition stands dismissed leaving it open to the petitioner to take recourse to the statutory alternative remedy.

(2022)06ILR A286
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.05.2022

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ-C No. 26057 of 2021
and Matters Under Article 227 No. 26250 of 2021

Smt. Kusum ...Petitioner
Versus
Smt. Bhawana & Ors. ...Respondents

Counsel for the Petitioner:
Rudra Mani Shukla

Counsel for the Respondents:
C.S.C., Amrendra Nath Tripathi, Avinash Mishra, Rakesh Kumar Chaudhary, Sanjeet Kumar Mishra, Santosh Kumar Pandey

A. Election Law – UP Panchayat Raj Act, 1947 – Section 12-C – UP Panchayat Raj (Settlement of Election Disputes) Rules, 1994 – Re-counting of votes – Service of notice – Rule of *audi alteram partem* – Applicability of O. 5 R. 1, 5, 6, 9 and 20 of CPC – Substituted mode of service, when can be adopted – Registered post was returned un-served and there is no declaration under O. 5 R. 9(5) – Effect – Case was proceeded ex-parte – Validity challenged – Held, recourse to substituted service can be taken only if the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, summons cannot be served in the ordinary way – The order of the Presiding Officer to proceed *ex-parte* against the petitioner was contrary to law. (Para 15, 22 and 25)

B. Election dispute case – Civil Procedure Code,1908 – O. 9 R. 7 and O. 17 R. 2 – Phrase 'at or before such hearing' – Meaning – Non-appearance of the defendant on the first adjourned date – Effect – Maintainability of application for recall of the order to proceed the case ex-parte – Held, there is nothing in the Civil Procedure Code which indicates that the right of the defendant under Order 9 Rule 7 CPC expires on the next date fixed by the court, i.e., the date fixed by the court on the day the court decides to proceed *exparte* against the defendant – The phrase 'at or before such hearing' only signifies that the application under Order 9 Rule 7 CPC can be filed by the defendant if he appears on any date fixed in the case before the hearing in the case is concluded – High Court held the application under O. 9 R. 7 maintainable (Para 30, 32, 33 and 34)

Writ petition allowed (E-1)

List of Cases cited :-

1. Sangram Singh Vs Election Tribunal; AIR (1955) SC 425

2. Arjun Singh Vs Mohindra Kumar & ors.; AIR (1964) SC 993

3. Om Prakash Vs Prakash Chand & ors.; AIR (2004) Allahabad 391

4. Bhagwati Lal Vs Sangeeta; (2017) AIR CC 2284 (Rajasthan)

5. Amrish Vs U.P. Ziladhikari Meerut; (2006) 4 ALJ 495

6. Prahlad Singh & anr. Vs Niyaz Ahmad & ors.; AIR (2001) Allahabad 78

7. Narendra Vs Prescribed Authority & ors.; (2010) 1 ALJ 784

8. Nihal Ahmad Vs District Judge, Siddharth Nagar & ors.; (2004) 97 RD 252

9. Neerja Realtors Pvt. Ltd. Vs Janglu (Dead) through Legal Representative; (2018) 2 SCC 649

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

1. Both petitions, i.e., Writ - C No. 26057 of 2021 and Matters under Article 227 No. 26250 of 2021 were connected by order dated 17.11.2021 passed by the Court and were heard together and are being decided by a common order.

2. Heard Sri Girish Chandra Sinha assisted by Sri Rudra Mani Shukla, Advocates for the petitioner, Sri Amrendra Nath Tripathi assisted by Sri Santosh Kumar Pandey, Advocates for respondent no. 1 and Sri Rakesh Kumar Chaudhary, Advocate for respondent nos. 5 and 7, the Election Commission and the State Government represented by their respective Standing Counsel.

3. The dispute in the present petitions relates to the election of the Gram Pradhan of Village - Ramgarh, Development Block - Shivgarh, Tehsil Raniganj, District Pratapgarh held on 19.4.2021. The post was reserved for woman (General). The petitioner and respondent nos. 1, 2 and 3 were candidates in the elections in which the petitioner was declared elected defeating the respondent no. 1 by a margin of about 60 votes. On 3.6.2021, the respondent no. 1 filed Election Petition, i.e., Case No. 1542 of 2021 under Section 12-C of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as, "Act') before the Deputy District Magistrate / Sub-Divisional Officer (S.D.O.), Tehsil Raniganj, District Pratapgarh (hereinafter referred to as, "Prescribed Authority'). The issues in the present case relate to correctness of the proceedings in Case No. 1542 of 2021 and certain orders passed in the case, therefore, the proceedings of the case are being narrated in detail.

4. It is the case of the petitioner that Election Petition was filed by the lawyer of respondent no. 1 and was accepted by the Prescribed Authority in the absence of respondent no. 1. The order-sheet of the case does not contain any order passed by the Prescribed Authority to issue notice on the Election Petition. An order dated 3.6.2021 directing that notices be issued to the defendants is transcribed on the Election Petition, a copy of which was handed over to the Court during the arguments and was taken on record. The order-sheet of the case shows that on 3.6.2021, the Prescribed Authority only acknowledged the presence of respondent no. 1 and his counsel while submitting the Election Petition and fixed 1.7.2021 as the next date in the case. The order-sheet has been annexed as Annexure No. C.A. - 5 to the counter affidavit of respondent no. 1 filed in Petition No. 26057 of 2021. On 3.6.2021 itself, notices were issued by the office of the Prescribed Authority notifying 15.7.2021 as the date in the case. The copy of the notice is annexed as Annexure 5 to the petition. The notice has not been specifically denied by the respondent no. 1 in his counter affidavit. The order-sheet of the case further shows that on 1.7.2021, the Prescribed Authority took note of the fact that notices had been issued in the case and fixed 15.7.2021 as the next date. The recital on the order-sheet of the case on 1.7.2021 is : - पत्रावली पेश पक्षों को नोटिस जारी किया गया पत्रावली दिनांक 15.7.2021 को पेश हो (Case presented, parties issued notice, Put up on 15.7.2021). On 15.7.2021, the

Prescribed Authority recorded that notices had been served on the opposite parties in the election petition and fixed 29.7.2021 as the next date in the case. On 15.7.2021, the respondent no. 1, i.e., the election petitioner also filed an application before the Prescribed Authority alleging that the petitioner was avoiding notice in the election petition and, therefore, notices be issued to the petitioner by registered post. On the aforesaid application, the Prescribed Authority passed an order on the same date directing the Reader of the court to issue notice by registered post. The order to issue notice by registered post has also not been transcribed on the order-sheet of the case but has been transcribed on the application dated 15.7.2021. It appears from the receipts annexed with the counter affidavit of respondent no. 1 in Petition No. 26057 of 2021 that notices by registered post were sent on 19.7.2021. The acknowledgment of the notices sent by registered post to the petitioner were returned back by the Postman with an endorsement dated 24th July, 2021 that the Postman had repeatedly visited the house of the petitioner but was informed by her husband that the petitioner was at Lucknow, therefore, notices were being returned unserved. On 29.7.2021, the respondent no. 1 filed an application, ostensibly under Order 5 Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as, "CPC') stating that the petitioner was not appearing in the court despite having knowledge of the case, therefore, notices be served on the petitioner through publication in local newspapers. On the application of the petitioner, the Prescribed Authority passed an order dated 29.7.2021 directing the Reader of the court to get the notice of the case published. The order dated 29.7.2021 passed by the Prescribed Authority has also not been transcribed on the order-sheet of the case but is transcribed on the application filed by respondent no. 1. The order-sheet shows that on 29.7.2021, the case was adjourned for 5.8.2021. Notices in pursuance to the order dated 29.7.2021 were published in some Hindi Daily named *Lok Mitra* on 4.8.2021 and 5.8.2021. On 5.8.2021, the case was adjourned to 12.8.2021 and on 12.8.2021, the case was adjourned for 26.8.2021. The order-sheet of the case indicates that on 26.8.2021, the case was adjourned for 9th September, 2021. However, on 26.8.2021, the respondent no. 1 filed an application before the Prescribed Authority praying that notice in the case be deemed to have been served on the petitioner and the case be considered on merits. No orders were passed on the said application on 26.8.2021 but by his order dated 2.9.2021, transcribed on the application dated 26.8.2021, the Prescribed Authority directed the Reader of the court to get notice of the case published in hindi daily, *Amar Ujala*. The order dated 2.9.2021 is also not transcribed on the order-sheet of the case and ***it is relevant to note that 2.9.2021 was not a date fixed in the case.*** In pursuance to the order dated 2.9.2021, notices were published in Hindi Daily Amar Ujala. The notice of the case published in Amar Ujala has been annexed as Annexure C.A. - 4 with the counter affidavit and it has been stated in Paragraph 14(3) of the counter affidavit that the publication was effected in *Amar Ujala* dated 2.9.2021. However, a perusal of the document annexed as Annexure CA - 4 of the counter affidavit in Petition No. 26057 of 2021 also contains notifications issued by the Uttar Pradesh Public Service Commission, Swami Vivekanand National Rehabilitation Training Centre and Executive Engineer, Electricity Distribution Division - II, George Town, Prayagraj on 6th September, 2021.

Obviously, the notifications could not have been published on a date previous to their issuance and, therefore, the notices could have been published in the newspaper earliest by 7th September, 2021. Thus, the averment in Paragraph 14 (3) of the counter affidavit can not be relied upon so far as the date of publication of the notice is concerned. Till 9.9.2021, the petitioner did not appear in the case, therefore, the Prescribed Authority directed that proceedings be held ex-parte against the petitioner. On the same date, the Prescribed Authority fixed 16.9.2021 to record the evidence of respondent no. 1. On 16.9.2021, the case was adjourned to 23.9.2021 and on 23.9.2021, the affidavits of the witnesses of respondent no. 1, i.e., the election petitioner were filed before the Prescribed Authority and 30.9.2021 was fixed for arguments in the case. On 30.9.2021, the petitioner appeared before the Prescribed Authority and filed an application under Order 9 Rule 7 read with Section 151 CPC for recall of the order dated 9.9.2021. It has been stated in the application dated 30.9.2021 filed by the petitioner that she came to know about the case from rumors in her village and when she inspected the records of the case on 23.9.2021. The application dated 30.9.2021 filed by the petitioner was dismissed by the Prescribed Authority by his order dated 7.10.2021 on the ground that it was not maintainable and the petitioner had the remedy to file an application under Order 9 Rule 13 because the case was fixed for arguments.

5. Against the order dated 7.10.2021, the petitioner filed a revision under Section 12-C(6) of the Act registered as Misc. Case No. 0245 of 2021 before the District Judge, Pratapgarh. The revision was filed on 13.10.2021. Meanwhile, because no interim order was granted to the petitioner by the revisional court staying the proceedings in the election petition, the hearing of the election petition continued and was concluded on 21.10.2021 and judgment was reserved. The District Judge, Pratapgarh vide his order dated 28.10.2021 dismissed Misc. Case No. 0245 of 2021 holding that as the trial before the Prescribed Authority had concluded during the pendency of revision and only judgment had to be pronounced by the Prescribed Authority, therefore, no effective relief could be given to the petitioner in revision.

6. Subsequently, by his order dated 1.11.2021, the Prescribed Authority directed for a re-count of the ballots because of certain discrepancies in Forms - 36, 45 and 46.

7. The orders dated 7.10.2021 passed by the Prescribed Authority and 28.10.2021 passed by the District Judge, Pratapgarh have been challenged in Petition No. 26250 of 2021 and the order dated 1.11.2021 passed by the Prescribed Authority has been challenged in Petition No. 26057 of 2021.

8. It was argued by the counsel for the petitioner that the application under Order 9 Rule 7 CPC was filed by the petitioner on 30.9.2021, i.e., before the judgment in the case was reserved on 21.10.2021, therefore, the application was maintainable and the Prescribed Authority has wrongly held that the aforesaid application was not maintainable. It was further argued by the counsel for the petitioner that no notice was served on the petitioner in Case No. 1542 of 2021 either through ordinary mode or through registered post. It was further argued by the counsel for the petitioner that

service of notice by publication, i.e., substituted service as directed by the Prescribed Authority vide his orders dated 29.7.2021 and 2.9.2021 were contrary to law in as much as the said notices were got published without the Prescribed Authority having recorded his satisfaction that the petitioner was avoiding service of notice in the case. It was argued that the order dated 1.11.2021 has been passed without giving any opportunity of hearing to the petitioner and is also a non-speaking order. It has been alleged in the petition that the Prescribed Authority was acting under the dictates of the local Member of the Legislative Assembly (hereinafter referred to as, "MLA') who is the brother-in-law of respondent no. 1 / election petitioner. It was argued that for the aforesaid reasons, the orders dated 7.10.2021 and 1.11.2021 are contrary to law and are liable to be set-aside by this Court. In support of his arguments, the counsel for the petitioner has relied on the judgments reported in ***Sangram Singh vs. Election Tribunal AIR (1955) Supreme Court 425; Arjun Singh vs. Mohindra Kumar & Ors. AIR (1964) Supreme Court 993; Om Prakash vs. Prakash Chand & Ors. AIR (2004) Allahabad 391; Bhagwati Lal vs. Sangeeta (2017) AIR CC 2284 (Rajasthan) and Amrish vs. U.P. Ziladhikari Meerut (2006) 4 ALJ 495***.

9. Rebutting the arguments of the counsel for the petitioner, the counsel for respondent no. 1 has argued that from the recital dated 15.7.2021 recorded on the order-sheet of the case, it is evident that notice of the case was served on the petitioner. It was argued that the petitioner was deliberately avoiding service of notice in the case and, therefore, no illegality had been committed by the Prescribed Authority in getting the notices published under Order 5 Rule 20 CPC. It was argued that the petitioner had been given sufficient opportunity to appear before the Prescribed Authority which he failed to avail. It was argued that the application filed by the petitioner for recall of the order dated 9.9.2021 whereby the Prescribed Authority had decided to proceed ex-parte against the petitioner was not maintainable under Order 9 Rule 7 CPC as the said application had to be filed either on a date preceding the next date fixed in the case or on the next date fixed in the case, i.e., it had to be filed on or before 16.9.2021, and in any case before 23.9.2021. It was further argued that the application filed by the petitioner does not disclose any reason for not appearing before the Prescribed Authority on the different dates fixed in the case before 30.9.2021. It was argued that in the circumstances, there is no illegality in the proceedings conducted by the Prescribed Authority in Case No. 1542 of 2021 and the application of the petitioner under order 9 Rule 7 CPC was rightly dismissed by the Prescribed Authority vide his order dated 7.10.2021. It was further argued that in any case, the petitioner cannot now be permitted to file his written statement as the evidence of respondent no. 1 has already been filed disclosing his evidence in the case and any order permitting the petitioner to file his written statement would seriously prejudice the respondent no. 1. It was further argued that the affidavits filed by the witness of respondent no. 1 proved that illegalities had been committed in counting of ballots and because no written statement was filed by the petitioner, therefore, the averments made by respondent no. 1 in Election Petition instituting Case No. 1542 of 2021 remained un-controverted. It was argued that in the circumstances, the order dated 1.11.2021 passed by the Prescribed

Authority is according to law. It was argued that for the aforesaid reasons, the petitions lack merit and are liable to be dismissed. In support of his contention, the counsel for respondent no. 1 has relied on the judgments reported in ***Prahlad Singh & Anr. vs. Niyaz Ahmad & Ors. AIR (2001) Allahabad 78; Narendra vs. Prescribed Authority & Ors. (2010) 1 ALJ 784 and Nihal Ahmad vs. District Judge, Siddharth Nagar & Ors. (2004) 97 RD 252.***

10. I have considered the submissions of the counsel for the parties.

11. The main issues in the present petitions are as to whether notice of the case can be held to have been served on the defendant - petitioner in accordance with law and whether the application filed by the petitioner under Order 9 Rule 7 CPC was maintainable.

12. Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as, "Rules, 1994') prescribes the procedure to be followed in an election petition filed challenging the election of a Gram Pradhan. Section 4 of the Rules, 1994 provides that subject to the provisions of the Act, every election petition shall be tried by the Sub-Divisional Officer, as nearly as may be, in accordance with the procedure applicable under the CPC for the trial of suits.

13. The provisions in CPC relating to service of summons on a defendant in a suit and relevant for the present case is Order 5 CPC. Order 5 Rule 1 CPC provides that when a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant. Order 5 Rule 6 CPC provides that the day fixed in the summons should be such so as to allow the defendant sufficient time to enable him to appear and answer on such day. Order 5 Rule 9 CPC prescribes the different modes of service of notice which includes service by registered post.

14. Order 5 Rule 20 provides for substituted service. Order 5 Rule 20 is reproduced below : -

"20. Substituted service.--(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, *the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court House, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.*

(1-A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

(2) ***Effect of substituted service.--*** *Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.*

(3) ***Where service substituted, time for appearance to be fixed.--Where service is substituted by order of the Court, the Court shall fix such time for the***

appearance of the defendant as the case may require."

(emphasis added)

15. A reading of Order 5 Rule 20 shows that recourse to substituted service can be taken only if the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, summons cannot be served in the ordinary way. Mode of service prescribed under Order 5 Rule 20 CPC is an exceptional mode and can be adopted only in the circumstances enumerated in Rule 20. At this stage, the observations of the Supreme Court in Paragraph No. 14 and 15 in ***Neerja Realtors Private Limited vs. Janglu (Dead) through Legal Representative (2018) 2 SCC 649*** is reproduced below :-

"14. Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The report of the bailiff does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. There was a breach of the provisions of Order 5 Rule 17. When the application for substituted service was filed before the trial court under Order 5 Rule 20, a cryptic order was passed on 2.9.2011. ***Order 5 Rule 20 requires the court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order 5 Rule 20 and its order must indicate due consideration of the provisions contained in it.*** *Evidently the trial court failed to apply its mind to the requirements of Order 5 Rule 20 and passed a mechanical order. ...*

15. The submission that under Order 5 Rule 20, it was not necessary to affix a copy of the summons at the court house and at the house where the defendant is known to have last resided, once the court had directed service by publication in the newspaper really begs the question. There was a clear breach of the procedure prescribed in Order 5 Rule 17 even antecedent thereto. Besides, the order of the Court does not indicate due application of mind to the requirement of the satisfaction prescribed in the provision. ***The High Court was, in these circumstances, justified in coming to the conclusion that the ex-parte judgment and order in the suit for specific performance was liable to be set aside."***

(emphasis added)

16. A reading of the observations of the Supreme Court in ***Neerja Realtors (supra)*** leads to the conclusion that a substituted service under Order 5 Rule 20 CPC would not be a valid service in law if the conditions mentioned in Rule 20 do not exist. Service of notice by the modes prescribed in Order 5 Rule 20 would not be a valid service if the order does not indicate application of mind by the court and its satisfaction that there was reason to believe that the defendant was keeping out of the way for the purpose of avoiding service or that for any other reason, the summons could not be served in the ordinary way.

17. It is a fundamental principle of law that proceedings in a litigation should not be held behind the back of a party.

18. The purpose of issuing summons / notice to a defendant in a case is to inform him about the institution of the suit and the date fixed in the case. The defendant

should be given sufficient time by the summons to appear and raise his defense. The purpose of issuing summons is to give effect to the rule of audi alteram partem. It was observed by the Supreme Court in ***Sangram Singh vs. Election Tribunal, Kotah AIR (1955) SC 425*** "that our laws of procedure are grounded on a principle of natural justice which require that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.' It was further observed that "our laws of procedure should be construed, wherever that is reasonably possible, in light of that principle' and "***no forms or procedure should ever be permitted to exclude the presentation of a litigants' defence.***' It was also observed by the Supreme Court in ***Sangram Singh (supra)*** that procedural provisions are designed to facilitate justice and are not penal enactments for punishment and penalties. It was observed that too technical a construction of procedural provision that leaves no room for reasonable elasticity of interpretation should be guarded against.

19. The service of notice on the defendant - petitioner in Election Case No. 1542 of 2021 has to be seen in light of the aforesaid legal position.

20. The order-sheet indicates that on 3.6.2021, the Prescribed Authority directed that the case be posted for 1.7.2021. The order-sheet of the case does not show that the Prescribed Authority had directed that notices be issued in the case to the defendants. However, the copy of the election petition handed over to the Court by the counsel for the petitioner contains an order by the Prescribed Authority directing the Reader to register the case and to issue notice to the parties and that the case be put up on 1.7.2021. On 1.7.2021, the Prescribed Authority records on the order-sheet that "notices issued to the parties'. The notice issued in the present case and annexed as Annexure 5 to Petition No. 26057 of 2021 shows that notices were issued on 3.6.2021 fixing 15.7.2021. It is difficult to comprehend as to how notices were issued for 15.7.2021 when by order dated 3.6.2021, the Prescribed Authority had directed that the case be put up on 1.7.2021. If notices were issued in pursuance to the direction of the Prescribed Authority, the same had to be issued for 1.7.2021 and not 15.7.2021. If notice fixing 15.7.2021 was issued on the directions of the Prescribed Authority, then there was no reason for the Prescribed Authority to fix 1.7.2021 as the next date in the case. Apparently, the notice issued by the office of the Prescribed Authority was not on the directions of the Prescribed Authority and, in any case, not according to the directions of the Prescribed Authority. The notice dated 3.6.2021 does not indicate the date fixed in the case by the Prescribed Authority ***and, therefore, cannot be considered as a valid notice in law***.

21. On the order-sheet of 15.7.2021, the Prescribed Authority records that notices had been served on the defendant and fixed 29.7.2021 as the next date in the case. Interestingly, on 15.7.2021 itself, the election petitioner, i.e., the respondent no. 1 in the present petitions filed an application stating that the defendant - petitioner was avoiding service of notice and, therefore, notice of the case be sent to the defendant - petitioner by registered post. The order-sheet does not contain any order directing service of notice by registered post but as

recorded earlier, an order dated 15.7.2021 of the Prescribed Authority is transcribed on the application of respondent no. 1 whereby the Reader of the court was directed to issue notice by registered post. The facts stated in the application dated 15.7.2021 on which the Prescribed Authority relied to pass an order directing issuance of notice by registered post controverts the recital dated 15.7.2021 in the order-sheet. Thus, even if a valid notice, the notice cannot be considered to be served on the petitioner.

22. The registered post was returned un-served. There is no noting by the Postman that either the petitioner or her husband had refused to receive the registered post. Apparently, the notice by registered post was also not served on the petitioner. There is no declaration by the Prescribed Authority, as required under Order 5 Rule 9(5), that notices sent by registered post had been duly served on the petitioner.

23. On 29.7.2021, the election petitioner, i.e., respondent no. 1 filed an application ostensibly under Order 5 Rule 20 CPC for publication of notice of the case. The Prescribed Authority made an endorsement on the application itself directing his Reader to get the notices published. The notices were published in Lok Mitra, Pratapgarh on 4.8.2021. It may be noted that the next date fixed in the case was 5.8.2021. On 5.8.2021, the case was adjourned for 12.8.2021. On 12.8.2021, the case was adjourned for 26.8.2021. On 26.8.2021, the respondent no. 1 had filed an application praying that as notices had been served on the defendant - petitioner through publication, therefore, the case may be decided on merits. No order was passed on the aforesaid application on 26.8.2021 but on 2.9.2021, the Prescribed Authority passed an order, transcribed on the application and not on the order-sheet, directing that notices of the case be published in hindi newspaper Amar Ujala. It is to be noted that 2.9.2021 was not a date fixed in the case. It appears that notice in the case was published in Amar Ujala but not before 7th September, 2021. On 9.9.2021, the Presiding Officer directed that the proceedings be held ex-parte against the defendant - petitioner.

24. The Prescribed Authority while passing orders for publication of notice has not recorded his satisfaction that there was reason to believe that the defendant was keeping out of the way for avoiding service of notice or that for any other reason, notice could not be served on the defendant in the ordinary way. The orders have been mechanically passed on the averment made by respondent no. 1, the election petitioner that the defendant - petitioner was avoiding service of notice and would not appear in the case unless notices are published in local newspapers. The Prescribed Authority, under the Rules, 1994 acts as a Tribunal and is not expected to outsource or delegate his discretion to a litigant. It is the Court / Tribunal and not the litigant who is to be satisfied that the defendant is keeping out of the way for the purpose of avoiding service or that summons cannot be served on the defendant in the ordinary way, before taking recourse to the exceptional mode of substituted service. There is nothing on record to show that the petitioner was keeping out of way for avoiding service of notice or that notice could not be served on the defendant in ordinary way. Further, notices of the case were published in the newspaper one or two days before the dates fixed in the case. The notice was published in Lok Mitra on

4.8.2021 and 5.8.2021 when the date fixed in the case was 5.8.2021. The second notice was published on 7.9.2021 when the date fixed in the case was 9.9.2021. The summons served through the exceptional mode have to also fulfill the requirements of Order 5 Rule 6 CPC, i.e., the summons should give sufficient time to the defendant to enable him to appear and answer the claim of the plaintiff. Apparently, even the notices published in the newspapers did not give sufficient time to the petitioner to enable him to appear and present his case as required under Order 5 Rule 6 CPC. In light of Order 5 Rule 6 CPC and the judgment of the Supreme Court in ***Neerja Realtors (supra)***, notice by publication in newspapers on 4.8.2021 and 7.9.2021 were contrary to law.

25. It has already been held that notice dated 3.6.2021 was not a valid notice. Notice by registered post was returned unserved without any noting of "refusal to receive'. It has also been held that service through publication was not valid. Thus, notice of the case was not duly served on the defendant - petitioner. Under Order 9 Rule 6(1)(a), the court is empowered to hear the suit ex-parte against the non-appearing defendant only if it is proved that summon was duly served on the defendant. In the facts of the present case, the Prescribed Authority could not have proceeded to hear the case ex-parte against the petitioner. Apparently, the proceedings have been held in violation of the principles of natural justice and without giving the petitioner - defendant any opportunity to put in his defense. The order of the Presiding Officer to proceed ex-parte against the defendant - petitioner was contrary to law and the whole proceedings in Election Case No. 1542 of 2021 starting from 9.9.2021 onwards are liable to be set-aside on the aforesaid ground only.

26. The other issue that arises in the present appeal is regarding maintainability of the application of the petitioner under Order 9 Rule 7 CPC filed on 30.9.2021, i.e., the date on which the case was posted for arguments after the evidence of the election petitioner, i.e., respondent no. 1, had been filed. At this stage, it would be relevant to reproduce Order 9 Rule 6, Order 9 Rule 7 and Order 9 Rule 13 CPC : -

*"6. **Procedure when only plaintiff appears**.--(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then--*

(a) When summons duly served.--If it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;]

(b) When summons not duly served.--If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time.--If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

7. Procedure where defendant appears on day of adjourned hearing and

assigns good cause for previous non-appearance.--*Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.*

13. 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 he was prevented by any sufficient cause from appearing 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 further than no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

[Explanation.--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.]

27. It was argued by the counsel for respondent no. 1 that the application filed by the petitioner on 30.9.2021 for recall of the order dated 9.9.2021 whereby the Presiding Officer had decided to proceed ex-parte against the petitioner was not maintainable under Order 9 Rule 7 CPC because the said application could have been filed on a date preceding the next date fixed in the case, i.e., it had to be filed before 16.9.2021 and in any case before 23.9.2021. In support of his contention, the counsel for respondent no. 1 has relied on a judgment in this Court reported in ***Prahlad Singh & Anr. vs. Niyaz Ahmad & Ors. AIR (2001) All 78***. Paragraph 6, 7 and 8 of the aforesaid judgment, on which the counsel for respondent no. 1 has relied, is reproduced below : -

"6. In this case admittedly the summons were duly served upon the defendants-petitioners. The Court was therefore, rightly passed the order on 19.5.1994 to proceed ex parte under the aforesaid Rule. The next date fixed for hearing after 19.5.1994 was 15.7.1994.

7. Order IX Rule 7 C.P.C. reads as under :

"Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance - where the court has adjourned the hearing of the suit ex parte and the defendant, <u>at or before such hearing</u> appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he appeared on the day fixed for his appearance."

8. The application under Order IX Rule 7 C.P.C. as it is evident from the reading of the aforesaid Rule, can be filed at or before the next date fixed for hearing.

In the instant case admittedly the application under Order IX Rule 7 C.P.C. was filed by the petitioner on 6.8.1994. It was the date after next date fixed under Order IX Rule 6 C.P.C."

28. From the reasons given subsequently, it would be apparent that the aforesaid judgment of the learned Single Judge overlooks the law laid down by the Supreme Court in ***Arjun Singh (supra)*** and is per incuriam.

29. Under Order 9 Rule 6(1)(a), the court is empowered to proceed with the hearing of a suit ex-parte if the plaintiff appears and the defendant does not appear when the suit is called on for hearing and it is proved that summons was duly served on the defendant. By virtue of Order 9 Rule 7, if the defendant appears on the next date fixed in the case and assigns good cause for his previous non-appearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. However, if he is not able to assign good cause for his previous non-appearance, he is not prohibited from appearing in further proceedings of the case but only looses the right to set the clock back as provided in Rule 7. The issue in the present case is whether the right of the defendant under Order 9 Rule 7 CPC expires if he fails to appear on the first adjourned date, i.e., the date fixed by the court on the day the court decides to proceed ex-parte against the defendant or whether the right can also be exercised on subsequent dates, i.e., dates on which the hearing of the case has been subsequently adjourned after the first adjourned date.

30. After the court decides to proceed ex-parte against the defendant and the defendant does not appear on the adjourned date also, the powers of the court are provided under Order 17 Rule 2 CPC. Order 17 Rule 2 CPC is reproduced below : -

*"**2. Procedure if parties fail to appear on day fixed.**--Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit."*

31. Under Order 17 Rule 2 CPC, if any party fails to appear on the adjourned date, the court has the discretion to proceed in any of the modes prescribed under Order 9 CPC or to pass any other order as it thinks fit. In other words, if the defendant fails to appear on the adjourned date, the Court may proceed ex-parte against the defendant as provided in Order 9 Rule 6(1) CPC or may make such order as it thinks fit.

32. There is nothing in the Civil Procedure Code which indicates that the right of the defendant under Order 9 Rule 7 CPC expires on the next date fixed by the court, i.e., the date fixed by the court on the day the court decides to proceed ex-parte against the defendant. To interpret Order 9 Rule 7 in the manner pleaded by counsel for respondent no. 1 would also be very unreasonable and impractical. As an illustration, lets assume that a defendant in a case had good cause for not appearing before the court on the date fixed in the summons and the court decides to proceed ex-parte against such defendants and on the next date fixed in the case, the defendant again fails to appear and the case is adjourned to some other date. If Order 9 Rule 7 is interpreted as argued by

respondent no. 1 and as interpreted by this Court in ***Prahlad Singh (supra)***, then the defendant after the adjourned date would prefer not to appear on all subsequent dates, even if he gets knowledge of the case on any subsequent date and would wait to file an application under Order 9 Rule 13 CPC for recall of the ex-parte decree. If the defendant in his application under Order 9 Rule 13 CPC is able to show good cause for not appearing in the case, the decree would be recalled leading to re-trial of the suit unnecessarily delaying final adjudication of rights. Such an interpretation would lead to absurdity and anomaly and is, therefore, to be avoided.

33. The phrase "at or before such hearing' only signifies that the application under Order 9 Rule 7 CPC can be filed by the defendant if he appears on any date fixed in the case before the hearing in the case is concluded and if he assigns good cause for his absence on the previous dates, he has the right to set the clock back and be heard in answer to the suit as if he had appeared on the day fixed for his appearance in the summons while the suit is at the trial stage but such an application would not be maintainable if the hearing has completed and only judgment is to be pronounced. After the hearing is concluded and judgment has been reserved by the Court, the defendant cannot file an application under Order 9 Rule 7 but has to wait for the judgment being pronounced and then file an application under Order 9 Rue 13 for recall of the ex-parte decree. In this context, it would be relevant to refer to the observations of the Supreme Court in Paragraph 20 of its judgment reported in ***Arjun Singh vs. Mohindra Kumar & Ors. AIR (1964) SC 993*** :-

"20. ... Order IX Rule 1 requires the parties to attend on the day fixed for their appearance to answer the claim of the defendant. Rule 2 deals with a case where the defendant is absent but the Court from its own record is apprised of the fact that the summons has not been duly served on the defendant in order to acquaint him with the proceedings before the Court. Rule 2 contains a proviso applicable to cases where notwithstanding the absence of service of summons, the defendant appears. Rule 3 deals with a case where the plaintiff alongwith the defendant is absent when the suit is called on and empowers the Court to dismiss the suit. Rule 5 deals with a case where the defendant is not served properly and there is default on the part of the plaintiff in having this done. Having thus exhausted the cases where the defendant is not properly served, Rule 6(1)(a) enables the Court to proceed ex-parte where the defendant is absent even after due service. Rule 6 contemplates two cases: (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which is fixed is for the disposal of the suit and the defendant is not present on such a day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case Order IX, Rule 13 would come in. The defendant can, besides filing an appeal or an application for

review have recourse to an application under Order IX, Rule 13 to set aside the ex parte decree. ***The entirety of the evidence of the plaintiff might not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. On the terms of Order IX Rule 7 if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled - "set the clock back" and have the suit heard in his presence.*** *On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order IX Rule 7 and Order IX Rule 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. .... ln the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) Where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order XX Rule 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX Rule 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order IX Rule 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order IX Rule 7. ...."*

(emphasis added)

34. In the present case, the defendant - petitioner had appeared and filed his application on 30.9.2021. The facts narrated earlier would show that 30.9.2021 was fixed for arguments in the case and the arguments were concluded on 21.10.2021 when judgment was reserved by the Prescribed Authority. Apparently, the hearing was not concluded and the case was not reserved for judgment before the defendant - petitioner appeared in the case. In view of the aforesaid, the application filed by the petitioner on 30.9.2021 under Order 9 Rule 7 was maintainable.

35. It was further argued by the counsel for respondent no. 1 that the present application under Order 9 Rule 7 CPC could not have been allowed as the respondent had already disclosed his evidence in the case and allowing the application would prejudice the respondent no. 1. The aforesaid cannot be a reason to reject the application under Order 9 Rule 7 because if the argument is accepted, then no application under Order 9 Rule 13 CPC can ever be allowed because a suit even if decreed ex-parte can be decreed only after the plaintiff has produced his evidence.

36. In light of the aforesaid, it is held that the application of the petitioner under Order 9 Rule 7 CPC was maintainable and

the order dated 7.10.2021 passed by the Prescribed Authority is contrary to law and is liable to be quashed.

37. For the aforesaid reasons, it is held that the proceedings in Election Petition No. 1542 of 2021 were held in violation of the principles of natural justice and contrary to the procedure prescribed in law and the order dated 7.10.2021 passed by the Prescribed Authority is contrary to law and liable to be quashed. As the proceedings in the election petition have been held in violation of the principles of natural justice, the order dated 1.11.2021 passed by the Prescribed Authority directing for re-count of the ballots is also liable to be quashed. It is clarified that I am not expressing any opinion on the merits of the reasons given in the order dated 1.11.2021 passed by the Prescribed Authority as the same is not required in light of the reasons given above.

38. Before parting with the case, it would be relevant to note the unusual manner in which the proceedings were held by the Prescribed Authority. The petitioner has alleged that the records and proceedings of the case were manipulated by the Prescribed Authority at the instance of a local MLA. The documents on record of the case do show that the Prescribed Authority has acted unfairly and very arbitrarily in conducting the proceedings in the case. Different orders passed by the Prescribed Authority have been noted on the applications of respondent no. 1 but have not been made a part of the order-sheet. The manner in which the proceedings have been conducted do raise a suspicion that orders were not passed during the court proceedings. The Prescribed Authority acts as a Tribunal while deciding an election petition and is not expected to delegate his discretion to a litigant, howsoever influential, politically or otherwise, the litigant may be. The most improper act of the Prescribed Authority is his order dated 2.9.2021 passed on the application dated 26.8.2021 filed by respondent no. 1. On 26.8.2021, the Prescribed Authority had adjourned the case and fixed 9.9.2021 for hearing. However, the Prescribed Authority heard the case on 2.9.2021 and passed an order for publication of notice. No reasons have been given by the Prescribed Authority to prepone the hearing or the urgency to hear the application dated 26.8.2021 before the date already fixed in the case. Even if all other irregularities committed by the Prescribed Authority are ignored, the impropriety committed by the Prescribed Authority by passing the order dated 2.9.2021, i.e., on a day not fixed in the case, cannot be ignored. The improprieties committed by the Prescribed Authority disqualifies him to act as a Tribunal and to decide issues relating to the rights of the parties. If the Sub-Divisional Officer who conducted the proceedings in Election Case No. 1542 of 2021 is still posted as Sub-Divisional Officer, Raniganj, District Pratapgarh, the District Magistrate, Pratapgarh shall exercise his powers under Rule 4 - Proviso (v) of the Rules, 1994 and shall transfer the case to some other Sub-Divisional Officer for trial. The order shall be passed by the District Magistrate, Pratapgarh by 30.6.2022 and the parties as well as their Counsel shall be informed accordingly. The District Magistrate shall also ensure that after his order nominating another Sub-Divisional Officer to hear the case, the records of the case are transmitted to such Sub-Divisional Officer by 14th of June, 2022.

39. For the aforesaid reasons, the petitions are allowed. The orders dated 7.10.2021 and 1.11.2021 passed by the Prescribed Authority and all proceedings in Election Case No. 1542 of 2021 from

9.9.2021 onwards are, hereby, quashed. The matter is remanded back for a re-trial of Election Petition No. 1542 of 2021. On 15th July, 2022, the parties shall appear before the Prescribed Authority, to whom the case is transferred by the District Magistrate, who shall grant reasonable opportunity to the petitioner - defendant to file his written statement and proceed to hear the case in accordance with law, as expeditiously as possible, without granting any unnecessary adjournment to either of the parties.

40. With the aforesaid direction, the petitions are ***allowed***.

41. Let this order be communicated to the District Magistrate, Pratapgarh by Joint Registrar (Civil) by 6.6.2022.

(2022)06ILR A301

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 25.05.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ-C No. 3000036 of 1998

Bhola Nath & Ors. ...Petitioners

Versus

Addl. Commissioner Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
U.C. Pandey

Counsel for the Respondents:
C.S.C.

A. Ceiling Law – UP Imposition of Ceiling on Land Holdings Act, 1960 – Sections 10(2), 11(2), 26, 27(1) & 27(3) – Declaration of the petitioner's land as surplus land – No notice issued u/s 10(2) – Application u/s 27(4) for cancellation of lease granted in favour of respondent was filed – Application was found not maintainable as petitioner is not aggrieved person – Legality challenged – Word 'Aggrieved person' – Definition – Heading of S. 27 is 'Settlement of surplus land' – Effect – Held, admittedly the petitioner is not a person who comes under clause 1 or clause 3 of Section 27 of the Act, 1960 for settlement of surplus land, and therefore, the present petitioners would not be covered under the purview of the words 'any aggrieved person' – The order of the appellate authority that the application u/s 27(4) does not attract in the matter of the petitioners does not assail any illegality or infirmity – High Court left open to the petitioners to avail remedy in accordance with law. (Para 20, 23, 24, 25 and 28)

Writ petition dismissed (E-1)

List of Cases cited :-

1. Ram Bahadur @ Laxmi Prasad Vs Collector, Hamirpur & ors. 2004(96) RD 555

2. C.M.W.P. No. 40601 of 1993; Girdhari Lal Vs Additional Commissioner Judicial (Ist) Bareilly Division & ors. decided on 19.08.1993

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Umesh Chandra Pandey, learned counsel for the petitioners, Sri Gopal Krishna Pathak, learned Additional Chief Standing Counsel for the State and perused the records.

2. Instant writ petition has been filed assailing the order dated 6th February, 1998 passed by the Additional Commissioner, Faizabad Division, Faizabad.

3. Matter pertains to year 1998.

4. From perusal of the order sheet, it is evident that no counter affidavit has been

filed by the State yet, since the matter pertains to year 1998, under such circumstances, no further time can be granted to the counsel for the State to file counter affidavit. Prima facie, it seems to be legal question involved in the matter, as such the Court is proceeding to hear this matter.

5. Learned counsel for the petitioners submits that ceiling proceeding was initiated in the year 1989 wherein the land of Raja Pratap Bahadur Singh was declared surplus including the present petitioners also. He submits that while initiating and concluding the aforesaid ceiling proceeding, no notice was issued and no opportunity of hearing was ever given to the petitioners. He further submits that on 26th December, 1990, lease under Section 26 of the Imposition of Ceiling on Land Holdings Act, 1960 (for short the 'Act, 1960') was granted in favour of the respondent no.2 by Sub-Divisional Officer, Barabanki and that lease was settled in favour of the respondent no.2.

6. He added that since ceiling proceeding was going on and during that ceiling proceeding CLH Form 23 was made available to the petitioners on 4th October, 1994 then the fact with regard to aforesaid ceiling proceeding came into knowledge of the petitioners. He further added that after the aforesaid information came to the petitioners, they filed an application under Section 27(4) of the Act, 1960 for cancellation of Patta/lease granted in favour of respondent no.2. He submits that, at the very inception stage, the status quo was granted by respondent no.1 and after calling objections from the respondents, the matter was finally heard and decided by the Additional Commissioner vide order dated 2nd February, 1998, which is under challenge in this writ petition.

7. He also argued that the petitioners are co-tenure holders of Raja Pratap Bahadur Singh, whose land considered and declared surplus land by the prescribed authority.

8. He further submits that, in fact, it is a case where the ceiling proceeding was concluded in absence of petitioners but it was done without issuance of any notice. He submits that absence cannot be termed if no notices ever issued to the petitioners. He further added that in such a case remedy available to the petitioners was under Section 27(4) of the Act, 1960 and as such he has rightly preferred an application under the aforesaid provision.

9. He has argued that the learned Additional Commissioner without considering the aforesaid provision has given its finding that the application under Section 27(4) of the Act, 1960 is not maintainable. He added that finding of the Additional Commissioner is perverse as he has recorded the finding that no evidence was adduced by the present petitioners before the Additional Commissioner. In fact, the petitioners had adduced the evidences which have been discussed in the order dated on 21st February, 1998.

10. On the other hand, learned counsel appearing for the State has vehemently opposed the contention aforesaid and submits that from bare reading of Section 27(4) of the Act, 1960 it is evident that the same is with regard to the settlement of surplus land. The head notes of the Section 27 itself connotes that the proceeding under Section 27 starts after

the proceedings of declaration of ceiling land are concluded and such surplus land vests in the State.

11. He has added his argument and drawn attention towards sub-clause (i) of Clause 4 of Section 27 of the Act, 1960 and submits that since after the proceeding under Section 27(4), records available to the Commissioner to revert such land in favour of the State Government. He has also drawn attention on Sub-Section 3 of Section 27, wherein he has referred that the word which denotes that "any remaining surplus land settlement by the Collector in accordance with the order of preference and subject to the limits" clearly indicate that the same is with regard to the settlement of surplus land. He submits that word 'any aggrieved person' is qualified by sub-clause (1) and (3) of Section 27 of the Act, 1960.

12. He further added his argument that the recourse which is open to the petitioners is to approach the prescribed authority under Section 11(2) of the Act, 1960. In such view of the matter, no interference is warranted in the order passed by the Commissioner.

13. Learned Additional Chief Standing Counsel has put strength to his argument while placing the judgment reported in **2004(96) RD 555 (Ram Bahadur @ Laxmi Prasad vs Collector, Hamirpur and others)**. He has referred paragraph 21, which is quoted as follows;

"21. The petitioner, against the order of Prescribed Authority dated 23rd April, 1988 whereby plot No. 362 was earmarked as surplus land to be allotted to the persons entitled to the same, filed an application dated 20th November, 1990 under section 27(4) of the Act before the Commissioner and obtained an ex parte interim order again on 28th November, 1990. The Commissioner has rejected the application on 30th November, 1995, against which the petitioner has filed the writ petition No. 8473 of 1996 (fifth petition) challenging the allotment of the surplus land made in favour of respondent Nos. 5 to 17 who were admittedly the persons entitled to allotment of the surplus land in accordance with the provisions of U.P. Imposition of Ceiling on Land Holdings Act. This writ petition is not legally maintainable in view of the earlier writ petition filed by the petitioner, referred to above, as also in view of the dismissal of his writ petition No. 29882 of 1995. The allotment of land is only consequential action. Any infirmity or illegality in the procedure of allotment, as alleged by the petitioner, cannot be a concern of the petitioner as he is neither an applicant for allotment of the land nor has any right or interest in the allotment of the surplus land."

14. Placing the aforesaid judgment, he submits that the court has very specifically held that the plot which was earmarked as surplus land to be allotted to the persons who are entitled under the provision of law. He submits that in Sub-clauses (1) and (3) of Section 27, the authority has been nominated to allot such land. He submits that the petitioners are neither applicants of allotment of the land nor have any right or interest in the allotment of the surplus land.

15. He has further placed reliance on a judgment and order dated 19th August, 1993 passed in **C.M.W.P. No. 40601 of 1993 (Girdhari Lal vs Additional**

Commissioner Judicial (Ist) Bareilly Division and others) and has placed reliance on paragraph 6, which is quoted hereinunder;

"6. The expression 'aggrieved' is not statutorily defined or judicially interpreted and in that event the help of Dictionary meaning can be obtained. See State of Orissa v. The Titaghur Paper Mills Co. Ltd. In the Reader's Digest Grant Encyclopaedic Dictionary, the word 'aggrieved' connotes distressed, oppressed, injured, having a grievance. According to the Shorter Oxford English Dictionary, the word 'aggrieved' means hurt in spirit, injuriously affected, having a grievance. According to the New Lexicon Webster's Dictionary of the English Language, the word 'aggrieved' means having a grievance. According to Webster's Third New International Dictionary, the word 'aggrieved' means troubled, distressed in spirit, showing grief, injury, having a grievance."

16. Placing the aforesaid judgment, he submits that the Court has held that the expression 'aggrieved' has not been statutorily defined but 'aggrieved' means having any grievance. He submits that the petitioner is not a person aggrieved so far as the intent of Section 27(4) of the Act, 1960 is concerned.

17. Having heard the learned counsel for the parties and perusal of records.

18. Before coming to purport of Section 27, it is necessary to look into the intent of legislature for envisaging the provision of Section 27 in the Act, 1960. 'Heading' of Section 27 of the Act, 1960 reads as under;

"Settlement of surplus land"

19. The interpretation of 'Headings' as per 13th Edition of the book of Justice G.P. Singh namely 'Principles of Statutory Interpretation', there is one of the view that the 'Headings' might be treated "as preambles to the provisions following them". Further, if the words mention in the section are plain, 'Headings' are meaningless.

20. If we go through the words and meaning of the 'Headings' that is very clear that the same connotes the settlement of surplus land under the Act, 1960. The question is that what could be 'settled'. Answer would be 'surplus land'. In such view, the provision of Section 27 of the Act, 1960 has been envisaged for such land which after a due procedure has been declared as surplus land and thereafter that has to be settled in favour of such persons, by such authorities, which are mentioned in Section 27 of the Act, 1960.

21. Now coming to Sub-clause 1 of Section 27 of the Act, 1960, the Section starts with the word that 'the State Government shall settle out of the surplus land' whereas no land is available for the community purpose and if it so settled with the Gaon Sabha that is used for planting trees, growing fodder or for such other community purpose.

22. In Sub-Section 3 of Section 27 of the Act, 1960, it has been provided that any remaining surplus land shall be settled by the Collector in accordance with order of preference and subject to the limits, specified respectively in Sub-section (1) and (3) of Section 198 of U.P. Zamindar Abolition of Land Reforms Act, 1950 and then Sub-section 4 of Section 27 comes in

picture wherein the Commissioner is empowered to either on his own motion or on the application of the aggrieved person, inquired into such settlement and if he found that the same is irregular, he may issue show cause. The word 'such settlement' envisaged in Section 4, derives its intention from two settlement. One which is been done by the State Government under Sub-Section (1) and in Sub-section (3) by the Collector. Mode has been prescribed under Section 27(4) that the Commissioner on his own motion or any application by any aggrieved person has been mentioned. So far as own motion is concerned, that does not attract in the instant matter but second word which an application of 'any aggrieved person' is been qualified by the word 'such settlement'.

23. It is admitted fact that the petitioner is not a person who comes under clause 1 or clause 3 of Section 27 of the Act, 1960 for settlement of surplus land, and therefore, the present petitioners would not be covered under the purview of the words 'any aggrieved person'.

24. It is case of the petitioners that they were the co-tenure holders of Raja Pratap Bahadur Singh and without issuance of notice under Section 10(2) of the Act, 1960, their land was declared as surplus land, and as such, the petitioners if aggrieved, in any way, are not by any order of settlement passed under Sub-Section (1) and (3) of Section 27 of the Act, 1960 but they may be person aggrieved by the order passed by the prescribed authority whereby the land of the petitioners has been declared as surplus land. The order passed by the prescribed authority can said to be an order passed in absence of the petitioners.

25. The appellate authority while passing the order in appeal which is under challenge in the writ petition has very clearly given its finding that the application under Section 27(4) does not attract in the matter of the petitioners and as such the order passed by the appellate authority does not assail any illegality or infirmity.

26. In view of the aforesaid submissions and discussions, the writ petition is devoid of merit.

27. Accordingly, the writ petition is hereby **dismissed**.

28. However, it is open to the petitioners to adopt the legal recourse which is available to them in accordance with law.

29. No order as to cost.

(2022)06ILR A305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ-C No. 3000118 of 1994

State of U.P. ...Petitioner
Versus
The Addl. Commissioner Judicial & Anr. ...Respondents

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondents:
V K Pandey

A. Ceiling Law – Imposition of Ceiling on Land Holdings Act, 1960 – Section 4-A – Declaration as the surplus and – Irrigation

land – Khasra reveals that the land is capable of growing two crops in a year – Report of Advocate commissioner found a tube-well over the land – Effect – Appeal was allowed by Additional Commissioner and the order of Prescribed authority to declare the surplus land was set aside – No reason assigned – Legality challenged – Held, the appellate authority has decided the matter in a very cursory manner and the issue which were raised by the petitioner before the appellate authority were either ignored or has not been considered in right perspective – Held further, the finding recorded by the appellate authority is wholly perverse and is against the settled proposition of law. (Para 10, 32, 33 and 39)

Writ petition allowed (E-1)

List of Cases cited :-

1. Civil Appeal No. 3241 1979; Kallu and ors Vs St. of U.P. & ors. decided on 24.10.1989

2. Writ Petition No. 11170 of 1975; Shyamvir Singh Vs The State of U.P. & ors. decided on 01.03.1978

3. Jaswant Singh Vs St. of U.P. & ors. 1978 AWC 577

4. St. of U.P. through Collector Vs Mukh Ram Singh & anr.; 1991 RD 312

5. Dhirendra Mohan Chaudhary & ors. Vs IInd Additional District Judge, Bareilly & ors. 1979 AWC 9

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Gopal Krishna Pathak, learned Additional Chief Standing Counsel for the State and Sri V.K.Pandey, learned counsel for the respondents and perused the record. .

2. By means of the instant writ petition the petitioner has prayed for issuance of a writ, order or direction in the nature of certiorari quashing the impugned judgment and order dated 12.07.1993 passed by the opposite party no. 1 i.e., The Additional Commissioner (Judicial) Lucknow Division, Lucknow.

3. The factual matrix of the case is that a notice under Section 10(2) was issued to opposite party no. 2 namely Sri Basudeo Pal, the original tenure holder mentioning therein 40.5 acres of land as irrigated land and an area of 22.462 acres was proposed to be surplus land. After the aforesaid notice the objection was filed mentioning therein that the entire land of village Suabojh has wrongly been shown as irrigated land. He also mentioned the fact in the objection that there are 2 acres of land as USAR land and on some of the portion, there is building etc. On the aforesaid objections, the prescribed authority appointed an Advocate Commission and the Advocate Commissioner prepared a report and submitted the same mentioning therein the status of the land. In the report, Advocate Commissioner mentioned a tube-well installed over the agricultural land.

4. After considering the aforesaid report the prescribed authority decided the objection of opposite party no. 2 on 10.03.1975, on the premises that the land is irrigated and 4.126 acres of land was declared as surplus land.

5. After the aforesaid order dated 10.03.1975, the opposite party no. 2 preferred an appeal on the ground that the order dated 10.03.1975 is in violation of mandate of Section 4-A of the Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as Act, 1960). The appeal filed by the opposite party no. 2 was dismissed by the 4th Additional & District Sessions Judge, Kheri vide order dated

17.10.1975, wherein holding that Khasra pertaining 1378, 1379 and 1380 fasli are indicating that the land is capable of growing two crops and there is private irrigation work.

6. He submits that being aggrieved from the judgment and order dated 17.10.1975, the opposite party no. 2 preferred Writ Petition No. 2973 of 1975 before Hon'ble High Court. The High Court vide order dated 02.04.1979 remanded back the matter before the learned District Judge to decide the appeal afresh with an observation that the appellate authority has to record a finding that whether the land is within the effective command area of lift irrigation canal or State tube-well or private tube-well irrigation work and further whether the composition of soil is such, which is capable of growing two crops in each year.

7. After the matter was remanded back to the appellate authority, the appellate authority remanded back the matter to the prescribed authority for deciding the question of irrigated or unirrigated land.

8. On the aforesaid remand, the prescribed authority heard the matter wherein the extract of the Khasra 1378, 1379 and 1380 Fasli of village Dalpur and Salawat Nagar was filed by the State and the statement of witnesses namely Sri Ram Avtar and Sri Ram Giri Lekhpal was recorded and they were examined. He added that infact the consolidation proceedings were going on in the village, as such the Khasra 1378 fasli of village Suabojh was available only and that too was filed before the prescribed authority. He submits that after the abovesaid, the judgment and order was passed on 25.10.1985 by the prescribed authority wherein the case was dismissed and the objection of the opposite party no. 2 was rejected, while recording the fact that there is a tube-well and entire land is irrigated land. While dismissing the aforesaid case he also mentioned that land is of such quality where sugarcane crop and wheat are being grown and as such he declared 4.162 acres as surplus land. The judgment and order dated 25.10.1985 was assailed while filing the appeal under Section 13 of the Act, 1960 i.e., before the District Judge, Lakhimpur Kheri and later on it was transferred to Additional Commissioner (Judicial), Lucknow Division, Lucknow. The appeal was dismissed on 30.08.1986, in non prosecution as opposite party no. 2 did not turn up to do pairvi of the case. Later on, an application for recall was moved on 09.01.1992 with the explanation that the opposite party no. 2 was not having any information about the case being transferred before the Additional Commissioner (Judicial), Lucknow Division Lucknow. He added that opposite party no. 2 filed the aforesaid recall application after a period of 51/2 years and no proper explanation was given that why he was not diligent in getting the information from the court of District Judge and as such after the aforesaid application moved by the opposite party no. 2, the petitioner was not afforded any opportunity of hearing to defend the aforesaid application and the Additional Commissioner (Judicial), Lucknow Division Lucknow, recalled the order dated 30.08.1986 by a non-speaking and un-reasoned order.

9. He submits that infact after the recall of the abovesaid order, the Additional Commissioner/appellate authority has passed the order on 12.07.1993, without

affording proper opportunity of hearing and further the application for recall was admitted without mentioning any reason.

10. He also added that vide order dated 12.07.1993, the appeal filed by the opposite party no. 2 was admitted and the order passed by the prescribed authority by virtue of which the land having area 4.162 acres was declared as surplus land, has been set aside. He submits that the findings of the appellate court are perverse as there is an ample evidence of the irrigation work over the land in question.

11. He further argued that learned prescribed authority while considering the issue has gone into the khasra 1378 fasli of village Suabojh wherein it was found that there is a private tube-well over the land in question. He further submits that the report of the Advocate Commissioner dated 21.02.1975, reveals that there is an electric tube-well over the land situated at village Suabojh by which the irrigation work is being done.

12. He further submits that area lekhpal in his statement has also averted that the land is being irrigated through private tube-well and while considering the abovesaid statement, the prescribed authority has also gone into the C.L.H. Form No. 3 wherein the land in question is recorded as irrigated land.

13. Learned prescribed authority has very minutely gone into the Khasra fasli year 1378 wherein it is evident that the sugar cane crop including wheat and paddy are also been recorded which clearly shows that land was capable to grow two crops. He also added that mandate of Section 4-A of the Act which has been envisaged under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 for determination of irrigated land has been followed in letter and spirit while deciding the issue by the prescribed authority. Section 4-A of the Act, 1960 is being quote hereasunder:-

[4A. Determination of irrigated land. - The prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1979 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion :-

firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years; by -
(i) any canal included in Schedule NO. 1 of irrigation rates notified in Notification No. 1579-W/XXIII-62-W-1946, dated March 31, 1953, as amended from time to time; or

(ii) any lift irrigation canal; or

(iii) any State tube-well or a private irrigation work; and

(b) that at least two crops were grown in such land in any one of the aforesaid years; or

secondly, that irrigation facility became available to any land by a State Irrigation Work coming into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10; or

thirdly, (a) that any land is situated within the effective command area of a lift irrigation canal or a State tube-well or a private irrigation work; and

(b) that the class and composition of its soil is such that it is capable of growing at least two crops in an agricultural year;

then the Prescribed Authority shall determine such land to be irrigated land for the purposes of this Act.

Explanation I. - For the purposes of this section the expression' effective command area' means an area, the farthest field whereof in any direction was irrigated -

(a) in any of the years 1378 Fasli, 1379 Fasli and 1380 Fasli; or

(b) in any agricultural year referred to in the clause 'secondly'.

Explanation II. - The ownership and location of a private irrigation work shall not be relevant for the purpose of this section.

Explanation III. - Where sugarcane crop was grown on any land in any of the years 1378 Fasli, 1379 Fasli and 1380 Fasli, it shall be deemed that two crops were grown on it any of these years, and that the land is capable of growing two crops in an agricultural year.]

14. Referring to the aforesaid Section 4-A of the Act, 1960, learned counsel for the petitioner has also contended that the prescribed authority had gone into the fasli year 1378 and found that provision firstly, secondly and thirdly is very well applied in case of the land of the respondent no. 2.

15. Adding his argument learned counsel for the petitioner submits that infact the prescribed authority has discussed and has gone into all the parameters as is prescribed under Section 4-A of the Act, 1960 and thereafter, he comes to the conclusion that the land in question comes under the purview of irrigated land. He also indicated that the respondent no. 2 did not adduce any such evidence which could substantiate his contention that the land in question does not fall under the category of irrigated land. Contrary to it, the statement of lekhpal , Nakal khasra year 1378 fasli private tube-well as per the report of the Advocate Commissioner (as was ascertain on spot inspection) and the land being capable of growing two crops including the sugar cane crop clearly reveals that aforesaid land in question is irrigated land and as such the prescribed authority had rightly passed the order.

16. He submits that the appellate authority ignoring the aforesaid evidences set aside the order passed by the prescribed authority. He submits that it is a well settled law that even if any part of land is proved to be capable of growing two crops then whole of the land shall be deemed to be irrigated. He further added that the statement of the lekhpal, the report of the Advocate Commissioner after the spot inspection, private tube-well over the land, the statement of the witnesses and capability of growing two crops as per the khasra fasli year 1378 has been ignored by the appellate authority while passing order impugned. The order impugned is against the settled proposition of law and further it is also contrary to the mandate of Section 4-A of the Act, 1960. The appellate authority has superfluously consider the facts and has ignored the actual facts, statement of witnesses and the provisions of law.

17. Apart from the aforesaid he has also argued that the appellate authority has also erred to allow the application for recall of the order after period of 51/2 years without recording any reason or finding.

18. In support of his contention he has placed reliance on a judgment and order dated 24.10.1989 passed in **Civil Appeal No. 3241 1979 and 4390 of 1984 (Kallu**

and ors vs. State of U.P. ors). He has referred para 9 and 10 of the judgement which reads as under:-

"9. Coming now to the specific provisions of Section 4-A dealt with by the High Court, it may be seen that in order to form an opinion whether irrigation facility was available for any land from one of the sources mentioned in subclauses (i), (ii) and (iii) in respect of any crop in anyone of the aforesaid years viz., Faslis 1378 to 15380, the Prescribed Authority is enjoined to examine the Khasras for those three Fasli years, the village map, other relevant records considered necessary and also to make a local inspection whenever it is necessary. Hence there is no scope for contending that a Prescribed Authority may form his opinion without reference to relevant material, in an arbitrary or capricious manner, to the detriment of a tenure holder as regards the availability of assured irrigation facility to a land from one of the enumerated sources. Consequently, there is no merit in the first contention of the appellant that in addition to the materials and records set out in the sub-clause, there must be independent evidence of assured irrigation facility before ever a Prescribed Authority can form an opinion about a land having assured irrigation facility.

10. As regards the second contention relating to sub-clause (b), the clause refers only to the growing of atleast two crops in a land found to be having assured irrigation facility in any one of the relevant years. The sub-clause does not contemplate the raising of two crops on the entire extent of the land. The classification has to be made with reference to the potentiality of the land to yield two crops in one Fasli year and not on the basis of the actual raising of two crops on the entire extent of the land. Therefore, sub-clause (b) cannot be read so as to mean that two crops should have been grown on the entire extent of a land having irrigation facility for classifying the land as 'irrigated land' as it would have the effect of limiting the operation of the sub-clause contrary to the legislative intent. The High Court has taken the view that when the Legislature made amendments to the Act, it must have had in mind the advancement that has been made in agricultural science and farm technology and by reason of it a tenure holder can overcome hurdles and raise two crops in a year over the entire extent of a land having irrigation facility. We need not go as far as that. The normal presumption, in the absence of contra-material, would be that the quality content of soil of a land would be uniform throughout its extent. Such being the case, if a tenure holder is able to raise two crops in a year in a portion of the land, then it would be logical to hold that the other portions of the land also would have the capacity to yield two crops if the tenure holder had utilised the entire extent to raise two crops instead of utilising a portion of the land alone. The raising of two crops even on a portion of the land will prove, in the absence of material to show poor quality of soil in portions of the land due to salinity etc., the uniform nature and content of the soil of the entire land. The High Court was therefore right in holding that the Prescribed Authority can treat a land, having assured irrigation facility, as 'irrigated land' if the tenure holder had raised two crops even in a portion of the land during anyone of the prescribed years and that it is not necessary that the raising of the two crops should have been made on the entire extent of the land in order to classify the land as 'irrigated land'."

19. Referring the aforesaid, he submits that if a tenure holder is able to grow two crops in a year in a portion of the

land, then it would be logical to hold that other portions would also have capacity to yield two crops. He added that raising two crops even on a portion of the land, will prove the uniform nature and content of the soil of the entire land.

20. Learned counsel for the petitioner has further placed reliance on a judgment dated on 01.03.1978 passed in **Writ Petition No. 11170 of 1975 (Shyamvir Singh vs. The State of U.P. and others)**. He has referred para 10 of the judgement which reads as under:-

In the aforesaid background if a tenure-holder wishes to challenge the correctness of the statement prepared in CLH From 3 in respect of his irrigated land he will have to plead in his objection all such facts which, if proved would establish that the statement in Form 3 about his irrigated land was not prepared in the manner prescribed by Section 4-A of the Act and that his land was not irrigated within the meaning of the said section. He will also, have to produce evidence to prove those facts. In adversary proceedings a presumptian cannot be rebutted only by raising a plea in the objection. The facts pleaded have to be proved. In Agricultural & Industrial Syndicate Ltd. v. State of U.P, (1974) 2 SCC 27 (para. 8) it was held that after an objection has been filed by the tenure-holder disputing the correctness of the statement prepared under Section 10 of the Act there ensues a dispute and in such a case there is an adversary proceeding before the Prescribed Authority between him and the government; Since the Prescribed Authority in the process of deciding the objection is empowered to take evidence it would be "court" within the meaning of Sec. 3 of the Evidence Act. As such when it is deciding an objection under Sec. 12 of the Act the provisions of the Evidence Act in regard to the manner and burden of proof will apply to the proceedings. Section 101 of the Evidence Act inter alia provides that when a person is bound to prove the existence of a fact, the burden of proof lies on that person. In view of the decision of the Supreme Court in P.J Ratnam's case (supra) to the effect that it is for the party who challenges the regularity in respect of official acts to plead and prove his case and in view of Section 101 of the Evidence Act the burden to prove that the statement in C.L.H Form 3 about his irrigated land was not prepared in the manner prescribed by Section 4-A of the Act would lie on the tenure-holder and to discharge that burden it would be for him to produce such evidence as he considers material including the relevant extracts of Khasras mentioned in Section 4-A. It is really with reference to these documents and not with reference to his pleading in the objection that the tenure holder would be in a position to show that the statement in Form 3 about his irrigated land has not been prepared in the manner prescribed by Section 4-A of the Act. In the eye of law there is hardly any difference between a case where no objection at all is filed and a case where in the objection necessary facts have not been pleaded nor evidence has been led to prove such facts. Section 4-A does not cast any obligation on the Prescribed Authority to record reasons where no objection is filed at all. The said section cannot in my opinion be reasonably interpreted to mean that it casts an obligation on the Prescribed Authority to record reasons why a particular plot has been treated as irrigated in C.L.H Form 3 even if no facts have been pleaded by the tenure-holder in his objection which if proved will establish that the said plot has been shown as irrigated in Form 3

otherwise than in conformity with Section 4-A and no evidence has, been led by him to prove those facts. If these facts have been pleaded and proved the Prescribed Authority will certainly have to decide the objection raised. In this behalf and record reasons for its findings in conformity with Section 4-A. In the absence of requisite pleading and proof the Prescribed Authority, while declaring surplus land under Section 12 of the Act, can be required to record reasons stating as to under which part or category of Section 4-A a particular plot has been treated as irrigated in CLH Form 3, only if Section 4-A is placed at par to the performance of a ritual. In this view of the matter I find it difficult to accept the submission made by counsel for the petitioner that the Additional Civil Judge committed an error in treating the petitioner's land of village Rajpur as irrigated.

21. Referring the aforesaid judgment he submits that the Court has held that it is the duty of the tenure holder to adduce copies of the khasra for relevant years, it is not incumbent upon the State Government to produce the same.

22. He submits that in such view of the matter the order passed by appellate authority vitiates in law and is liable to be set aside.

23. On the other hand, learned counsel for opposite party no. 2 has opposed the contention aforesaid and submits that the finding recorded by the appellate court is correct as he has considered the matter on the basis of the evidence and the records available before him.

24. He further submits that very small part of land is said to be irrigated and that does not mean that all the holdings of the tenure holder comes under the purview of irrigated land, as per provision of Section 4-A of Act, 1960. He further added that as per finding of the appellate court, only 2.30 acres land was found to be irrigated though the total land which was found irrigated by the prescribed authority was 22.123 acres. He submits that specific finding has also been recorded by the appellate authority that due to tube-well it could not be assume that all the land of the tenure holder comes under the area of irrigated land. There is also a finding that as per the Fasli 1379 the sugar cane crop and paddy as well as wheat was shown to be there but in Fasli 1380 there is only sugar cane crop.

25. Learned counsel for respondent no. 2 has placed reliance on a judgment dated 03.05.1979 passed in Civil Misc. Writ No. 8178 of 1975, Jaswant Singh Vs. State of U.P. and others. Referring the aforesaid judgment he submits that Division Bench of this Court has held that in order to find out irrigated land Section 4-A of the Act, 1960 makes it obligatory on the prescribed authority to examine khasras of the fasli years 1378, 1379 and 1380 and latest village map including the local inspection.

26. He submits that in the instant matter the prescribed authority has failed to comply with the verdict of the judgment and order dated 03.05.1978.

27. Learned counsel for the respondent has also placed reliance on a judgment reported in **1978 AWC 577 Jaswant Singh vs. State of U.P. and others.** Placing the aforesaid judgement, he submits that it is the khasra of concern fasli year by which the ceiling authority comes to conclusion that whether any irrigation

facility was available and whether two crops are being grown over the land. He has referred para 14 of the judgement which reads as under:-

It would thus appear that on all the points specified in the various sub-sections of Section 4-A the Prescribed Authority can form an opinion on the basis of records and local inspection. The legislature, therefore, thought it fit that the enquiry under Section 4-A should remain confined to examination of records and local inspection and not to production and examination of oral evidence.

28. He has also placed reliance on a judgment reported in **1991 RD 312 State of U.P. through Collector vs. Mukh Ram Singh and another** and has referred para 3 of the judgment which reads as under:-

In the present case, it has been observed by the Prescribed Authority in his judgment that he did not examine the khasras for 1378 to 1380 Fasli because they were not produced by the party concerned. He has mentioned that there are private tube wells near the disputed plot and only on this basis he had recorded the finding that the said plot is an irrigated land. It was open to the Prescribed Authority to ask for the Khasras from his own records and examine the same, and not only the khasras but also the village map and other necessary records. He has not specifically recorded the finding that the class and composition of soil is such that it is capable of growing at least two crops in an agricultural year. Therefore simply because there are two tube wells near the disputed plot, it cannot be held in view of Section 4-A, and clause thirdly of that Section, that it is an irrigated plot. Moreover the finding recorded by the learned Additional District Judge is a finding of fact based on appreciation of evidence including entires in Khasra 1380 Fasli and there is no justification to interfere with the said finding, in the writ petition. It may be incidently mentioned that the learned counsel for the opposite parties has also referred to the case reported in 1979 AWC 9 Dhirendra Mohan Chaudhary v. IInd Additional District Judge, Bareilly, in which it has been held that in order that a land may be termed as irrigated one, it is necessary that the land must be irrigated from the canal or any lift irrigation canal or any State Tube well or a private irrigation work and that even if the land is irrigated by boring Tubewell, it cannot be said that the irrigation work was done from a private irrigation work and it cannot be termed as irrigated land.

29. Referring the aforesaid judgement he submits that it has been held that the khasra fasli year 1378 to 1380 is to be examined by the prescribed authority. He submits that even if a land is been irrigated by the boring tube-well the same cannot said to be a private irrigation work. Concluding his argument he has also placed reliance on a judgement reported in **1979 AWC 9 Dhirendra Mohan Chaudhary and others vs. IInd Additional District Judge, Bareilly and others.** He has referred para 4 to 6 of the judgement which reads as under:-

4. Learned counsel for the petitioners has also contended before me that on the finding recorded by the appellate authority itself the tube-wells were not of such nature as could be termed as a source of irrigation of perennial nature yet the land of the petitioners has been termed as irrigated one on the ground that the same area of the petitioners had been actually irrigated. But

the authority did not consider this aspect of the matter that in order that the land of the petitioners may be termed as irrigated one, it is necessary that the land must be irrigated from the canal or any lift irrigation canal or any State tube well or a private irrigation work. In the circumstances of the present case it appears that the appellate authority thinks that the land was irrigated by boring tube-well, hence the land of the petitioners was termed at irrigated one.

5. Private irrigation work has been defined in Section 3 sub-clause (14) of U.P. Imposition of Ceiling on Land Holdings Act, which runs thus:-

""Private irrigation work" means a private tube-well, or a private lift irrigation work operated by deisel or electric power for the supply of water from a perennial water source, completed before August 15, 1972."

6. On the finding recorded by the appellate authority it is clear that the boring tube well was not capable of producing perennial water source. Even if the land of the petitioners was irrigated, it cannot be said that the irrigation work was done from a private irrigation work. In this view of the matter the determination of the appellate authority that the land of the petitioners is irrigated one appears to be patently erroneous.

30. Referring the aforesaid, he submits that in fact the boring tube-well cannot be termed as means of private irrigation facility and as such even if there is any report that tube-well was there that was in the form of boring tube-well and as such that cannot be treated as private irrigation work.

31. Adding his contention he submits that the appellate authority has rightly come to the conclusion that only 2.30 acres of land is irrigated and as such the order passed by the prescribed authority wherein 4.162 acres land was declared as surplus land are against the evidence as well as the provisions of law and as such the order passed by the prescribed authority was liable to be set aside and the order passed by the appellate authority is liable to be uphold by this Court.

32. Having heard learned counsel for the parties and after perusal of record, I find that the appellate authority has ignored the material facts while discussing the issue raised by the petitioner. The appellate authority while passing the impugned order did not consider the fact that the mandate of Section 4-A of the Act, 1960 has been taken care of by the prescribed authority while passing the order dated 22.10.1985. The prescribed authority had gone into khasra fasli year 1378 of village Suabojh, wherein he found that there was a private tube-well over the land. The entry recorded in fasli year 1378 is also supported by the report of the Advocate Commissioner dated 21.02.1975, wherein he has also mentioned the fact that there is a private tube-well by which the land in question are been irrigated. Apart from the aforesaid, the khasra also reveals that the land in question is capable to grow two crops including the sugar cane crop. Further the statement of lekhpal of area concerned has also been recorded in this regard who also supportted the version of the report of Advocate Commissioner as well as entries made in fasli year 1378. From perusal of the order 25.10.1985, it seems that there is no such objection or evidence adduced contrary to the fact and evidences mentioned/adduced by the State over there.

33. Further it has also been noticed by this Court that the appellate authority has decided the matter in a very cursory manner and the issue which were raised by

the petitioner before the appellate authority were either ignored or has not been considered in right perspective.

34. From perusal of the order of the appellate court, it reveals that though he has mentioned the fact that sugar cane crop was over there but no finding has been recorded to the effect of the same. Further he has also disbelieved the statement of the area lekhpal as well as the entries of the tube-well which is evident from the khasra entry of fasli year 1378. The report of Advocate Commissioner which was submitted by local inspection, has been over looked by the appellate authority.

35. In explanation (III) of Section 4-A, where sugar cane crop has been recorded on khasra to grow on any land in any of the fasli years 1378, 1379, 1380, it shall be deemed that two crops were grown on it, in any of these years, and that land is capable of growing two crops in an agricultural year. In the instant matter the prescribed authority has recorded finding that in fasli year 1378, there is entry of sugar cane crop over the land in question and this finding has not been controverted by the appellate authority.

36. So far as the private tube-well is concerned, the petitioner did not raise any objection with regard to the boring tube-well before the prescribed authority.

37. Further it is incumbent upon the tenure holder to place the khasra of 1378, 1379 and 1380 fasli before the prescribed authority, though in the instant matter the State has submitted the nakal of khasra 1378, 1379 and 1380 fasli before the prescribed authority. The entries in one fasli year is sufficient to substantiate regarding irrigation work and crops on the land in question. The oral statement of lekhpal of area can be treated as a good evidence if it is supported by documentary evidence.

38. The respondent has also failed to submit any proof either before the prescribed authority or the appellate authority to show the reason to disbelieve the statement of area lekhpal. Further finding recorded by the appellate authority regarding 2.30 acres of land as irrigated land, is based on conjecture and surmises.

39. In such view of the matter the finding recorded by the appellate authority is wholly perverse and is against the settled proposition of law and as such the order passed by the appellate authority dated 12.07.1993 is hereby set aside.

40. The matter is remanded back to the appellate authority to decide the matte afresh after taking into consideration the entries of khasra of fasli 1378, the statement of area lekhpal and the report of the Advocate Commissioner in a right perspective. The appellate authority shall also give its finding on the issue with regard to the capability of the land growing two crops over the land in question.

41. The State shall file the copy of this order within a period of 10 days before the appellate authority and then the appellate authority after calling objection from the concerned parties shall decide the matter within further period of four months from the date of production of certified copy of this order produced before him.

42. The writ petition is allowed accordingly.

43. No order as to cost.

(2022)06ILR A316
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.05.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ-C No. 3000166 of 2003

Ram Pal Misra ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Q.M. Haque

Counsel for the Respondents:
C.S.C., Anoop Srivastava

A. Ceiling Law – Indian Limitation Act, 1963 – Section 5 – Declaration of the petitioner's land as surplus land u/s 10(2) of UP Imposition of Ceiling on Land Holdings Act, 1960 – State filed the appeal after 26 years – Appeal admitted on first date of hearing and notice issued – No notice was issued on delay condonation application – Effect – Held, an inordinate delay could not be condoned without notice to the respondents and without recording any reasons for condonation of delay. So far as the issue of reaching to the substantial justice is concerned, the same is undoubtedly a goal/intent of legislature but, condoning the inordinate delay, without issuance of notice or calling objection from other side, shall frustrate the very object of the aforesaid doctrine. (Para 18)

B. Indian Limitation Act, 1963 – Section 5 – Delay condonation – Sufficient cause – Held, the sufficient cause is to be considered in a proper object, philosophy and spirit. While dealing with such situation, the court has always found out paramount consideration of substantial justice. Liberal approach, while dealing with such applications, are required but it is also the duty of the court to see that the same may not be unbriddled and unguided. (Para 17)

Writ petition allowed (E-1)

List of Cases cited :-

1. Ragho Singh Vs Mohan Singh & ors. (2001) 9 SCC 717

2. Noharlal Verma Vs District Cooperative Central Bank Ltd. Jagdalpur; 2008 14 SCC 445

3. V. M. Salgaocar & bros. Vs Board of Trustees of Port of Mormugao & anr.; (2005) 4 SCC 613

4. St. of Mah. Vs Sharadchandra Vinayak Dongre & ors. (1995) 1 SCC 42

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Q. M. Haque, learned counsel for the petitioner, Sri J.P. Maurya, learned Additional Chief Standing Counsel and perused the record.

2. Instant writ petition has been filed assailing the order dated 21.2.2003 passed by the appellate authority as well as the order dated 17.2.1975 passed by the Prescribed Authority.

3. Learned counsel for the petitioner submits that in fact a proceeding under Section 10(2) of U.P. Imposition of Ceiling on Land Holdings Act, 1960 was commenced and the case was instituted as Ceiling Case No. 83 wherein misinterpreting the records, the Prescribed Authority (Ceiling), vide order dated 17.2.1975 determined 54.4 acres of land as surplus land from the holdings of the petitioner. He admits that against the aforesaid order, the petitioner filed Appeal No. 244 of 1975 before the District Judge, Gonda wherein operation of the order impugned was stayed during the pendency of the appeal.

4. He further submitted that, due to the change of jurisdiction as per the amendment in the Ceiling Act, the matter was transferred from the court of District Judge to the Divisional Commissioner, Faizabad. The aforesaid appeal was dismissed in default on 28.12.1988. He further added that a fresh proceeding, after the amendment of Ceiling Act, was initiated and fresh notices were issued showing 49.08 acres of land as surplus land from the holdings of the petitioner. The petitioner filed objection to the aforesaid notice. After hearing the parties, the Prescribed Authority declared 5.12 acres of land as surplus from the holdings of the petitioner. He submits that the order dated 29.7.1976 had become final as the State did not file any appeal against the same.

5. He argued that later on, the State filed an appeal on 20.9.2002 after delay of 26 years and assailed the order dated 29.7.1976. Learned counsel for the petitioner has drawn attention towards Annexure No. 7, which is the order of appellate authority dated 21.2.2003 by which the appellate authority admitted the appeal; condoned the delay; and issued notices to the petitioner. He submits that it is evident from the order itself that no notice was issued on the application for condonation of delay and, on the first date of hearing, i.e., at the admission stage, delay was condoned by the appellate authority without affording opportunity of hearing to the petitioner.

6. He also submits that in fact delay of 26 years has been condoned without calling any objection and without affording opportunity of hearing to the petitioner, which is impermissible under settled proposition of law. In support of his contention, learned counsel for the petitioner has placed reliance on the order of the Apex Court rendered in the case of **Ragho Singh Vs. Mohan Singh and others, (2001) 9 SCC 717** wherein the Apex Court has held that appeal filed before the Additional Collector was beyond ten days and the application under Section 5 of the Limitation Act was not filed and, in that view of the matter, the Apex Court has held that such appeal is liable to be dismissed. Para 6 of that Judgment reads as under:-

"6. We have heard learned counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under Section 5 of the Limitation Act was not filed for condonation of delay, there was no jurisdiction in the Additional Collector to allow that appeal. The appeal was liable to be dismissed on the ground of limitation. The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay shall be deemed to have been condoned. This is patently erroneous. In this situation, the High Court was right in setting aside the judgment of the Additional Collector as also of the Board of Revenue. We find no infirmity in the impugned judgment. The appeal is dismissed. No costs."

7. Learned counsel for the petitioner further placed reliance on judgment of the Apex Court rendered in the case of Noharlal Verma Vs. District Cooperative Central Bank Ltd. Jagdalpur, 2008 14 SCC 445 wherein it has been held in paras 32 and 33 that issue of limitation goes to the root of the matter and if any appeal or application is delayed or barred by

limitation, the Court has no jurisdiction, power or authority to entertain such suit, appeal or application for deciding the same on merits and, in such cases, the suit, appeal or application is liable to be dismissed. Paras 32 and 33 of that Judgment read as under:-

"32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub Section (1) of Section 3 of the Limitation Act, 1963 reads as under:

"3. Bar of Limitation.-(1) Subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not be set up as a defence."

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in the absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

8. Learned counsel for the petitioner further placed reliance on the Judgment of Apex Court rendered in the case of **V.M. Salgaocar and bros. Vs. Board of Trustees of Port of Mormugao and another, 2005, 4 SCC 613** wherein in para 20, following has been held:-

"The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex-facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."

9. Learned counsel for the petitioner further placed reliance on para 5 of the Judgment of the Apex Court rendered in the case of **State of Maharashtra Vs. Sharadchandra Vinayak Dongre and others, (1995) 1 SCC 42**. Para 5 of the said Judgment reads as under:-

"5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court however, did not adopt that course and proceeded further to hold that the trial court could not have taken cognizance of the offence in view of the application filed by the prosecution seeking permission of the Court to file a "supplementary charge-sheet" on the basis of an "incomplete charge-sheet" and quashed the order of the CJM dated 21.11.1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous."

Placing reliance on the aforesaid Judgment, he submits that the Apex Court has emphasized that on delay condonation application, notice to the respondent is must and condonation of delay without issuing of notice and recording reasons is impermissible.

10. Referring the aforesaid Judgments, learned counsel for the petitioner submitted that it is well settled proposition of law that if the revision or appeal is being filed beyond the period of limitation as prescribed under law then that must have to be accompanied with the application under Section 5 of the Limitation Act. He submits that in the instant matter, the delay was of about more than 26 years but the appellate authority, without providing opportunity of hearing, had admitted the appeal on the first date of hearing and no opportunity was provided for submitting objection to the aforesaid application. Placing the abovesaid Judgments, he has also added that from the order of the appellate authority, it is evident that same has been passed against the purport and ratio of the Judgments of the Apex Court. He further added that the appellate authority has overlooked the issue of limitation and did not take care of mandate of Section 3 of the Limitation Act. From the admission of the appeal, it is evident that the delay condonation application was admitted without calling any objection from the petitioner/respondents.

11. Learned counsel for the petitioner has also argued that 5.12 acres of land was declared surplus by the Prescribed Authority. He submits that appellate authority without recording any finding has passed the impugned order which does not speak a single word about the same. The orders passed by the appellate authority and Prescribed Authority assail illegality and perversity and, as such, the same are liable to be set aside.

12. He also added to his contention that the appellate authority has also recorded a finding that the order of the Prescribed Authority by virtue of which 5.12 acres of land was declared surplus without jurisdiction. The appellate authority could not substantiate the finding that how the Prescribed Authority has exercised his jurisdiction which was not entrusted upon him.

13. On the other hand, learned counsel for the State vehemently opposed the aforesaid contention and submitted that in fact order dated 21.2.2003 itself is indicative of the fact that the appellant counsel was directed to provide a copy of the memo of appeal and the application for condonation of delay to the counsel for the respondents. He submits that in fact adopting the aforesaid method, opportunity of hearing was provided to the petitioner. He further added that so far as the second contention of the learned counsel for the petitioner is concerned that has been misread as the same is only the pleading on behalf of the Divisional Government Advocate and the same is not a finding of the appellate authority and, as such, there is no illegality or infirmity in the order passed by the court below.

14. He also added that the Judgments, which were placed by the learned counsel for the petitioner, are of the case where the appeal, suit or application is not supported by application for condonation of delay. In the instant matter, the application for condonation of delay was submitted and the appellate authority directed to provide a

copy to the respondents counsel and, as such, the respondents counsel had an opportunity to oppose the application for condonation of delay.

15. Having heard learned counsel for the parties and after perusal of record, I find that the order dated 21.2.2003 reveals that on the first date of hearing, the appeal was admitted and, thereafter, notices were issued though it is settled proposition of law that on delay condonation application, notice is to be issued to the respondent/ party concerned and after deciding the same, the matter shall be heard on merits. Further so far as the issue with regard to the jurisdiction, which was raised by the Divisional Government Advocate, is concerned, there may not be any finding by the appellate authority but since the fact was there and it seems that same was in the mind of the appellate authority while deciding the appeal and, as such, it cannot be said that while passing the order aforesaid, the same has been taken into consideration.

16. Prior to going into exhaustive discussion over the issue, it is appropriate to mention Section 5 of the Indian Limitaion Act, 1963 (hereinafter referred to as 'the Act 1963'), which is being quoted hereunder:-

"5. Extension of prescribed period in certain cases -

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908) may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

17. Barely going through the aforesaid Section, the word which has been emphasized by the Legislature is 'sufficient cause and the satisfaction of the court'. So far as the 'sufficient cause' is concerned, it depends on factual matrix of the case in a given situation. The bona fide nature of the explanation and the diligent act of such applicant are the base of test of sufficient cause. If it is found that explanation is concocted or the applicant is thoroughly negligent in prosecuting his cause then certainly that goes against such applicant, who has moved application for condonation of delay. The sufficient cause is to be considered in a proper object, philosophy and spirit. While dealing with such situation, the court has always found out paramount consideration of substantial justice. Liberal approach, while dealing with such applications, are required but it is also the duty of the court to see that the same may not be unbriddled and unguided.

18. It has also to be looked into that there is material difference between inordinate delay and short delay. While condoning the inordinate delay, the Court has to be rather strict as the same can change the settled things as unsettled. It has been settled that an inordinate delay could not be condoned without notice to the respondents and without recording any reasons for condonation of delay. So far as the issue of reaching to the substantial justice is concerned, the same is undoubtedly a goal/intent of legislature but, condoning the inordinate delay, without issuance of notice or calling objection from other side, shall frustrate the very object of the aforesaid doctrine.

19. So far as the argument of the learned counsel for the respondents is concerned that the appellate court had directed to provide a copy of the appeal as well as the application for condonation of delay to the counsel for the respondents, the same will not subserve the purpose as the appellate authority had admitted the appeal on the first date of hearing and, virtually, no opportunity of hearing was provided. Further if such procedure is supposed to be sufficient in case of calling objection on application for condonation of delay then the very purpose and intent of the legislature for enactment of the Limitation Act will frustrate as the same is not sufficing the very purpose of the word 'sufficient cause' mentioned in the Act 1963.

20. In the instant matter, the appeal has been filed after an inordinate delay of 26 years. Admittedly, no notice was issued and the appeal was admitted on the first day of hearing without issuance of notice to the petitioner. In such view of the matter, the appellate authority has not only ignored the provisions envisaged under the Act 1963 but has also overlooked the settled proposition of law.

21. Considering the aforesaid facts and circumstances, the order dated 21.2.2003 passed by the appellate authority is hereby set aside.

22. The matter is remanded back to the appellate authority to decide the matter afresh after calling objections on the delay condonation application submitted by the petitioner and after providing due opportunity of hearing to all the concerned parties. The matter shall be concluded within six months from the date of this order. The petitioner shall appear before the appellate authority within a period of 15 days.

23. The parties undertake that they shall not seek unnecessary adjournments.

24. Interim protection granted by this Court, vide order dated 8.8.2003 shall remain continued till disposal of the appeal.

25. The writ petition is allowed accordingly.

(2022)06ILR A321
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.06.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Application U/S 482 No.650 of 2022

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

Counsel for the Applicants:
Sri Manoj Kumar Srivastava

Counsel for the Opposite Parties:
G.A., Sri Jeetendra Kumar Sharma

Criminal Law - Code of Criminal Procedure, 1973 -Section 173, 482 – Indian Panel Code, 1860 -Section 323, 498-A – Dowry Prohibition Act, 1961 - Section 3/4: - **Cognizance of Charge sheet & continuation of criminal proceeding in a matrimonial dispute - be quashed when the parties (**husband & wife**) have resolved their entire dispute through a duly verified compromise – to avoid abuse of process of law – Application allowed – entire proceeding are hereby quashed.** (Para – 14, 15)

Application (U/s 482) is allowed. (E-11)

List of Cases cited: -

1. Gian Singh Vs St. of Punj.& anr. (2012 vol. 10 SCC 303)

2. Narinder Singh & ors. Vs St. of Pun. & ors. (2014 Vol. 6 SCC 466)

3. St. of M.P. Vs Laxmi Narayan & ors. (2019 vol. 5 SCC 688)

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

1. Heard Mr. Monoj Kumar Srivastava, learned counsel for the applicant, Mr. Jeetendra Kumar Sharma, learned counsel for the opposite party No.2 and learned A.G.A. for the State.

2. The present Application U/S 482 Cr.P.C. has been filed with a prayer to quash the charge sheet dated 07.04.2021 filed in Case No.9956 of 2021 arising out of Charge sheet No.01 dated 07.04.2021 filed in Case Crime No.0018 of 2021, under Sections 498-A and 323 of IPC and 3/4 of D.P. Act, Police Station-Mahila Thana, District-Kannauj, as well as stay the proceeding in pursuance of cognizance order dated 02.08.2021 in view of the compromise dated 16.03.2021 executed between both the parties.

3. The brief facts of the case are opposite party No.2 (wife) had lodged an F.I.R. on 02.02.2021 under Sections 498-A, 323 IPC and Section 3/4 of D.P. Act against the applicants (Husband and his family members) alleging that marriage of applicant and opposite party No.2 was solemnized about 6 years before. From the wedlock of applicant No.1 and opposite party No.2, three children were born, who are living with opposite party No.2. The applicants have not satisfied to the dowry and they started beating and harassing her for fulfillment of additional demand of dowry. On 18.01.2021 on the refusal of demand of dowry by the opposite party No.2, applicant beaten her due to which opposite party No.2 has received injuries on her body. The investigating officer after investigation has submitted charge sheet No.1 dated 07.04.2021 before the Court and the cognizance was accordingly taken on 02.08.2021. In the meanwhile, due to intervention of the relatives and well wishers of the family, opposite party No.2 and applicants have entered into compromise on 16.03.2021 outside the Court and started to live together as husband and wife along with their children having no grievance to each other. The applicants have filed present 482 Cr.P.C. application to quash the charge sheet dated 07.04.2021, on the basis of compromise dated 16.03.2021 on 16.02.2022, this Court passed the following order:

"Heard learned counsel for the applicants, Sri Jeetendra Kumar Sharma, learned counsel for the O.P. No. 2 as well as learned A.G.A. for the State and perused the record.

Learned counsel for the applicants submits that the parties have entered into a compromise as a subject matter of the dispute was matrimonial. The terms and conditions have been entered into a compromise which is Annexure No. 3.

Learned counsel for the O.P. No. 2 has acknowledged the aforesaid facts.

The parties shall appear before the trial court and file compromise within four weeks. Upon the said compromise being filed before the trial court, it shall

after due identification, verify the compromise. The trial Judge shall forward to this Court a duly verified copy of the compromise entered into between the parties along with a copy of his order verifying the compromise which shall be before the next date fixed.

List on 30.03.2022 as fresh.

Till the next date of listing, no coercive steps shall be taken against the applicants in Case No. 9956 of 2021 (Case Crime No. 0018 of 2021), under Sections 498A, 323 IPC and 3/4 D.P. Act, P.S. Mahila Thana, District Kannauj.

Office will ensure the compliance of the aforesaid order and will transmit the copy of the compromise along with copy of the order to the trial court through the concerned Session Judge within three days"

4. In compliance of the order dated 16.2.2022 parties have filed compromise application in the courts below, which has been duly verified and sent to this Court along with verification report dated 30.03.2022, the same is on the record of the case.

5. Learned counsel for the applicant submitted that proceeding of Criminal case under Sections 498-A,323 IPC and Section of D.P. Act be quashed as parties to dispute have entered into compromise which have been verified also by courts below. He further submitted that applicant No.1 and opposite party No.2 along with their children are living together as such no useful purpose will be served to drag present proceeding further he further placed reliance upon the judgment of this court reported in 2022 Law Suit (Alld) 104 Dr. Mohd. Ibrahim and others vs. State of U.P. and others, **Gian Singh vs.State of Punjab and another (2012) 10 Supreme Court Cases 303, Narinder Singh and others Vs.State of Punjab and other (2014) 6 Supreme court cases 466 and State of Madhya Pradesh vs. Laxmi Narayan and others (2019) 5 Supreme court cases 688.**

6. Learned Counsel for the opposite party No.2 has also filed his vakalatnama and compromise affidavit dated 21.12.2021 stating that opposite party No.2 and applicant No.1 are living together having no grievance to each other as such she does not want to press the proceedings of criminal case against the applicants.

7. Considered the submission of learned counsel for the parties.

8. On the point of compromise between the parties in criminal cases following case law will be relevant:

(i) Gian Singh vs.State of Punjab and another (2012) 10 Supreme Court Cases 303

(ii) Narinder Singh and others Vs.State of Punjab and other (2014) 6 Supreme court cases 466

(iii) State of Madhya Pradesh vs. Laxmi Narayan and others (2019) 5 Supreme court cases 688.

9. In the case of Gian Singh (Supra) Hon'ble Supreme Court has held in para No.61 and 62 as follows:

"61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its

inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between thee a victim and the offender in relation to the offences under special statutes like b the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

62. In view of the above, it cannot be said that B.S. Joshi ,Nikhil Merchants and Manoj Sharma were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the Bench(es) Concerned."

10. In the Case of **Narinder Singh (supra**) Hon'ble Supreme Court has held as follows in para No.29:

29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its

power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in a such cases would be to secure: (i) ends of justice, or (ii) to prevent abuse of the process of any court. While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction

or the chances of conviction are remote and bleak. In the former case it can refuse to accept the Settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not a Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

11. In the case of **State of Madhya Pradesh Vs.Laxmi Narayan (Supra)** held as follows in para No. 15.1 to 15.4:

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

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

15.3 Similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that

capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

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

12. Learned Counsel for both the parties are present before this Court and submitted that the charge sheet including the proceedings of the case be quashed on the basis of compromise entered into the parties.

13. The learned A.G.A. has no objection as parties to the dispute relating to matrimonial mater have entered into compromise.

14. Considering the facts of the present case as well as the principle of law laid down by Hon'ble Supreme Court as mentioned above, matrimonial dispute between the husband and wife should be a quashed when the parties have resolved their entire dispute amongst themself through compromise duly filed and verified by the Court. There is another aspect of the case that F.I.R. has been lodged under Sections 498-A, 323 IPC and 3/4 D.P. Act, which will come under category specified in para No.29.4 laid down by Hon'ble Apex Court in **Narinder Singh (supra**) and in category specified in para No.15.1 laid down by Apex Court in **State of Madhya Pradesh vs. Laxmi Narayan and others (supra)** regading which proceedings relating to matrimonial dispute can be quashed in exercise of power under Section-482 Cr.P.C.

15. In view of the discussion made above, it would be unnecessary to drag these proceeding, as continuation of the criminal proceeding despite settlement and compromise would amount to abuse of process of law accordingly, the instant application under Section 482 Cr.P.C. is allowed on the basis of compromise dated 16.03.2022 as verified on 30.03.2022. The proceeding of cognizance order dated 02.08.2021 and charge sheet No.1 dated 07.04.2021 filed in Case No.9956 of 2021

arising out of Case Crime No.0018 of 2021, under Sections 498-A, 323 of IPC and 3/4 of D.P. Act, Police Station-Mahila Thana, District-Kannauj including the entire proceedings of the case are hereby quashed. No order as to costs.

(2022)06ILR A328
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.03.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, .J.

Application U/S 482 No. 1312 of 2022

Uma Shankar Soni & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Manish Bajpai

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 156(3), 200, 202, 482 – Indian Panel Code, 1860 - Section 419, 420 – Employee Provident Fund and Miscellaneous Provision Act, 1952 (EPF)-Section 14, 14A, 14AC – Employee St. Insurance Act, 1948 (ESI)-Section 85, 86, 86A, 94 – Insolvency and Bankruptcy Code, 2016 -Section 10, 14, 33, 33(5): - **Validity of summoning order & dismissal of revision - complaint case filed by an Employee - without arrayed the company as party - against officers of company which is under liquidation proceeding - for violation of obligations to deposit shares of employee towards EPF & ESI Act, - interpretation of Doctrine of contribution – companies, corporate Houses and Corporations are not immuned from Criminal prosecution - Application allowed – impugned judgment & order set aside – Trial Court directed to proceed accordingly.**(Para – 41, 44, 45)

Application (U/s 482) is allowed, judgment and order of Trial court is set aside. (E-11)

List of Cases cited: -

1. Aneeta Hada Vs Godfather Travels & Tours Pvt. Ltd. (2012 vol. 5 SCC 661)

2. Sharad Kumar Sanghi Vs Sangita Rane (2015 Vol. 12 SCC 781)

3. Sushil Sethi & anr. Vs St. of Arunachal Pradesh & ors. (2020 vol. 3 SCC 240)

4. S K Alagh Vs St. of U.P. & ors. (2008 vol. 5 SCC 662)

5. Roop Mani Pandey Vs St. of U.P. & anr. Decided on 16.02.2016

6. Standard Chartered Bank Vs Director of Enforcement (2005 vol. 4 SCC 530)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Syed Imran Ibrahim and Sri Manish Bajpai, learned counsel for the applicants, Sri Anirudh Kumar Singh, AGA-I and Sri Sushil Pandey, learned AGA for the State and perused the record.

2. The notice to the respondent no.2 is hereby dispensed with.

3. By means of instant application under Section 482 Cr.P.C. has been filed assailing the order dated 29th September, 2021 passed by 9th Additional District and Sessions Judge, Rae Bareilly in Criminal Revision No.54 of 2019 as well as order dated 19th May, 2017 passed by ACJM, Court no.15, Rae Bareilly in Compliant Case No. 3074 of 2016, under Sections

419, 420 IPC, Police Station- Mill Area, District- Rae Bareilly.

4. The factual matrix of the case is that an application under Section 156(3) Cr.P.C. was filed by the opposite party no.2 against the applicants alleging therein that the applicants are under obligation to deposit the shares of the employees towards Employee Provident Fund (EPF) and the Employee State Insurance (ESI) .

5. After filing of the aforesaid application under Section 156(3) Cr.P.C., the court below registered the case as a complaint case vide its order dated 3rd of June, 2015. In compliance of the order, the court below examined the opposite party no.2 under Section 200 Cr.P.C. There is specific provision for punishment in the Act itself as such punishment under Section of I.P.C. would not be invoked.

6. After the aforesaid statement of the opposite party no.2, three witnesses namely Ramchandra Singh, Krishna Kumar Yadav and Prakhat Singh were recorded under Section 202 Cr.P.C. and were named as PWs 1, 2 and 3 respectively. After recording the aforesaid statement and examining the strength of the evidence, the lower court vide order dated 19th May, 2017 summoned the applicants under Sections 419 and 420 IPC.

7. Against the summoning order dated 19th May, 2017, the applicants filed a revision before the learned Sessions Judge. After filing of the aforesaid revision, it was finally heard and decided by the trial court on dated 29th September, 2021. Vide the order dated 29th September, 2021, the revision filed by the applicants, was dismissed and the summoning order dated 19th May, 2017 was affirmed.

8. The crux, on the basis of which the applicants were summoned, is that the applicants did not comply with the provision of Employee Provident Fund Act as well as Employee State Insurance Act. In fact, both the Acts specifically envisage provision of penalties.

9. He submits that Section 86 of Employee State Insurance Act, 1948 (hereinafter referred to as the 'Act, 1948') clearly states that prosecution for the violation of the Act can be done when a complaint is been filed with the prior permission of Insurance Commissioner by an officer who has been authorised to do so meaning thereby a complaint by an individual without compliance of the mandate of Act, 1948, cannot be entertained. The Section 86 of Act, 1948 is quoted hereinunder;

Section 86- *(1) No prosecution under this Act shall be instituted except by or with the previous sanction of the Insurance Commissioner 1[or of such other officer of the Corporation as may be authorised in this behalf by the 2[Director General of the Corporation]].*

(2) No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act.]

(3) No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof.

10. More importantly, Section 86(A) of Act, 1948 deals with the provision that if any offence has been committed, the company shall be deemed to be guilty.

Section 86(A) of the Act, 1948 is quoted hereinbelow;

86A. Offences by companies.-

(1) If the person committing an offence under this Act is a company, every person, who at the time the offence was committed was incharge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

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

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

(ii) "director" in relation to-

(a) a company, other than a firm, means the managing director or a whole-time director;

(b) a firm means a partner in the firm.]

11. Learned counsel appearing for the applicants submits that the court below has failed to consider the fact that without arraying the company as party in criminal proceeding, no case can proceed. He added that even assuming the complaint in its true value then at best it is constituting offence under Section 85 of the Act, 1948. Sections 419 and 420 IPC would not attract in such matter. Section 85 of Act, 1948 is quoted hereinbelow;

85. Punishment for failure to pay contributions, etc.-If any person-

(a) fails to pay any contribution which under this Act he is liable to pay, or

(b) deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution, or

(c) in contravention of section 72 reduces the wages or any privileges or benefits admissible to an employee, or

(d) in contravention of section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or

(e) fails or refuses to submit any return required by the regulations, or makes a false return, or

(f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or

(g) is guilty of any contravention of or non-compliance with any of the

requirements of this Act or the rules or the regulations in respect of which no special penalty is provided,

[he shall be punishable-

(i) where he commits an offence under clause (a), with imprisonment for a term which may extend to three years but

(a) which shall not be less than one year, in case of failure to pay the employee's contribution which has been deducted by him from the employee's wages and shall also be liable to fine of ten thousand rupees;

(b) which shall not be less than six months, in any other case and shall also be liable to fine of five thousand rupees:

Provided that the Court may, for any adequate and special reasons to be recorded in the judgement, impose a sentence of imprisonment for a lesser term;

(ii) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may extend to four thousand rupees, or with both.]

12. He further referred Section 14, 14A and 14AC of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'EPFMP Act, 1952') which provides the procedure with regard to the penalties in case of violation of the provision of the Act and further Section 14A envisaged the offence committed by the company and Section 14AC speaks about cognizance and trial of the offence. The Sections 14, 14A and 14AC of EPFMP Act, 1952 are quoted hereinbelow;

14 Penalties. -

(1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act ,the Scheme the [Pension] Scheme or the Insurance Scheme]] or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to 19 [one year, or with fine of five thousand rupees, or with both].

(1A) An employer who contravenes, or makes default in complying with, the provisions of section 6 or clause (a) of sub-section (3) of section 17 in so far as it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to three years), but

(a) which shall not be less than 22 [one year and fine of ten thousand rupees] in case of default in payment of the employees' contribution which has been deducted by the employer from the employees' wages;

[(b) which shall not be less than six months and a fine of five thousand rupees, in any other case]: [***] Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term [***].] (B) An employer who contravenes, or makes

default in complying with, the provisions of section 6C, or clause (a) of sub-section (3A) of section 17 in so far as it relates to the payment of inspection charges, shall be punishable with imprisonment for a term which may extend to Jone year] but which shall not be less than [six months and shall also be liable to fine which may extend to [five thousand rupees]: Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term [***]. (2) (Subject to the provisions of this Act, the Scheme, the [Pension] Scheme or the Insurance Scheme] may provide that any person who contravenes, or makes default in complying with, any of the provisions thereof shall be punishable with imprisonment for a term which may extend to [one year, or with fine which may extend to four thousand rupees, or with both).

(2A) Whoever, contravenes or makes default in complying with any provision of this Act or of any condition subject to which exemption was granted under section 17 shall, if no other penalty is elsewhere provided by or under this Act for such contravention or non-compliance, be punishable with imprisonment which may extend to [six months, but which shall not be less than one month, and shall be liable to fine which may extend to five thousand rupees.

14A Offences by companies.

(1) If the person committing an offence under this Act the Scheme or the [Pension] Scheme or the Insurance Schemell is a company, every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

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

against and punished accordingly. Explanation-For the purposes of this section, (a) "company" means any body corporate and includes a firm and other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

***Section 14AC**: Cognizance and trial of offences. No court shall take cognizance of any offence punishable under this Act, the Scheme or 2/the 3/Pension] Scheme or the Insurance Scheme] except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf, by an Inspector*

appointed under section 13. (2) No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act or Scheme or 2[the 3[Pension] Scheme or the Insurance Scheme.

13. He has also referred the Section 94 of the Employees State Insurance Act, 1948, wherein the payment of priorities of dues have been mentioned. He submits that if a company is corporation and declares insolvency then distribution of property of the insolvent is required to be paid on priority basis to the employees which has contributed and covered under Section 94 of the Act, 1948, which reads as under;

94. Contributions, etc., due to Corporation to have priority over other debts.? *There shall be deemed to be included among the debts which, under section 49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909) or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), 1[or under any law relating to insolvency in force 2[in the territories which, immediately before the 1st November, 1956, were comprised in a Part B State]], 3[or under section 530 of the Companies Act, 1956 (1 of 1956)], are, in the distribution of the property of the insolvent or in the distribution of the assets of a company being wound up, to be paid in priority to all other debts, the amount due in respect of any contribution or any other amount payable under this Act the liability where for accrued before the date of the order of adjudication of the insolvent or the date of the winding up, as the case may be.*

14. In view of the aforesaid, there would be no any financial loss to the applicants so far as the payment of the provident fund or any insurance benefit are concerned.

15. Quoting the aforesaid, he submits that since under the clause 86A in the Act, 1948, there is deeming clause and he has drawn attention that this deeming clause shows the intent of the legislature while enactment of the aforesaid provision without holding the body corporate guilty the purpose of the Act would be frustrated.

16. He further argued that, in fact, the company namely Shree Bhawani Paper Mills Limited is under liquidation at present. Further it is not a case where the company or its Director has intentionally committed any cheat or forgery but it is due to unavoidable financial crisis as the Bank's account of the company declared as Non-Performing Assets (NPA) in the month of December, 2012. It is admitted fact on behalf of the complainants that they are not getting the benefit of EPF and ESI since 2012.

17. He has also added that company was declared as sick unit under the Sick Industrial Companies (Special Provisions) Act, 1985, on 26th September, 2013 and once the company has been declared as sick unit, the Board of Directors of the company ceased to exercise any constructive control over the management and affairs of the company.

18. He further added that while the matter was pending before Board of Industrial Financial Reconstruction (BIFR), the Government of India promulgated the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code, 2016') and as soon as the aforesaid Code, 2016 was promulgated, the company moved an application under Section 10 of the Code,

2016, which was admitted by the Tribunal on 13th February, 2018. After the aforesaid application, the resolution professional was appointed and moratorium as mentioned under Section 14 of the Code, 2016 was enforced.

19. He further submits that after the aforesaid, the company could not be revived and learned National Company Law Tribunal vide order dated 17th July, 2021 directed that assets of the company be liquidated so as to recover the loss of the debtor and thus the company went into liquidation proceedings. After the aforesaid order, the moratorium under Section 14 of the Code, 2016 was lifted and moratorium under Section 33(5) was enforced.

20. He also argued that after appointment of resolution professional, the notices were published in leading newspapers with regard to the fact that the company has gone into liquidation proceedings. Thereafter e-auction was successfully done on 25th October, 2021 and letter of intent was issued in favour of R.K. Chaudhary and new company i.e. M/s Inter Weaved Polytex Pvt. Ltd. He submits that there is specific provision in both the Acts that if such a company goes under liquidation and the matter is settled, the payment is to be meet/ released/ disbursed to the claimants particularly as per provisions envisaged under ESI Act and EPF Act.

21. He submits that the proceeding against the applicants cannot be continued since the company has not been arrayed as party. He added that hearing of proceeding of the complaint as well as issuance of summon in the complaint case vitiates in the eyes of law as the authority of the Apex Court as well as other High Courts are very clear that company is an essential party in such cases.

22. It is an admitted fact that the company has not been arrayed as party. He further says that nothing has been concealed or no cheat, fraud or forgery has ever been committed by the applicants and due to the financial hardship the company could not be allowed to run as per law and the same went into liquidation proceedings and every disbursement is to be done as per law. He further added that the applicants are law abiding citizen and commanding respect in the society and they had no criminal intent to make any fraud or forgery with the complainants. He has further drawn attention towards the list of the complainants-employees annexed as Annexure-14 with instant application wherein the name of the complainant/respondent no.2 finds place at serial no.3.

23. He submits that the intent of the legislature would frustrate if the applicants are been prosecuted in furtherance to the criminal proceeding of the Complaint Case No.3074 of 2016.

24. He also argued that, in fact, it is a matter of civil liability and it is not a criminal act. He has forcibly argued that since the company has not been arrayed as party in the complaint and as such the whole proceedings of the complaint case is vitiated and is not sustainable in the eyes of law. Further the order passed by the revisional court is also not sustainable and same has passed on the similar premises and without arraying company as party.

25. Learned counsel appearing for the applicants, in support of his contention, has placed reliance on the case of **Aneeta**

Hada vs Godfather Travels and Tours Private Limited; 2012(5) SCC 661. It has been upheld by the Hon'ble Apex Court that company is a juristic person and can be fastened with criminal liability. Extract of the aforesaid judgment are as follows:-

"We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification."

26. He has further placed reliance on the case of **Sharad Kumar Sanghi vs. Sangita Rane** reported in **(2015) 12 SCC 781**. It has been held in para 11 to 13 that where there is allegation against the Director and company has not been arrayed as a party, no proceedings can be initiated against it even where the vicarious liability is fastened in certain statutes.

"11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the company, but the company has not been made arrayed as a party. Therefore, the allegations have to be restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened on certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours Private Limited in the context of Negotiable Instruments Act, 1881.

12. At this juncture, it is interesting to note, as we have stated earlier, that the learned Magistrate while passing the order dated 22.10.2001, had opined, thus:-

"It appears prima-facie from the complaint filed by the complainant, documents, evidence and arguments that accused company has committed cheating with the complaint by delivering old and accidented vehicle to her at the cost of a new truck. Accordingly, prima-facie sufficient grounds exist for registration of a complaint against the accused U/s. 420 of I.P.C. and is accordingly registered."

13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant."

27. It has also been reiterated in case of S**ushil Sethi and another vs. State of**

Arunachal Pradesh and others reported in (2020) 3 SCC 240 wherein the Hon'ble Apex Court in para 8.2 of this judgment held that if the allegations are against the company and the company has not been made a party then it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability against the companies. Para 8.2 is extracted hereasunder:-

8.2. It is also required to be noted that the main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. In the case of Maksud Saiyed v. State of Gujarat (2008) 5 SCC 668, it is observed and held by this Court that the penal code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. It is further observed and held that the vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further observed that statute indisputably must contain provision fixing such vicarious liabilities. It is further observed that even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. In the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside.

28. Further Hon'ble Apex Court in the case of **S.K. Alagh vs. State of Uttar Pradesh and others** reported in **(2008) 5 SCC 662**, has held in para 14 to 19 that even at drafts were drawn in the name of the company, the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. The following para is extracted below:-

14. Appellant No.1 is the Managing Director of the Company. Respondent No.3 was its General Manager. Indisputably, the company is a juristic person. The demand drafts were issued in the name of the company. The company was not made an accused. The dealership agreement was by and between M/s. Akash Traders and the company.

15. Mr. Pramod Swarup, learned counsel appearing on behalf of Responent No.2, in support of the order passed by the learned Chief Judicial Magistrate as also the High Court, submitted that as, prima facie, the appellant was in charge of and was in control of the business of the company, he would be deemed to be liable for the offence committed by the company.

16. The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.

17. A criminal breach of trust is an offence committed by a person to whom the property is entrusted.

18. Ingredients of the offence under Section 406 are :

"(1) a person should have been entrusted with property, or entrusted with dominion over property;

(2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;

(3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

19. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. {See Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya.

29. He has further placed reliance on the case of **Roop Mani Pandey vs State of U.P. and Anr.** along with other connected applications, on 16.02.2016 which has held ratio as under;

"After having given my anxious thought to the rival submissions made on behalf of the parties and considering the material on record, I find that it is not disputed between the parties that the opposite party No.2 has supplied the material to the company and the company was liable to pay its price to the opposite party No.2, but it is not disputed between the parties that by order passed by B.I.F.R. dated 08.10.2013 the company has been declared as sick unit and unless the company stands rehabilitated, the petitioners, who are sought to be prosecuted, cannot do anything. It has also not been disputed that the opposite party No.2 has also initiated the proceedings of civil case for recovery of the amount due. The company has not been impleaded as an accused in the complaint. It has also not been shown as to how the petitioners are liable for payment of dues to the opposite party No.2 while the material was supplied in the name of the company. The opposite party No.2 has failed to show as to how the petitioners are vicariously liable for the company. The learned Magistrate while passing the summoning order and taking cognizance, has failed to disclose as to how the petitioners are liable to be prosecuted for the offence under Sections 418 and 506 IPC. Since, the opposite party No.2 had supplied the material in the name of the company and admittedly company has not been arrayed as an accused, the learned Magistrate ought not to have passed the impugned order summoning the petitioners, specially when the opposite party No.2 had failed to show as to how the petitioners are liable for the wrong committed by the company."

30. He further referred a case in **Standard Chartered Bank vs Director of Enforcement reported in 2005(4) SCC**

530 has referred para 6. The para 6 of the aforesaid judgment is quoted hereinbelow;

"6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act [may be] committed through its agents."

It has also been observed that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment is mandatory imprisonment and fine."

31. Referring the aforesaid, he submits that now it has been settled that the company is liable to be prosecuted and punished for criminal offence. Company is not immuned from the prosecution. He added that locus to prima facie satisfy the court upon the complainant that intent of the company was missing in a particular case.

32. cHe also added that in the instant matter, the punishment for violation is itself provided in the Employee State Insurance Act, 1948 as well as Employee Provident Fund and Miscellaneous Act, 1952 and being the special law the prosecution can only be done under the provision of the aforesaid Act. It is admitted fact that the violation has been done which comes under the preview of Section 86A of the Act, 1948 as well as Sections 14 and 14A of the Act, 1952 and as such the learned Magistrate could have invoked his jurisdiction in the aforesaid provision but it is evident from the impugned order dated 29th September, 2021 that Magistrate has issued the process by issuing a summon vide order dated 19th May, 2017 under Sections 419 and 420 of the IPC. He submits that the Magistrate could not have issued the summons under the aforesaid provision of IPC and as such the whole proceeding of the complaint case vitiates in the eyes of law.

33. Learned counsel appearing for the petitioner has argued that it is a bullet point since the company has not been arrayed as party in the complaint case and there is settled proposition of law that the company being a juristic person is liable to be prosecuted and is to be punished as such the order passed by the learned Magistrate in Complaint Case No.3074 of 2016 is liable to be set aside.

34. On the other hand, learned AGA appearing for the State has very vehemently opposed the contention aforesaid and submits that the learned Magistrate has very well recorded the statement of the complainant and witnesses under Sections 200 and 202 Cr.P.C. He submits that there is no any deviation or unlawfulness in recording the statement of the complainant or the witnesses. He also added that there is no proclavity or contradiction in the statement under Sections 200 and 202 Cr.P.C. and there are ample material facts on the basis on which, the complaint case can proceed against the present applicants.

35. While countering the contention of learned counsel for the applicant, on the issue that the company is under liquidation

proceedings, he submits that in fact the liquidation proceeding is civil proceeding, which can go on simultaneously with the criminal proceedings and as such this set of argument of the applicants have no force.

36. He also added that since so far as the contention regarding non-impleadment of the company as party is concerned, it is technicality and that will not affect the fate of the case or that will not vitiate of complaint proceedings.

37. He further argued that in fact the applicants have committed breach of trust as well as cheated the complainant, and as such, they can be prosecuted. There are material facts as per statement of witnesses and complainant.

38. Having heard the learned counsel for the parties and after perusal of record, I find that the present applicants are said to be Directors of the Company. The Company was already declared sick unit on 26th September, 2013 and it is an admitted fact that the bank accounts of the company were declared as Non-Performing Assets (NPA) in way back December 2012. Further the Company is under liquidation proceedings invoking the provisions of Section 33 of Insolvency and Bankruptcy Code, 2016 and after calling the objections the applicants have already forwarded their objections through a list (annexed as annexure 14, page 122 of this writ petition), wherein the name of the complainant no.2 find place at serial no.3 and as such no error or illegality or criminal intent is prima face seems to be committed/seen in the aforesaid matter.

39. Further from perusal of the complaint, it is evident that the same has been filed for deliberately non-payment of 12% of contribution of EPF and ESI 17% to the complainant. Penalty as well as the punishment has been prescribed under the Employees Provident Fund as well as Employee State Insurance Act, 1948.

40. It has also been noticed that after 2012 due to financial hardship the Bank account of the company has become NPA and later on under the Insolvency and Bankruptcy Code, 2016, the proceedings were initiated. The resolution professional was appointed and the matter further proceeded. It has also been noticed that the list, which was produced before the resolution professional, finds place the name of the complainant at serial no.3. Section 94 of the Act, 1948 envisaged the provision that in such eventuality, the payment under Act, 1948 shall have priority over the other debts of the company. Meaning thereby as soon as liquidation procedure would be concluded, as per Act, 1948, the dues shall be paid firstly to such employees, naturally the applicants are also covered under the same. At this stage, this Court restraining itself to comment on the issue regarding deliberate intent of the Directors and the Company for not payment of the dues under the Act, 1948 and EPF Act.

41. Coming to the issue with regard to the fact that whether the company is juristic person and further company can have any criminal liability and can be punished, it has been settled that the company is juristic person and the doctrine of vicarious liability also touch to the company as well as the Directors vise versa. The liability is penal and in such situation, the strict interpretation of law shall be done. In the Act, 1952, the penalty and punishment both have been provided for non-payment of dues with respect to contribution of the employees. Non payment of such dues

comes under the purview of offence and as such the same is punishable also.

42. It is also noticeable that there is deeming clause while providing the punishment clause under Section 86A of the Act, 1948. Having at glance of proviso of Section 86A in sub-clause (i) it is very much clear that if any offence is been committed by the company including every person incharge of the company shall be held guilty of the offence and are attributable of punishment for such act. In this sub-clause, the word 'deemed to be guilty' has been mentioned which connotes the very clear intent of the legislature to fasten the criminal liability on the functionaries and the company by this deeming fiction. In such view of the matter the word 'deemed' must have profound context in which it is used.

43. In the instant matter, indeed, there is allegation against the company and until the company which is juristic entity is arrayed as accused, such proceeding shall vitiate.

44. It has been settled in all jurisdiction across the world by the role procedure established by law that the Companies, Corporate Houses and Corporations are not immuned from criminal prosecution, on the premises that they are not possessing the necessary mens rea for commission of offence. The doctrine of **contribution** and **imputation** are needed for interpretation, in case the company or the corporation which guides business of the company if at all have a criminal intent would always be imputed to the company.

45. Considering the aforesaid facts and rival submission of learned counsel for the parties as well as settled laws, the order dated 29th September, 2021 passed by 9th Additional District and Sessions Judge, Rae Bareilly in Criminal Revision No.54 of 2019 as well as order dated 19.05.2017 passed by ACJM, Court no.15, Rae Bareilly in Compliant Case No. 3074 of 2016, under Sections 419, 420 IPC, Police Station Mill Area, District Rae Bareilly are hereby set aside.

46. It is made clear that this court has passed the order only on the issue of non-impleadment/ arraying the company as party in the complaint case.

(2022)06ILR A340
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.06.2022

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Application U/S 482 No. 2235 of 2022

Bhavesh Jain ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Satish Chandra Mishra, Neha Rashmi & Gantavya

Counsel for the Opposite Party:
Santosh Kumar Mishra (A.G.A.)

Criminal Law - Code of Criminal Procedure, 1973 -Section 173, 482– Indian Panel Code, 1860 –Section 120(b), 201, 204, 415, 420, 463, 467, 468, 471, Information Technology Act, 2000 - Section 66:- Application - for quashing the Cognizance of Suppl. Charge sheet/ summoning order to the extent of Applicant (one of accused) - no further or new evidences were collected by the investigating officer before placing suppl.

Charge-sheet in the Court concern – no any evidence either oral or documentary placed before the Trial Court by which specifically assigned any role of applicant to have committed any offence individually or in connivance with other accused persons – no *'quid pro quo'* has been established – trial Court materially erred in summoning the applicant taking cognizance without application of its judicial mind - thus impugned summoning order as well as entire subsequent proceeding to the extent of applicant are quashed.(Para – 25, 32, 35, 38)

Application (U/s 482) is allowed. (E-11)

List of Cases cited: -

1. Ravindranatha Bajpe Vs Mangalore Special Economic Zone Ltd. & ors. (AIR 2021 SC 4587),

2. St. of Karnataka Vs L. Muniswamy & ors. (AIR 1977 SC 1489),

3. Harishchandra Prasad Mani & ors. Vs St. of Jharkhand & ors. (AIR 2007 SC 1117),

4. Neelu Chopra Vs Bharti (2009 Vol. 13 SCALE 313),

5. Mirza Iqbal Vs St. of U.P. (AIR 2022 SC 69),

6. Rekha Jain Vs St. of Karn. (Criminal Appeal No. 749/2022 Decided on Dated 10.05.2022) ,

7. Ramveer Upadhyay & ors. Vs St. of U.P. & ors. (MANU/SC/0524/2022),

8. Satish Kumar Jatav Vs St. of U.P. & ors. (MANU/SC/0653/2022),

9. M/S Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra & ors. (AIR online 2021 SC 192),

10. The St. of Haryana Vs Bhajanlal (1992 Suppl. 1 SCC 335),

11. Inder Mohan Goswami Vs St. of Uttarakhand (2007 Vol. 12 SCC 01),

12. Indian Oil Corporation Vs NEPC India Ltd. & ors. (2006 Vol. 6 SCC 436),

13. St. of M.P. Vs Awadh Krishna Gupta & ors. (2004 Vol. 1 SCC 691),

14. G. Sagar Suri & anr. Vs St. of U.P. & ors. (2000 Vors.other (Criminal Appeal No. 463 of 2022 decided on 22.3.2022).

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The instant application moved under Section 482 Cr.P.C. is directed against the summoning order dated 9.9.2021 issued in Session Case No.752 of 2021 titled "C.B.I. Vs. Md. Azam Khan etc" under Sections 201, 204, 420, 467, 468, 471, 120-B I.P.C. and Section 66 of the I.T Act, 2000 and all orders passed in furtherance whereof qua the applicant, "Bhavesh Jain" one of the accused charge sheeted in Case Crime No.2 of 2018 in Session Case No.752 of 2021 pending before the Special Court, Anti-Corruption, C.B.I. (Central), Lucknow.

2. It is stated in the application that the F.I.R. No.2 of 2018 was filed on 25.4.2018, alleging certain irregularities in recruitment of candidates to 1300 posts of the R.G.C.'s, J.E.'s, A.E.'s advertised by the U.P. Jal Nigam in the year 2016-2017. The said F.I.R. was filed against (i) Mr. Md. Azam Khan, the then Chairman, U.P. Jal Nigam; (ii) Mr. Syed Aafaak Ahmad, the then O.S.D; (iii) Mr. Prakash Singh, the then Secretary, Urban Development; (iv) Mr. P.K. Assudani, the then Managing Director, U.P. Jal Nigam Ltd; (v) Mr. Anil Kumar Khare, the then Chief Engineer, U.P. Jal Nigam; (vi) other officers of the U.P. Jal Nigam involved in the recruitment process. The allegation is, that the aforesaid accused persons conducted the selection without taking prior approval of the Board of Jal Nigam or the State Government causing a loss of Rs.37.5 Lacs to the State

Exchequer and violate of rules and regulations of the Jal Nigam including the U.P. Water Supply and Sewerage Act, 1975. None of the allegations are attributable to the applicant nor he is alleged to be a beneficiary anyhow.

3. The company titled "Aptech" who was hired by the U.P. Jal Nigam under contract to organize and develop the infrastructure for conducting the Computer Based Test (C.B.T.) for short listing of the candidates, is also arraigned as accused in the F.I.R.

4. The said F.I.R. No.2 of 2018 was lodged by one Sri Ram Sevak Shukla, retired, approximately eight years back, from the post of Executive Engineer, Jal Nigam, with some ulterior motive on account of strong political rivalry and enmity between him and certain officers of U.P. Jal Nigam, who were at the helm of affairs when the selections were conducted. Pursuant to the lodging of the F.I.R. No.2 of 2018, the Special Investigation Team (S.I.T) was constituted, which investigated the case for more than one and a half years, allegedly and apparently under the influence and control of the persons on whose behest the F.I.R. was filed.

5. The applicant who is a mid-level employee of the Aptech group which was hired by U.P. Jal Nigam for the limited purpose of organizing the infrastructure for conducting the Computer Based Test (C.B.T) for the recruitment under the contract executed between U.P. Jal Nigam and Aptech. Aptech's role was limited to facilitate the qualifying examination (C.B.T) and providing the necessary I.T. infrastructure and software solution for the same. It had no role in the actual selection of the candidates. The contracts effected the purpose of recruitment dated 17.6.2016, 28.10.2016 and 15.12.2016 respectively and the work order dated 19.5.2016 was issued theirfor.

6. The present applicant, as a matter of fact, is a Software Engineer. In the course of examination in question (C.B.T.), he was serving as Deputy Manager, Software Development. His role was confined to programming, Software and website development, which are purely technical in nature. He had no role in setting the question papers, tabulation of scores, preparation of merit list, etc. Moreover, the applicant did not have access either to the questions papers, or the result of the examination or marks of the candidates, which were confidential documents/information stored in the password protected files with strict access control. It is alleged by the applicant and stands un-rebutted in the counter affidavit that the applicant was posted at Mumbai since 2003 and he had never visited the State of U.P., much less Lucknow, when the examination was conducted on behalf of the U.P. Jal Nigam. He had no interaction with the officials of the U.P. Jal Nigam or any candidate appearing in the examination.

7. It is stated in the affidavit filed in support of the instant application under Section 482 Cr.P.C. that the applicant was never served with the notice in the course of investigation by the S.I.T. and merely on the telephonic request of the Investigating Officer made to Aptech, he gave his statement to the investigating officer on 12.9.2019, copy whereof is made Annexure No.4 to the affidavit. Thereafter he has never summoned to participate in the Investigation or to provide any document or information. Ultimately, the investigation was concluded

sometimes in January, 2020 and the charge sheet was submitted by the S.I.T. on 24.5.2021 which did not include the name of the applicant as an accused. The court concerned took cognizance of the offences against the charge sheeted accused namely Md. Azam Khan, Girish Chandra Srivastava under Sections 201, 204, 420, 467, 468, 471 I.P.C. read with Section 120-B I.P.C. and Section 13 of the Anti Corruption Act and against the accused Neeraj Malik, Vishwajeet Singh, Ajay Kumar Yadav, Santosh Kumar Rastogi, Roshan Fernandeez and Kuldeep Singh Negi under Sections 201, 204, 420, 467, 468, 471, 120-B I.P.C. and Section 66 of the I.T. Act, 2000 on the basis of evidences collected by the Investigating Officer and submitted before the court with the charge sheet. The court which took the cognizance of the offence over the charge sheet dated 24.5.2021 without conducting any further investigation or collecting any new material or evidence, when a supplementary charge sheet dated 12.8.2021 was illegally filed by the Investigating Officer arraying the applicant as accused No.2, took cognizance of the offences without evidences against him. The applicant has objected that in any event a prima facie evaluation of the material and documents on record and the facts emerging therefrom, if taken at their face value, do not disclose the existence of ingredients constituting the alleged offence or even give rise to suspicion against the applicant and there did not exist sufficient grounds for proceeding against him. In the absence of any specific allegations against the applicant disclosing his active involvement in the alleged offences, the learned court below ought to have refused to take cognizance of the offences against the applicant.

8. The applicant has submitted in the instant application that the recruitments in issue were entirely an internal affair of the Jal Nigam conducted under the aegis of an internal examination committee which oversaw the entire recruitment process and took all the decisions regarding the same. Under the contracts executed between the Jal Nigam and Aptech, Aptech's role too was limited to facilitate the conduct of the qualifying examination (C.B.T.) and providing the necessary I.T. infrastructure or software solutions for the same, and it had no role in the actual selection of the candidates. The applicant being employee of Aptech, had no role, whatsoever, in the conduct of the examination on behalf of the U.P. Jal Nigam as a Software Engineer, his role was confined to programming applications, software and website development, he is a technical professional and have no role in setting the question papers, tabulation of scores, preparation of merit list, etc. Even he did not have access the question paper or the result of the examination or marks of the candidates. The online examination was conducted in accordance with the instructions of the U.P. Jal Nigam issued time to time. The examinations were held on 5.8.2016 to 7.8.2016 (R.G.C.), 6.12.2016 to 7.12.2016 (J.E.) and 16.12.2016 (A.E.). The Jal Nigam issued completion certificates for successful completion of the exams which is also made Annexure No.9 to the affidavit.

9. It is alleged by the applicant that the impugned supplementary charge sheet was filed against him containing vague allegations which are entirely false and baseless. In the charge sheet, it is alleged that under the contract company was required to publish the answer key upon the conclusion of the online examinations which it failed to do. As such, it is alleged that **Aptech breached the contract and connived with the officers of the U.P. Jal**

Nigam as a consequence whereof the candidates did not get an opportunity to submit their objections on the question paper. Secondly, it been alleged the terms of the contract were breached by the Aptech and primary data of the examination was deleted from the cloud server and valuable evidence was destroyed **under a criminal conspiracy with the Jal Nigam for unfair gain**. It has also been alleged that the marks of 169 candidates have been increased as a consequence whereof ineligible candidates were selected and eligible candidates were deprived and being selected. He has further stated that no specific role in this regard has been attributed to the applicant and there is not an iota of evidence linking the applicant with the allegations. He had no concern with the conduct of the examination, publication of answer key, inviting of objections, etc. There being no specific material or allegations against him, there is no reason and justification to proceed against the applicant. To verify his position with regard to the allegation of conspiracy the applicant has further stated in the affidavit that **there is no whisper or any prior meeting of minds between the applicant and officers of Jal Nigam and no "quid pro quo" has been established.** The applicant has never interacted with any officer of Jal Nigam or candidates appearing in the examination either directly or indirectly. As such, the S.I.T. has conducted a sham investigation and the entire impugned proceeding are purely based on conjectures and surmises, and no offence under Section 120-B I.P.C. is made out. The applicant in the affidavit in support of the application has further states that in February, 2017 after completion of the examination the complete set of answer keys and response sheets of the examinations were handed over by the Aptech to the M.D., Jal Nigam upon being so requested in a C.D. ROM together with cover letters dated 18.3.2017 (R.G.C.), 27.2.2016 (J.E.) and 27.2.2017 (A.E.). The revised result was handed over to the Managing Director, Jal Nigam vide letters dated 8.8.2017, 31.8.2017, 19.8.2017 and 8.8.2017. However, for the reason best known to it the Jal Nigam never published the revised result, even with regard to the allegations that the original/primary result data of the examination was removed by the Aptech from the cloud server in connivance with the officers of the Jal Nigam. No role of the applicant has been attributed in the charge sheet. The allegation is neither concerned with the storage of data nor does he access to control of the computer system or computer network where the data of the examination is stored. **Moreover, as a matter of fact, the original data has not been deleted and continues to be stored in the archives of the company in hard disks in its original format under strict access control,** as mandated by the internal data retention policy of the company. The S.I.T. has been informed repeatedly and severally that original data of the examination is not deleted and is available through various letters dated 7.11.2017 and e-mail dated 7.9.2018, 3.3.2020, 5.3.2020, 21.9.2020 and 3.11.2020. Yet for the reasons best known to it, S.I.T. has never collected the original data, instead acting with apt premeditation and planned, it filed a false charge sheet against the applicant on 12.8.2020 in submission to earlier one which is made Annexure No.14 and 15 to the affidavit in support of the application.

10. Counter affidavit on behalf of the State of U.P. filed in the matter has not factually any differences with regard to the contract between the U.P. Jal Nigam and

Aptech India Ltd. for conducting C.B.T. for recruitment of post of R.G.C., J.E., A.E. in a selection for appointment of 1300 advertised posts. For ready reference, para-8 of the counter affidavit is thus reads as under:-

8– यह कि उपरोक्त चयन प्रक्रिया में अध्यक्ष, विशेष कार्याधिकारी, प्रबन्ध निदेशक जल निगम एवं जल निगम के अन्य अधिकारियों द्वारा नियमावली का उल्लंघन कर मनमाने तरीके से अर्हता/योग्यता में विज्ञापन के बाद छेड़–छाड़ की गयी तथा आशुलिपिक परीक्षा में निर्धारित पदों के सापेक्ष कम परीक्षार्थी सफल होने पर मनमाने ढंग से परीक्षा निरस्त कर दी गयीतथा अन्य विज्ञापित पदों की भर्ती में मेसर्स एपटेक लि0 के अधिकृतप्रतिनिधि व जल निगम के उत्तरदायी अधिकारियों द्वारा आपसी दुरभि संधिके माध्यम से समय से उत्तर कुंजी न प्रदर्शित कर प्रश्नों के उत्तरों मेंसही विकल्प न निर्धारित कर त्रुटिपूर्ण ढ़ंग से क्लाउड सर्वर के माध्यममूल्यवान साक्ष्य को विलोपित कर अनियमित रुप से परिणाम घोषित करपात्र अभ्यर्थियों को क्षति पहुंचाकर अपात्र अभ्यर्थियों का चयन कर जल्दबाजी में नियुक्ति पत्र जारी कर उसी तिथि को चयनित अभ्यर्थियों को कार्यभार ग्रहण कराकर मनमाने ढ़ंग से विधि विरुद्ध कार्य किया गया है।

11. In para-9 of the counter affidavit without specifying any particular evidence with regard to the offence alleged to have been committed by the applicant "Bhavesh Jain", it is alleged that he has committed the following offences, (i) a conspiracy between U.P. Jal Nigam and M/S Aptech Ltd., a collusion is evident from the fact of breach of contract between them with regard to the recruitment on all the 1300 posts and not publishing the answer key just after the completion of the exam and even then under a criminal conspiracy to continue with the process of recruitment. (ii) in breach of conditions of contract working against the rules for undue gain under a criminal conspiracy in collusion with the U.P. Jal Nigam deleted the primary data from the cloud server and thus destroyed a valuable evidence. (iii) that for an undue benefit committed the criminal conspiracy during the course of recruitment process. (iv) the present accused applicant whose name came into light in the course of investigation is arrayed on the basis ofevidences collected by the Investigating Officer under Section 201,204, 420, 467, 468, 47/120-B I.P.C. and Section 66 of the I.T. Act and a supplementary charge sheet was submitted on 12.4.2021 against him. Denying the pleading of the accused applicant in his affidavit that S.I.T. has never bothered to access the original data following due course of procedure, therefore, the allegation as to the deletion of primary data and arraigning the charges under Section 201, 204, 120- B I.P.C. and Section 66 of the I.T. Act maliciously has stated that Aptech company had deleted the primary data from the cloud server and in the course of investigation whenever the company was asked to provide primary data, the officers and employees of the company did not make available the same, therefore, the accused is arraigned with Section 201, 204, 420, 467, 468 and 120-B I.P.C. and Section 66 of the I.T. Act prima facie and further the primary data was recovered with the help of the Forensic Science Laboratory.

12. In para 51 and 52 aforesaid the Aptech company as a whole is charged with deletion of primary data, not providing the primary data despite repeated request by the S.I.T., it is alleged without specifying with particular and visible role of the present accused applicant.

13. **Annexure No.3 to the counter affidavit** has an importance for ascertaining the admitted role and responsibility of each and every employee

of Aptech associates engaged for the examination in issue. Annexure No.3 is a document supplied by the Aptech company on the requisition of S.I.T. For easy reference table in Annexure No.3 is quoted as under:-

Role & Responsibilities of Associates w.r.t. U.P. Jal Nigam Project						
S. No.	**Resource Name**	**Designation**	**Role & Responsibility**	**Period of Deployment**	**Present Address**	**Mobile No.**
1.	Neeraj Malik	Executive Vice President	Head - Enterprise Business Group	May 2016 to Nov 2017	Tata Primanti, Tower 7, House No.203, Sector-72, Gurugram - 122101	9810814058
2.	Vishwajeet Singh	Vice-President (Head Delivery & Chief Information Officer)	Responsible for Operations and Delivery of UP Jal Nigam Project	Aug 2016 to Nov 2017	Flat No.02 2012 ATS Advantage Indirapuram Ghaziabad 201014	9810280264
3.	Ajay Yadav	Senior General Manger (Zonal Business Head)	Responsible for Sales & Operations of UP Jal Nigam Project	May 2016 to Nov 2017	3/228, Viram Khand, Gomti Nagar, Lucknow 226010	9235501182
4.	Santosh Kumar Rastogi	Assistant General Manager (Regional Business Head)	Responsible for Sales & Account Management for UP Jal Nigam Project	May 2016 to Nov 2017	3/74, Viram Khand, Gomti Nagar, Lucknow 226010	9044211333
5.	Amit Saini	Senior General Manger - Technical	Responsible for Technical Delivery for UP Jal Nigam	Dec 2016 to Nov 2017	C-205, Elite Homes, Indira College Roa	7506513885

			Project		d, near Akshara International School, Tathawade, Pune - 411033	
6.	Roman Fernandes	General Manager - Technical	Responsible for Technical Delivery for UP Jal Nigam Project	May 2016 to Nov 2017	Mardes, Post-Nirmal, Tal-Vasai, Dist. Palghar, Pin 401304	8898845528
7.	**Bhavesh Jain**	**Manager - Software Development**	**Responsible for Development Support for UP Jal Nigam Proje**	**May 2016 to Nov 2016**	**104 Janta Apartment, Dindayal Nagar, Vasai Wes**	**7400427537**
			ct		**t.**	
8.	Jitendra Dixit	Senior Executive - Software Development	Responsible for Application Management and Candidate scheduling for UP Jal Nigam Project	May 2016 to Nov 2017	Room No.503, Sai Pooja, Plot No.36, Sector 34, Kamothe Navi Mumbai 410209	9594353825/9323887819
9.	Jagdish Sahu	System Administrator	Responsible for Infrastructure Support for UP Jal Nigam Project	May 2016 to Nov 2017	B-404, Sentosa Park, Ekta Parksville, Global City, Virar West, 401303	9920835967
10.	Aftab Kha	Deputy Gen	Responsible for	May 2016 to Feb	Rustomjee	9820095

	n	eral Manager - Project & Operations	Project Management (coordination between different departments within Aptech & Customer) & Zonal Operations management for RGC for UP Jal Nigam Project	2017	Athena, D-201 Majiwada Thane (W) 400601	9711
11.	Hemant Kandpal	Assistant Manager - Projects	Responsible for Project Management for AE & JE (coordination between different departments within Aptech & Customer) for UP Jal Nigam Project	June 2016 to Nov 2017	67-Raipur, IIM road off Sitapur road, MVM School, Lucknow - 226020	7054199777
12.	Pitam Singh	Head - Content (Advisor)	Responsible for Content Development for UP Jal Nigam Project	July 2016 to Mar 2017	3/36 Sector - 5 Rajinder Nagar Sahibabad Ghaziabad - 201005	9968275220/9540142522
13.	Ratnarupa Ray	General Manager - Content Authorin	Responsible for Content Authoring for UP Jal	May 2016 to Mar 2017	402 A Poonam Darshan, Poonam Nag	7400427524

		g	Nigam Project		ar, Andheri (E) Mumbai - 400093	
14.	Palak Maharishi	Manager - Content Development	Responsible for Content Development for UP Jal Nigam Project	May 2016 till Nov 2017	B-501, Himalaya Apartment, Sector - 5, Vasundhra, Ghaziabad, UP 201012	9990743450
15.	Dharmendra Singh	Manager - Zonal Operations	Responsible for Operations Management (JE & AE) for UP Jal Nigam Project	Sep 2016 to Nov 2017	136 Narain Nagar, Ravindrapalli, Lucknow, U.P., 226016	8960003331
16.	Kuldeep Negi	Approved Vendor - Result Processing	Responsible for Merit List Preparation for RGC for UP Jal Nigam Project	Jun 2016 to Nov 2016	C/O Sarvatra IT Services Pvt. Ltd. Head Officer: SCO 86, Second Floor, Sector 22 Gurgaon-122016	0124-4239250
17.	Ashok Upreti	Approved Vendor Result Processing	Responsible for Merit List Preparation for AE & JE for UP Jal Nigam Project	Dec 2016 to June 2017	C/O SARTHAK DATA SOLUTIONS PVT LTD G-247 FIRST FLOOR, GAZIPU	022652868 08

					R, DELHI 110096	

14. It is argued by learned Senior designated on behalf of the accused applicant "Bhavesh Jain" in the instant application under Section 482 Cr.P.C. that the complaint itself has no allegation individually or jointly with the other co-accused against the role of the applicant in making or deleting the entries with regard to marks obtained by the candidates in C.B.T. The role of the accused is very much specified in the Annexure No.3 annexed with the counter affidavit by the State opposite party which is detailed against the name of "Bhavesh Jain, Manager- Software Development, responsible for development support for U.P. Jal Nigam Project from May 2016 to November 2016" at Sr. No.7.

15. On telephonic request the applicant presented himself before the S.I.T. and his statement was recorded by the Investigating Officer where he stated about the work assigned to him which is made Annexure No.4, the works assigned to him was (i) production and development of website (ii) planning and explaining the work on the website to the colleagues in accordance with the approved plan conduct of the work, etc. On the query of Investigating Officer of the S.I.T., his reply was recorded on 12.9.2019 which may be seen at Annexure No.4 of the affidavit filed in support of the application that the development work of the website with regard to the online form, admit card and call letter in the recruitment process was done by him. It is also work that after the development of the website the prescribed fields were to be filled up by the employee arrayed at Sr. No.8 in Annexure No.3 to the counter affidavit namely Jitendra Dixit, Kuldeep Negi at Sr. No.16 and Ashok Upreti at Sr. No.17 as they were given responsibility for application management and candidate scheduling, merit list preparation, etc. There is no iota of evidence against those collected by the Investigating Officer which prima facie show the role or capacity to access the primary data filled in the website even evidence of any conspiracy is also not given. As such, the learned court of Magistrate did not apply his mind in taking cognizance over the charge sheet and issuance of summon for trial. He relied on the case laws propounded by the Apex Court on the argument in support of his argument that an employee of a company cannot be made accused without any specific allegation or specific role attributed to them relying on ***Ravindranatha Bajpe Vs. Mangalore Special Economic Zone Ltd. and Ors.1, State of Karnataka Vs. L. Muniswamy and Ors.2*** in support of the argument that where no material on record is available to show prima facie the complicity of the accused or to suspect him for committing the offence. In this regard, ***Harishchandra Prasad Mani and Ors. Vs. State of Jharkhand and Ors.3, Neelu Chopra Vs. Bharti4 and Mirza Iqbal Vs. State of Uttar Pradesh5*** placed before the court in support of his argument that particulars of offences committed by each and every accused and role of accused must be demonstrated in the charge sheet and where only vague and bald allegations are made no specific allegations against the accused and there is no specific role against the accused, the candidates of relevant offences cannot be taken by the Magistrate. Lastly, learned counsel submitted that a criminal

proceeding cannot be continued if there is no specific allegations against the accused, he relied on a judgment of R***ekha Jain Vs. State of Karnataka*** dated 10.5.2022 passed in ***Criminal Appeal No.749 of 2022*** by the Apex Court.

16. On the other hand, learned A.G.A. Sri Santosh Kumar Mishra, Advocate argued that police has the statutory right and duty to investigate into a cognizable offence on complaint having been made the result of investigation done by the S.I.T. brought into light the name of the accused as employee of the company engaged by the Aptech company as Software Developer to fulfill its obligation under the contract with the U.P. Jal Nigam to conduct C.B.T. for the recruitment of R.G.C., J.E. and A.E on 1300 posts advertised by the U.P. Jal Nigam. The allegations was that illegalities and irregularities were committed in connivance with the officers of U.P. Jal Nigam by the Aptech company under a conspiracy of which the present accused applicant was a participant, therefore, prima facie case against the accused was made out and the charge sheet was submitted against him by the S.I.T. whereupon cognizance was taken by the Magistrate and summons were issued.

17. Learned A.G.A. relying on the case law propounded by the Apex Court dated 20.4.2022 in ***Ramveer Upadhyay and Ors. Vs. State of U.P. and Ors.6*** submitted that the criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival, there would have been possibility of a false complaint at the behest of a political opponent but the same would not be justified interference under Section 482 of the Code of Criminal Procedure, 1973.

18. Learned A.G.A. has also relied on the judgments of Apex Court in ***Satish Kumar Jatav Vs. State of U.P. and Ors.7*** decided on 17.5.2022 and ***M/S Neeharika Infrastrucure Pvt. Ltd. Vs. State of Maharashtra and Ors.8***. He emphasized the argument that while examining the F.I.R./complaint the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made therein. Criminal proceeding ought not to be scuttled at the initial. Quashing of complaint/FIR should be an exception rather than an ordinary rule.

19. Heard learned counsels, perused the materials available on record, gone through the cases cited in support of their contentions.

20. In ***The State of Haryana Vs. Bhajanlal9*** the scope of High Court power under Section 482 Cr.P.C. and Article 226 of the Constitution of India was widely considered to quash the FIR and refer to several judicial precedents and held that High Court should not embark upon an enquiry into the merits and demerits of the allegations and quash the proceeding without allowing the investigating agency to complete its task. At the same time, the Apex Court identified the following cases in which FIR/complaint can be quashed. Para-102 of the aforesaid case is quoted below:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we

give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

21. In ***Inder Mohan Goswami Vs. State of Uttarakhand10*** Apex court in para-27 has observed as under:-

27. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard-and-

fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

22. In ***Indian Oil Corporation Vs. NEPC India Ltd. and Ors.11*** formulated guiding principles for exercise of power under Section 482 Cr.P.C. in following terms:-

*"12. ... **(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations.** Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

*(ii) A complaint may also be quashed where it is **a clear abuse of the process of the court,** as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) .."

23. In the ***State of M.P. Vs. Awadh Krishna Gupta and Ors.12, i***n para-11 it is held:-

"11. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.

In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations

set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code.

24. Further in ***G. Sagar Suri & Anr. Vs. State of U.P. & Ors.13*** it is observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature.

25. At the very outset the present accused applicant in the complaint he is alleged individually or jointly with the other co-accused responsible for the offence punishable under Sections 201, 204, 420, 467, 468, 471, 120-B I.P.C. and Section 66 of the I.T Act, 2000, therefore, it is also imperative to examine the ingredients of the said offences and whether the allegations made in the complaint, read on their face, attract those offences under the penal code. Out of the aforesaid offences with which the present accused applicant "Bhavesh Jain" is arraigned if Section 420, 467, 468, 471 and 120-B I.P.C. are taken at first for the purpose of consideration.

26. Before proceeding with the discussion Section 415 of the I.P.C. which defines cheating needs to be quoted here below:-

"415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

27. The Apex Court in ***Vijay Kumar Ghai and Ors. Vs. State of West Bengal & Ors. in Criminal Appeal No. 463 of 2022 decided on 22.3.2022*** in para 27, 28, 29, 30, 31, 32, 33 and 35 observed as under:-

"27. Section 415 of IPC define cheating which reads as under: -

"415. Cheating. --Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"." The essential ingredients of the offense of cheating are:

1. Deception of any person

2. (a) Fraudulently or dishonestly inducing that person-

(i) to deliver any property to any person: or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were no so deceived, and which act or omission causes or is likely to cause damage or harm to that

person in body,mind,reputation or property.

28. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

29. Section 420 IPC defines cheating and dishonestly inducing delivery of property which reads as under: -

"420. Cheating and dishonestly inducing delivery of property. --Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

30. Section 420 IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

31. To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved:-

1. The representation made by the person was false

2. The accused had prior knowledge that the representation he made was false.

3. The accused made false representation with dishonest intention in order to deceive the person to whom it was made.

4. The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

32. As observed and held by this Court in the case of Prof. R.K. Vijayasarathy & Anr. Vs. Sudha Seetharam & Anr. 24 , the ingredients to constitute an offence under Section 420 are as follows:-

i) a person must commit the offence of cheating under Section 415;

and

ii) the person cheated must be dishonestly induced to;

a) deliver property to any person; or

b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 I.P.C.

33. The following observation made by this Court in the case of Uma Shankar Gopalika Vs. State of Bihar & Anr. 25 with almost similar facts and circumstances may be relevant to note at this stage:-

"6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of the complaint any criminal offence whatsoever is made out much less offences under Section 420/120-B IPC. The only allegation in the complaint petitioner against the accused person is that they assured the complainant that when they receive the insurance claim amounting to Rs. 4,20,000, they would pay a sum of Rs. 2,60,000 to the complainant out of that but the same has never been paid. It was pointed out that on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the consumer forum in relation to the claim of Rs. 4,20,0000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases of breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception that there was intention on behalf of the accused person to cheat which is a condition precedent for an offence under 420 IPC.

"7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-B IPC and the present case is a case of purely civil dispute between the parties for which remedy lies before a civil court by filing a properly constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same it was just and expedient for the High Court to quash the same by exercising the powers under Section 482 Cr.P.C which it has erroneously refused."

35. In Vesa Holdings Pvt. Ltd. & Anr. Vs. State of Kerala & Ors. 27, this Court made the following observation:-

"13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case, there is nothing to show that at the very inception there was any inception on behalf of an accused person to cheat which is a condition precedent for an offence u/s 420 IPC. In our view, the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the courts. Superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of the court and the High Court committed an error in refusing to exercise the power under Section 482 Cr.P.C to quash the proceedings."

28. Having gone through the complaint/FIR and even the charge sheet it cannot be said that avernments made therein bear the allegations against the present accused applicant have prima facie constituted an offence under Section 420 I.P.C., even in a case where allegations are made in regard to the irregularity and illegality committed by the company as a whole in the process of recruitment through

C.B.T. The role and responsibility with which the present accused applicant is entrusted has nowhere his access to the primary datas filled in the prescribed fields of the website, therefore, in the absence of a culpable role no offence under Section 420 I.P.C. said to have been made out. In the instant case there is no material to indicate that the present accused applicant had any malafide intention against the U.P. Jal Nigam or the candidates appearing in the C.B.T. or against the unsuccessful candidates who appeared in the C.B.T. and some malafide intention or undue favour with regard to the some illegal gaining undue benefit from the successful candidates in exclusion to other candidates.

29. For easy reference sections 467, 468, 471 I.P.C. are quoted hereunder:-

467. Forgery of valuable security, will, etc.--Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

468. Forgery for purpose of cheating.--Whoever commits forgery, intending that the 1[document or electronic record forged] shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

30. On perusal of the impugned order dated 9.9.2021 passed by the Special Judge, Anti Corruption (C.B.I.), Central, Lucknow, it is simply stated therein that cognizance of offences under Section 201, 204, 420, 467, 468, 471 and 120-B I.P.C. read with Section 66 of the I.T. Act, 2000 is taken on the basis of oral and documentary evidences.

31. Before considering the allegations or facts prima facie constituting the offences under Sections 467, 468, 471 I.P.C. it would be pertinent to go into the definition of forgery as defined under Section 463 I.P.C. For easy reference Section 463 I.P.C. is quoted hereunder:-

"463. Forgery- Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

The essential ingredients of offence under Section 463 I.P.C. are-

(1) A person makes any document or part of a document.

(2) The document or false electronic record or part of the document or electronic record must be false.

(3) With intention-

(a) to cause damage or injury to the public or any person; or

(b) to support any claim or title; or

(c) to cause any person to part with his property; or

(d) to enter into any express or implied contract to commit any fraud or that fraud may be committed.

In furtherance of above essential ingredients the making of false document is also defined under Section 464 of the I.P.C. according to which dishonest or fraudulent-

(i) making of the false document or false electronic record, signs, seals or executes a document or part of a document.

(ii) making or transmitting any electronic record or part of any electronic record.

(iii) affixing any digital signature on any electronic record.

(iv) making any mark denoting the execution of a document or the authenticity of the electronic signature.

Section 467 I.P.C. contemplates forgery of documents which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security ..... to receive or deliver any money, movable property or valuable security ..... or receipt acknowledging the payment of money. Likewise who ever fraudulently or dishonestly uses as genuine any document or any electronic record which he knows or has reason to believe to be a forged document or electronic record.

32. No evidence, oral or documentary, is referred in the impugned order of taking cognizance of the charge sheet which also did not include the evidence as to the applicant's alleged or suspected role of execution, making any false document or false electronic record by making signature, putting seals or transmitting any electronic record wholly or partly or affixing any e-signature on any electronic record or making any mark denoting the execution of any document specifically assigned to have been committed individually or in connivance with any of the other accused persons. Even no specific allegation is made in the complaint. The documentary evidence in the form of statement of present accused-applicant recorded by the Investigating Officer of S.I.T. and the list of employees engaged by the Aptech company in the project of U.P. Jal Nigam for conducting the C.B.T. to select and recruit R.G.C., J.E. and A.E. on 1300 posts. The said record specifically refers the role to present accused applicant at Sr. No.7 as Manager- Software Development, responsible for development support for U.P. Jal Nigam Project from May 2016 to November 2016.

33. There is no further evidence as to any other acts assigned to or done by the present accused-applicant, "Bhavesh Jain" except the development of software and handing over them to the other responsible employees of Aptech company referred in

the document dated 4.9.2019, Annexure No.3 to the counter affidavit.

34. Even prima facie evidence also is not on record against the present accused-applicant with regard to his access in any capacity to the website for making relevant entries or deleting the primary datas filled by other responsible employees in the prescribed fields of the website developed by him. The work of entry is assigned to Vishwajeet Singh at Sr. No.2, Jitendra Dixit at Sr. No.8, Kuldeep Negi at Sr. No.16 and Ashok Utpreti at Sr. No.17 in annexure no.3 of the counter affidavit, shown responsible for operation and delivery of contracted project of the U.P. Jal Nigam, application management and candidates' scheduling and preparing the merit list of the R.G.C's, A.E.'s and J.E.'s in the project individually and collectively. Except the aforesaid document which is annexed to the counter affidavit as Annexure No.3 no other documentary evidence specifying the role of present accused-applicant and activities done by him under the project is included in the charge sheet, submitted by the Investigating Officer before the court concerned, after completing the investigation.

35. The Special Court (C.B.I.) has, thus correctly did not take cognizance vide its first order dated 15.7.2021 of offences against the present accused in issue, and took cognizance on the basis of available evidences only against Md. Azam Khan, Girish Chandra Srivastava, Neeraj Malik, Vishwajeet Singh, Ajay Kumar Yadav, Santosh Kumar Rastogi, Roshan Fernandeez and Kuldeep Singh Negi, in various provisions of the I.P.C. and Information Technology Act, 2000 and Section 13 of the Anti Corruption Act. Peculiarly enough subsequent to the submission of first charge sheet, though no further or new evidences were collected by the Investigating Officer but the supplementary charge-sheet dated 12.8.2021 was brought on record, placed before the concerned court which without applying it's mind took cognizance vide the impugned summoning order dated 9.9.2021, against the present accused-applicant also.

36. This would be important to refer an admitted fact, that present accused-applicant was never posted in Lucknow, his place of posting was in Bombay. Neither there is allegation nor evidence oral or documentary with regard to any premeditated plan between the applicant and other accused persons to assist in the forgery alleged to have been committed by the two companies, U.P. Jal Nigam and Aptech India Ltd. in connivance with each other. Two companies were under a contract executed legally to conduct examination through C.B.T. for recruitment of employees on 1300 posts of R.G.C., J.E. and A.E. in U.P. Jal Nigam. It is alleged in the affidavit in support of the application and also in counter affidavit, that irregularities and illegalities were committed in execution of the works performed under the contract by both the parties to the contract, in breach of the conditions stipulated in the contract. Higher officials of both the corporations are alleged and found prima facie to have breached the conditions under the contract knowingly, willfully and dishonestly, but no civil action or departmental disciplinary inquiry, if taken, are brought on the record with their conclusions. In the absence of any prima facie evidence on record of the charge sheet and in the counter affidavit of the opposite parties also, so as to gather

inference of the suspected involvement of the present accused-applicant in conspiracy with any of the officers, officials and employees, found prima facie guilty in committing the irregularities and illegalities in the process of recruitment process under the contract. It seems that the present accused-applicant unnecessarily brought into the next of implication without logical and legal reasons and basis.

37. Thus, the facts mentioned in the complaint and in both the charge sheets submitted by the Investigating Officer of the S.I.T. are not disclosing the commission of any cognizable offence under the relevant sections of the I.P.C. with which the present accused-applicant is arraigned and, therefore, the cause of action clearly arose for him to challenge the continuance of criminal proceeding in the impugned order of cognizance dated 9.9.2021.

38. In view of the above facts and discussions the impugned summoning order dated 9.9.2021 passed by the learned Special Court, Anti-corruption, C.B.I. Central, Lucknow is set aside to the extent of the applicant "Bhavesh Jain" and all the orders passed in furtherance whereof and the entire subsequent proceedings in Sessions Case No. 752 of 2021 (C.B.I. Vs. Mohd. Azam Khan, etc.) under Sections 201, 204, 420, 467, 468, 471, 120-B I.P.C. and Section 66 of the I.T Act, 2000 against the accused applicant arising out of F.I.R. lodged on 25.4.2018 bearing No.2 of 2018 registered at Police Station- S.I.T. Sadar, Lucknow pending in the court of learned Special Court, Anti-Corruption, C.B.I. (Central), Lucknow to the extent of present accused applicant "Bhavesh Jain" are quashed.

39. Accordingly, the application under Section 482 Cr.P.C. is ***allowed.***

(2022)06ILR A360
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.05.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Application U/S 482 No. 2897 of 2020

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

Counsel for the Applicant:
Sri Ramakar Shukla

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 173(2), 482 – U.P. Gangsters & Anti-Social Activities (Prevention) Act, 1986 -Section 2, 3(1) – Indian Panel Code, 1860 -Section 120(b), 302, 34, 504, 506:- Application - Validity of Charge sheet, summoning order and for quashing the proceeding of Session Trial under Gangsters Act - Gang chart has been prepared & approved by the Competent Authorities on very same day in a hasty manner and without application of mind – showing only two cases out of which one is not related with accused and in anr. case charge sheet was not forwarded by the police to the court concern as on date – in view of settled law i.e. Gangsters Act cannot be used as weapon to wreak vengeance to harass the accused – Petition allowed - impugned proceedings of session trial as well as Charge sheet & summoning orders are quashed with direction to the competent Authority to proceed against the petitioner as per law. (Para – 5, 8, 9)

Application (U/s 482) is allowed. (E-11)

List of Cases cited: -

1. Ram Raheesh & anr. Vs St. of U.P. & ors. (2011 vol. 73 ACC 559)

2. Matchumari China Venkatareddy & ors. Vs St. of A.P. (1994 Crl.LJ 257)

3. Master Alias Ramzan Vs St. of UP (AIR online 2020 All 2766)

4. Ashok Kumar Dixit Versus St. of U.P., AIR 1987 All. 235

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. The petition has been filed under Section 482 CrPC for quashing proceeding of Sessions Trial No.6 of 2018 State versus Sonu alias Santosh and others vide case crime No.279 of 2017 under section 3(1) of U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, P.S. Kotwali Nagar, district Sultanpur as regards the petitioner as well as the charge sheet dated 25.5.2018 and summoning order dated 28.5.2018.

2. Heard learned counsel for the petitioner and learned A.G.A. for the State.

3. Learned counsel for the petitioner is permitted to delete respondent No.2 from the array of parties, during course of the day.

4. Facts of the case are that a first information report was registered against the petitioner. As per the first information report, while the complainant was on patrolling duty on 27.5.2017, during patrolling, he came to know that Sonu Singh alias Santosh Singh resident of district Jaunpur is a desperate criminal and is having an organised gang. He is a gang leader and he along with Ajeet Yadav, Deepak Mishra, Sandeep Mishra, Praeep Mishra, Raghunayak Dubey, Anil Pandey alias Santu and Ezajullah are active members of gang.

It has also been alleged that the gang has created a terror in districts Sultanpur, Jaunpur, Ghazipur and other districts and to earn economic and physical benefits, they are habitual for committing offences given under Chapters XVI, XVII and XXII of the Indian Penal Code. It is further alleged that the gang leader Sonu Singh alias Santosh Singh and Ajeet Yadav used to commit contract killing and on 8.2.2017 with active support of other members of the gang, they have committed murder of prestigious businessman Bharat Bhushan Mishra. To curve the increasing anti social activities of the gang, gang chart has been approved by the District Magistrate, Sultanpur on 26.5.2017.

5. Learned counsel for the petitioner submits that merely on the basis of two cases, i.e. Case Crime No.63 of 2017 under sections 302, 34, 120-B I.P.C., P.S. Kotwali Nagar, district Sultanpur and Case Crime No.153 of 2017 under sections 504, 506 I.P.C., P.S. Kotwali Nagar, district Sultanpur, U.P. Gangster & Anti Social Activities (Prevention) Act, 1986 has been imposed against the petitioner.

It is next submitted that in case Crime No.63 of 2017 (supra), the petitioner has been granted bail vide order dated 25.5.2017 and before the petitioner could be released from jail in compliance of the order, in order to nullify the bail order granted in favour of the petitioner, with ulterior motive, the police of police station Kotwali Nagar, district Sultanpur has falsely prepared the gang chart on

26.5.2017 which is one day after the bail order was passed, in a mechanical manner in utter haste and without examining the material on record by the authorities.

It is submitted that preparing of the gang chart in a mechanical manner and in haste and the manner in which it has been approved is evident from the fact that the Station Officer of police station Kotwali, district Sultapur has forwarded the gang chart on 26.5.2017. The Circle Officer received the gang chart on the same day and he also signed it on 26.5.2017 which was forwarded to the Addl. Superintendent of Police, Superintendent of Police and District Magistrate, Sultanpur. All the authorities have signed the gang chart on the same day, including the District Magistrate, Sultanpur who approved it on the very same day, i.e. on 26.5.2017. It is submitted that the entire exercise has been done in haste and without application of mind.

In this context, learned counsel has relied on **Ram Raheesh and another** versus **State of U.P. and others (2011)73 ACC 559** in which this court has deprecated the practice of recommending and forwarding the gang chart and approving it on the same day and held that before granting approval to the gang chart, subjective satisfaction of the District Magistrate is required. Relevant paragraph 12 is extracted below :

"12. Having considered the submissions made by the learned Counsel for the parties, we, prima facie are of the view that the gang chart has been approved in a mechanical manner by the District Magistrate and the said decision to lodge the FIR on that basis has been taken in haste. The haste with which, without examining the material on record by the authorities concerned, Gang chart has been approved is evident from the fact that on 15.10.2010 Inspector, Kotwali prepared the Gang chart and submitted to the Circle Officer, Hardoi City for approval. On the same day, he referred the matter to the Additional Superintendent of Police, Hardoi, who in turn, on the same day referred the matter to the Superintendent of Police, Hardoi. The Superintendent of Police, Hardoi made a note dated 15.10.2010 "recommended" and forwarded the gang chart to the District Magistrate, who in his turn, approved the gang chart on the same day i.e. 15.10. 2010. Thus it cannot be said that the District Magistrate at any point of time recorded subjective satisfaction before imposition of the Gangsters Act."

It is next submitted that in the gang chart, there are two cases imposed against the petitioner. In Case Crime No.153 of 2017 under sections 504, 506 I.P.C., the petitioner has no concern, at all. The case has wrongly been shown against the petitioner which again shows total non-application of mind of the district authorities. The fact that the petitioner has no concern with case crime No.153 of 2017 has been admitted by the State in para 12 of the counter affidavit.

As regards other case, i.e. case crime No.63 of 2017 (supra), charge sheet has been prepared on 25.5.2017 and according to 'Z' register, (register which records forwarding of the charge sheet to the concerned Judicial Magistrate), the same was forwarded to the Magistrate on 23.6.2017 and the cognizance was taken by the Magistrate on the same day, i.e. on 23.6.2017.

It is further submitted that according to para 12 of the circular dated

18.9.2012, issued by the Director General of Police, U.P. No.42 of 2012, only those cases should be shown in gang chart in which charge sheet has been filed.

In the case in hand, the gang chart was prepared on 26.5.2017 and at the time of preparation of gang chart, it is admitted case that no charge sheet was submitted before the court and was lying before the police authorities. It is submitted that out of two cases shown in the gang chart, as referred to above, the petitioner has no concern as regards Case Crime No.153 of 2017 (supra) and in other case, i.e. in Case Crime No.63 of 2017, charge-sheet was yet to be forwarded to the court below at the time of preparation of gang chart.

In support of his contention, learned counsel has relied on **Matchumari China Venkatareddy and others** versus **State of A.P.** 1994 Crl. L.J. 257 in which it has been held that unless the court takes the charge sheet on record for examination for taking cognizance or not, it cannot be said that a police report (charge sheet) is filed as contemplated under section 173(2) CrPC.

In support of his argument, learned counsel has further relied on **Master Alias Ramzan** versus **State of U.P**. AIR Online 2020 All 2766 (relevant para 11), in which it has been held that only those cases shall be included in the gang chart in which the police has prepared charge sheet and the same has been filed before the court concerned.

It is submitted that in the present case, at the time of preparation of the gang chart on 26.5.2017, charge sheet in case crime No.63 of 2017 (supra) was still lying with the police authorities. It is submitted that the entire exercise of preparation of the gang chart and lodging of the first information report is malicious which is evident from the fact that as per the first information report lodged on 27.5.2017 with the allegation that when the then Inspector Incharge of police Station Kotwali Nagar, district Sultanpur Mr. Chandrashekhar Singh was on patrolling duty, then he came to know about the gang of the petitioner and the fact that the petitioner is a gang leader, whereas one day prior to it, entire exercise of preparation of the gang charge was completed by the police authorities.

It is also submitted that although the gang chart was prepared and charge sheet has been filed in haste against the petitioner. It is submitted that in the entire investigation, the investigating officer did not show that while allegedly committing the offence, the petitioner gained any advantage like temporal, pecuniary or other advantage. No such material of any sort has been collected by the investigating officer. Counter affidavit filed by the State is also silent in this regard. .

Learned counsel has further relied o**n Ashok Kumar Dixit** versus **State of U.P. AIR 1987 All. 235** (relevant para 75), in which this Court has observed that the provision of the Gangsters Act cannot be used as a weapon to wreak vengeance to harass the accused.

6. Section 2 of the Gangsters Act defines the gang as under :

"2. .....

(a) .....

(b) "Gang" means a group of persons, who acting either singly or

collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

(ii) distilling or manufacturing or .storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport

vehicle from following its scheduled course;

[(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life.]

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code (Act No. 45 of 1860), or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a pen on in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes."

7. A perusal of the definition shows that if an offence punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code is committed, in order to gain any undue temporal, pecuniary, material or other advantage , then on account of such activity by use of

violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order, such a person is held to be indulged in anti-social activities. To bring the accused in the definition of Gangster, the very motive of such accused for committing the offence is relevant. The material collected by the investigating officer must reveal that there was a motive of making wrongful economic gain while committing the crime.

In the present case, this court has noted that although the accused are facing the charge of committing murder, however, there is no material to show that they have committed the crime in order to derive any wrongful economic gain.

8. It is admitted case of the State that the accused petitioner has no concern with case crime No.153 of 2017 (supra), as admitted in para 12 of the counter affidavit. It is also admitted case of the State that when the gang chart was prepared, charge sheet was not forwarded by the police authorities, rather it was forwarded to the court concerned on 25.6.2017. In this context, learned counsel has produced an information sought under Right to Information Act which is taken on record and it also shows that the charge sheet has been filed in the court on 23.6.2017 for the first time. Therefore, in view of the law laid down by this court in the case of **Master Alias Ramzan** (supra), the said charge sheet which was yet to be filed in the court could not have been considered for the purpose of preparation of the gang chart.

9. Considering the argument advanced by the petitioner's counsel as well as learned A.G.A. for the State as also going through the entire material on record and the case laws referred to herein above, I am of the view that the petition is liable to be and is hereby allowed.

The impugned proceedings of Sessions Trial No.6 of 2018 State versus Sonu alias Santosh and others vide case crime No.279 of 2017 under section 3(1) of U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, P.S. Kotwali Nagar, district Sultanpur as regards the petitioner as well as the charge sheet dated 25.5.2018 and summoning order dated 28.5.2018 are quashed. However, it shall be open for the competent authority to proceed against the petitioner as per law.

(2022)06ILR A366
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.06.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Application U/S 482 No. 3457 of 2022

Ashwani Kumar (Mishra) ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Tung Nath Tiwari, Sri Ramesh Kumar Dwivedi, Sri Sunil Srivastava

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 -Section 231, 311, 313, 482:- Application for permitting the present accused to cross examine the PW-3 whose examination-in-chief had already been recorded twenty one year back & also cross-examined in detailed on behalf of other co-accused which was further adopted by the counsel for the present applicant & other co-accused - proceeding

pending before Ld. Special Judge (Ayurved Scam Matter), Lucknow since 1997 – rejection of request for recalling PW-3 being found belated & mala fide attempt to stall the trial – just and proper.(Para – 11, 12, 13, 14)

(B) Criminal Law - Code of Criminal Procedure, 1973 -Section 231, 311, 313, 482:- Application for summoning the prosecution witnesses whom were mentioned as PWs in charge sheet but are not produced by the prosecution – once prosecution has choose to closed its evidence after producing the witnesses whom they wants – prosecution is not bound to call each and every witnesses – accused has no legal right to seek to recall each and every PWs – Trial Court rightly declined the request. (Para 15, 17, 18**)**

Application (U/s 482) is dismissed. (E-11)

List of Cases cited: -

1. Mohammad Shafi Vs St. & ors. (AIR 1953 All 667),

2. Rajbir Vs St. of Har. (1996 Vol. 7 SCC 86),

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Sri S.N. Singh Gaherwar, Advocate has put in appearance on behalf of opposite party No.2 by filing his *vakalatnama* in Court today, which is taken on record.

2. Heard Sri Tung Nath Tiwari, learned counsel for the applicant, learned A.G.A. appearing for the State, Sri S.N. Singh Gaherwar, learned counsel for opposite party No.2 and perused the entire record.

3. By means of instant application under Section 482 Cr.P.C., the applicant seeks for quashing the order dated 25.05.2022 passed by the learned Special Judge (Ayurved Scam Matter), Lucknow in Sessions Trial No.474 of 1997 (State of U.P. vs. Ashwani Kumar Mishra) and for permitting him to cross examine the prosecution witness, Surendra Prakash Tripathi and also to summon Nomilal and Dwarika as witnesses.

4. From a perusal of record, it transpires that Sessions Trial No.474 of 1997 (State of U.P. vs. Ashwani Kumar Mishra) is pending in the court of Special Judge (Ayurved Scam Matter), Lucknow. In the aforesaid Session Trial, the present accused/applicant, Ashwani Kumar (Mishra) moved an application dated 21.05.2022, under Section 311 Cr.P.C. praying to recall PW-3, Surendra Prakash Tripathi and also praying for summoning witnesses, namely, Nomilal and Dwarika as they are independent witnesses who were not examined by the prosecution in exercise of their right of adducing prosecution evidence.

5. This application dated 21.05.2022, which was moved under Section 311 Cr.P.C., came to be rejected by the learned trial court by a detailed impugned order dated 25.05.2022.

6. Learned counsel for the applicant has submitted that PW-3, Surendra Prakash Tripathi is alleged to have been present on the spot and have witnessed the incident-in-question. He contends that the accused/applicant, Ashwani Kumar (Mishra) did not get opportunity to cross examine PW-3, Surendra Prakash Tripathi which would cause him prejudice as it would amount to denial of opportunity of fair trial to him.

7. His further submission is that though the order sheet would reveal that the

opportunity of cross-examination for accused/applicant, Ashwani Kumar (Mishra) was closed by the then learned trial judge with the endorsement that learned counsel for the accused/applicant has stated to adopt the detailed cross-examination done by the other accused persons. However, no such written consent was given by his counsel. Therefore, denial of opportunity of cross-examination to the present accused/applicant which would cause prejudice to him.

8. Learned counsel for the accused/applicant has also submitted that all the witnesses produced by the prosecution are interested witnesses. Therefore, the prosecution ought to have produced Nomilal and Dwarika as independent witnesses whose names find mention in the charge sheet.

9. Per contra, learned A.G.A. appearing for the State has vehemently opposed the prayer for grant of relief prayed for by submitting that the trial of aforesaid Sessions Trial is pending since the year 1997. Reasonable opportunity was afforded to all the accused persons including the present accused/applicant, Ashwani Kumar (Mishra) and only thereafter, when the learned counsel for the accused/applicant adopted the cross-examination done by other accused persons, the opportunity of cross-examination of PW-3, Surendra Prakash Tripathi came to be closed. This application, at a belated stage, has been moved malafidely and with a view to stall the proceeding.

10. His further submission is that the prosecution cannot be compelled to produce any particular witness. In support of its case, the prosecution has examined the witnesses whom the public prosecutor thought proper to get examined in order to bring home guilt of the accused persons including the present applicant. Therefore, the prosecution cannot be compelled to produce any such witness. He has, thus, prayed for dismissal of the instant application under Section 482 Cr.P.C.

11. Having heard learned counsel for the applicant, learned A.G.A. for the State, learned counsel for opposite party No.2 an upon perusal of record, it transpires that the statement of PW-3, Surendra Prakash Tripathi was recorded by the learned trial court in three stretches. His examination-in-chief was recorded on 02.02.2000, 19.07.2001 and 20.07.2001. It also transpires from perusal of order sheet dated 20.07.2001 that the learned trial court has made a specific endorsement that the cross-examination of PW-3, Surendra Prakash Tripathi, which was done on behalf of co-accused, namely, Jata Shankar and Shravan Kumar, is being adopted by learned counsel for the applicant. Therefore, it was, accordingly, endorsed at the bottom of the statement of PW-3, Surendra Prakash Tripathi which, thus, stood closed.

12. In the aforesaid background, this Court finds that a belated attempt is being made on behalf of the accused/applicant, Ashwani Kumar (Mishra) by making a prayer to recall PW-3, Surendra Prakash Tripathi whose examination-in-chief has already been recorded and who was cross-examined in detail on behalf of co-accused, Jata Shankar and Shravan Kumar and which was adopted by the learned counsel for the present accused/applicant and co-accused, Pramod Kumar. Therefore, this is nothing but an attempt to stall trial of a case which is pending since the year 1997. It is also an abuse of process of the Court.

13. This matter may be view from another angle also. This Court in **Mohammad Shafi vs. State and others** reported in **AIR 1953 All 667**, while interpreting scope and an ambit of Section 540 of old Cr.P.C. (corresponding to Section 311 Cr.P.C., 1973) has held that this section does not confer a right to any party to examine, cross-examine or reexamine any witness. It is entirely discretionary in the Court, in the interest of justice to take action or not to take action under this section. It is relevant to mention that Section 540 of the old Cr.P.C. corresponds to present Section 311 Cr.P.C.

14. It is indeed disquieting that in the application dated 21.05.2022 moved by the accused/applicant before the learned trial court for recalling PW-3, Surendra Prakash Tripathi for cross-examination, a copy of which is annexed as Annexure No.5 to the instant application under Section 482 Cr.P.C. There is no mention of any question which was to be put to the witness, PW-3, Surendra Prakash Tripathi and which was not covered by the detailed cross-examination of PW-3 which was done on behalf of the co-accused, Jata Shankar and Shravan Kumar and which ultimately came to be adopted for the present accused/applicant also by his learned counsel. Therefore, the exercise of moving an application by the accused/applicant in the form of application dated 21.05.2022 for recall of cross-examination of PW-3, Surendra Prakash Tripathi after about a lapse of twenty one years is nothing but a belated mala fide attempt on behalf of the present accused/applicant to stall the proceeding of aforesaid Session Trial. The same was, thus, rightly declined by the learned trial court.

15. So far as the question of summoning prosecution witnesses, namely, Nomilal and Dwarika, who were mentioned as witnesses in the charge sheet in this matter is concerned, it appears from records that the prosecution after producing witnesses, whom they wanted to produce, has closed its evidence. Thereafter, statements of applicant and another co-accused have already been recorded by the learned trial court under Section 313 Cr.P.C.

16. Section 231 Cr.P.C. provides as under:-

"231. Evidence for prosecution.--(1) *On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.*

2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."

17. The Hon'ble Supreme Court in **Rajbir vs. State of Haryana** reported in **(1996) 7 SCC 86** in Para-6 has held as under:-

"6. Learned counsel for the appellant submitted that non-examination of Shri Mool Chand jain and Shri Makharia who, according to the prosecution case, were present along with Shri Banarsi Das Gupta, PW 17 and sitting on the sofa has created a doubt on the correctness of the prosecution case. Learned counsel further stated that the non-examination of Pawan Kumar, who had snatched the pistol from the appellant was a serious infirmity in the prosecution case and therefore the conviction of the appellant could not be sustained. We cannot agree. ***It is elementary that the***

prosecution is not bound to call each and every witness of an occurrence irrespective of the consideration whether such witness is essential to the unfolding of the narrative on which the prosecution case is based. *The prosecution has examined all material witnesses. PW 17 Shri Banarsi Das Gupta is the injured witness. PW 18 and PW 19 had caught hold of the appellant at the spot and handed him over to the police. PW 20 had deposed about the motive. The non-examination of Mool Chand Jain or P.D. Makharia, therefore does not in any way affect the correctness of the prosecution case."*

(emphasis supplied)

18. Therefore, once the prosecution has chosen to close its evidence after producing the witnesses whom they wanted to produce, it is none of the right of the accused to seek their recall on the ground that prosecution ought to have produced them in order to prove its case.

19. On the basis of foregoing discussions, this Court is of the considered view that the impugned order does not suffer from any illegality or irregularity. The instant application under Section 482 Cr.P.C. is devoid of merit which is, accordingly, **dismissed.**

20. Let a copy of this order be sent to the concerned learned trial court by the Office for information, forthwith.

(2022)06ILR A370

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 27.06.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 3963 of 2022

Sangam Lal ...Applicant

Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Neelu Singh Chauhan

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 173, 190, 190(1)(b), 204, 482 – Essential Commodities Act, 1955 -Section 3/7: - Application - validity of Cognizance/ summoning order and for quashing entire criminal proceeding under EC Act, - trial court materially erred in summoning the applicant on printed proforma by filling up the gaps/blanks – judicial orders cannot be allowed to be passed in a mechanical manner, without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out –Magistrate failed to exercise the jurisdiction vested in him resulting miscarriage of justice - Application allowed - impugned summoning order is quashed – matter is remitted back to proceed a fresh as per law. (Para – 14, 18, 25, 26, 27)

Application (U/s 482) is allowed. (E-11)

List of Cases cited: -

1. Dilwar Vs St. of Har. (2018 vol. 16 SCC 521),

2. Menka Gandhi Vs U.OI.. & ors. (AIR 1978 SC 597),

3. Hussainara Khatoon (I) Vs St. of Bihar (1980 vol. 1 SCC 81),

4. Abdul Rehman Antulay Vs R S Nayak (1992 Vol. 1 SCC 225),

5. P. Ramchandra Rao Vs St. of Karn. (2002 Vol. 4 SCC 578),

6. H. N. Rishbud Vs St. of Delhi (AIR 1955 SC 196),

7. Bhushan Kumar & anr. Vs St. of Delhi (AIR 2012 SC 1747),

8. Basauddin & ors. Vs St. of UP & ors. (2011 (I) JIC 335 (All) (LB),

9. Sunil Bharti Mittal Vs C.B.I. (AIR 2015 SC 923),

10. Darshan Singh Ram Kishan Vs St. of Maharashtra (197 vol. 2 SCC 654),

11. Ankit Vs St. of UP & anr. (Application (U/s 482) No. 19647/2009 decided on 15.10.2009.

12. Kavi Ahmad Vs St. of UP & anr. (Criminal Revision No. 3209/2010 73 ACC 559)

13. Abdul Rasheed & ors. Vs St. of UP & anr. (2010 vol. 3 JIC 761 (All).

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Ms. Neelu Singh Chauhan, learned counsel for the applicant as well as Sri Rao Narendra Singh, learned A.G.A.-I for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicants with a prayer to quash the entire criminal proceedings of Case No. 15605/2021: State Vs. Sangam Lal, arising out of Case Crime No. 227/2020, under Section 3/7 E.C. Act, Police Station Mileriya, District Raebareli, pending in the court of A.C.J.M.-I, Raebareli as well as to quash the charge sheet no.01 dated 08.06.2021 by which the learned court below has taken the cognizance against the applicant and to quash the summoning order dated 12.08.2021 passed by Additional Chief Judicial Magistrate-I, Raebareli.

3. Learned counsel for the applicant submits that the applicant is a licensee of fair price shop at Village-Taj pur Amrawa, Police Station Mileriya, Tehsil, Sadar, District Raibareli and on 19.06.2020 the opposite party no.3- Supply Inspector, Mahrajganj, District Raebareli made a spot inspection of the shop of the applicant and without counting the bags of wheat and rice, he made a forged report before the opposite party no.5-Sub Divisional Magistrate, Sadar, District Raebareli against the applicant only on the basis of oral statements of the card holders because the applicant could not fulfill the illegal demands of the Supply Inspector.

4. Learned counsel for the applicant further submits that the Regional Supply Inspector, Sadar Raebareli submitted its inquiry report on 19.06.2020 before the District Supply Officer and the District Supply Officer without approval of the District Officer suspended the licence of the applicant's fair price shop.

5. Learned counsel for the applicant further submits that after suspending the licence of the applicant's fair price shop, the Supply Inspector lodged the F.I.R. against the applicant on 24.06.2020 at Police Station Mileriya, District Raebareli under Section 3/7 Essential Commodities Act, 1955, which was registered as Case Crime No. 0227/2020.

6. Learned counsel for the applicant further submits that the opposite party no.3 submitted the charge sheet dated 08.06.2021 against the applicant before the learned court below and in pursuance of the charge-sheet the learned Additional Chief Judicial Magistrate has taken cognizance on 12.08.2021 without application of mind and summoned the applicant, while no case is made out against the applicant and the cognizance was taken on the printed

proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has summoned the applicants for facing trial. Copy of the cognizance order is also annexed as Annexure No.A1 to the affidavit.

7. Learned counsel for the applicants further submits that the entire prosecution story is false. No such incident took place and the applicants have been falsely implicated in the present case.

8. Learned counsel for the applicants further submits that by the order dated 12.08.2021 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abuse of process of law and the same was without application of mind and was in a routine manner.

9. Learned counsel for the applicants further submits that after submission of charge sheet and cognizance order on printed proforma, the applicants have been summoned mechanically by order dated 12.08.2021 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicant through a printed order, which is wholly illegal.

10. It is vehemently urged by learned counsel for the applicant that the impugned cognizance/summoning order dated 12.08.2021 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned cognizance/summoning order dated 12.08.2021 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

11. Learned counsel for the applicants has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

12. Per contra, learned A.G.A. for the State submitted that considering the material evidences and allegations against the applicants on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out, therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. Accordingly, this case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

13. I have heard the learned counsel for the parties and perused the record.

14. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when

condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence,

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

15. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal 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 material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

16. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

17. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr.P.C. for the

collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196**. Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

18. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that 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 proceedIn the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB)**, the Hon'ble Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

19. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747**, the Hon'ble Apex Court was pleased to observe that 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 pre-

requisite for deciding the validity of the summons issued.

20. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923,** the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

21. In the case of **Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654,** the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. 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."

22. In the case of **Ankit Vs. State of U.P. And anothe**r passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

23. Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the

blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of **Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826**, in which reference has been made to the cases of **Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC)**, the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."

24. In the case of **Kavi Ahmad Vs. State of U.P. and another passed in Criminal Revision No. 3209 of 2010,** wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

25. In the case of **Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All).** The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

26. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and

the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants on the basis of the allegations made by the complainant. the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

27. In light of the judgments referred to above, it is explicitly clear that the order dated 12.08.2021 passed by the Additional Chief Judicial Magistrate-I, Raebareli is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance/summoning order dated 12.08.2021 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

28. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is allowed. The impugned cognizance/summoning order dated 12.08.2021 passed by Additional Chief Judicial Magistrate-I, Raebareli in Case No. 15605/2021: State Vs. Sangam Lal, arising out of Case Crime No. 227/2020, under Section 3/7 E.C. Act, Police Station Mileriya, District Raebareli is hereby quashed.

29. The matter is remitted back to Additional Chief Judicial Magistrate-I, Raebareli directing him to decide afresh the issue for taking cognizance and summoning the applicant and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a copy of this order.

30. The party shall file certified copy or 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.

31. 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.

(2022)06ILR A377

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Matters U/A 227 No. 723 of 2022 (CIVIL)

Khurshidurehman S. Rehman ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Jai Prakash Prasad

Counsel for the Respondent:
G,A., Sri Manish Goyal (Addl. A.G.), Sri A.K. Sand

Civil Law – Constitution of India, Article 227 – Criminal Procedure Code, 1973 - Section 156 (3) - Parliamentary Election – non-fulfilling of Election Manifesto/ promises – does not comes under 'cognizable Offence' or under comes within ambit of any law – thus cannot enforced under any legislation – Trial

court rightly rejected application. Para 21, 23)

Writ Petition is dismissed. (E-11)

List of Cases cited: -

1. Vivek Kumar Mishra Vs U.O.I. & ors. (2019 SCC OnLine All 5139)

2. Mithilesh Kumar Pandey Vs Election Commission of India (2014 SCC Online Del.4771)

3. V. P. Ammavasai Vs Chief Election Commissioner & ors. (2019 SCC OnLine Mad 5623)

4. Prof. Ramchandra G. Kapse Vs Haribanshramakbal Singh (1991 vol.1 SCC 206)

5. Anil Kumar & ors. Vs MK Aiyappa & ors. (2013 vol. 10 SCC 705)

6. Priyanka Srivastava & anr. Vs St. of U P & ors., (2015) 6 SCC 287

7. Jagannath Verma Vs St. of UP & anr. [2014(8) ADJ 439 (FB)]

8. Lalita Kumari Vs Government of U.P., (2014) 2 SCC 1

9. S. Subramaniam Balaji Vs The Government of Tamil Nadu & ors., (2013) 9 SCC 659

10. M. Chandramohan Vs The Secretary, M/o Parliamentary Affairs & ors. (WP (MD) No. 18733 of 2020) decided on 31.3.2021

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Jai Prakash Prasad, learned counsel for the petitioner, Sri Manish Goyal, Senior Advocate (Additional Advocate General) assisted by Sri AK Sand, Advocate appearing for the State and perused the record.

2. In view of the peculiar facts and circumstances of the present case, this Court proceeds to decide the present matter finally at admission stage itself without calling for the respective affidavits of the parties with the consent of the counsel concerned.

3. The petitioner has invoked the supervisory jurisdiction of this Court under Article 227 of the Constitution of India challenging the order passed by the trial court as well as the revisional court rejecting an application filed under Section 156 (3) CrPC.

4. The facts culled out from the pleadings of the petitioner are that the present petitioner has moved an application under Section 156 (3) CrPC with an allegation that Bhartiya Janta Party headed by the respondent No. 2 (opposite party No. 1 in the original application) had wooed the voters with several promises but failed to fulfil the promises as made in the Election Manifesto-2014, which was promulgated by Bhartiya Janta Party in the parliamentary election conducted in the year 2014. Therefore, he has committed crime of fraud, cheating, criminal breach of trust, dishonesty, defamation, deceiving and falls allurement. The aforesaid application was rejected by the trial court (Additional Chief Judicial Magistrate, Aligarh) vide its order dated 1.10.2020. Feeling aggrieved and dissatisfied with the order passed by the trial court, the applicant (petitioner herein) has preferred a revision dated 12.10.2020 being criminal revision No. 141 of 2020. Aforesaid revision was dismissed affirming the order passed by the trial court.

5. It is submitted by the learned counsel for the petitioner that both the courts below have illegally rejected an application under Section 156 (3) CrPC

without applying their mind and without properly appreciating the allegations made against the respondent No. 2 and the document on record. Non fulfilment of promises as made in the Election Manifesto-2014 makes out a clear cut criminal case against the respondent No. 2, who is liable to be summoned and tried under different sections of IPC. Learned counsel for the petitioner submitted that in a similar matter Hon'ble Supreme Court has issued notices to the other side in Writ Petition (Civil) No. (s). 688/2019, which is still pending for consideration. Fact regarding pendency of the aforesaid matter was brought to the knowledge of the revisional court through paragraph No. 5 of the memo of the revision but the same has not been considered by the revisional court while deciding the revision on merits.

6. Per contra, learned senior counsel has contended that on the face of an application, no cognizable offence is made out against the respondent No. 2 to be tried by the court below. It is further contended that non-fulfilling promise, if any, as averred in the Election Manifesto-2014 does not make out any cognizable offence against the persons who have promulgated the election manifesto. It has further been contended that non-fulfilling the conditions as averred in the election manifesto does not come within the ambit of any law, and therefore, it cannot be enforced under any legislation. Trial court as well as revisional court has rightly rejected an application after going through the contents of the application and evidence adduced on behalf of the petitioner. In support of his contention, learned senior advocate has cited the case of **Vivek Kumar Mishra Vs. Union of India Cabinet Secretary and others reported in 2019 SCC OnLine All 5139, Mithlesh Kumar Pandey Vs. Election Commission of India and others reported in 2014 SCC Online Del 4771, V.P. Ammavasai Vs. Chief Election Commissioner, Election Commissioner of India and others reported in 2019 SCC OnLine Mad 5623 and Prof. Ramchandra G. Kapse Vs. Haribanshramakbal Singh reported in (1991) 1 Supreme Court Cases 206.**

7. Carefully considered the rival submission advanced by the learned counsel for the parties and perused the record on board.

8. The present petitioner has invoked the authority of Magistrate by moving an application under Section 156 (3) CrPC which authorises Magistrate empowered under Section 190 of the CrPC to pass an order for investigation into any cognizable offence by an officer in charge of a police station. Section 156 comes within Chapter XII captioned as "Information to the police and their power to investigate'. Under sub-section (1) of Section 156, the power of a police officer to investigate a cognizable case, which a court with jurisdiction over the local area within the limits of such station would have power to enquire into or try under Chapter XIII, is untrammelled in the sense that it does not require an order of Magistrate. Issuing any direction to investigate the matter under Section 156 (3) CrPC is a pre-cognizance stage, that too, in matters where a case of cognizable offence is made out by the applicant. Invoking the power of Magistrate under Section 156 (3) in a casual manner, without producing sufficient details and material for commission of cognizable offence, is not justifiable in the eye of law. Magistrate, before whom an application has been moved for issuing a direction for investigation under under Section 156 (3)

CrPC, is only required to examine the matter and to apply his judicious mind to reach a, prima facie, conclusion as to whether the case for investigation is made out, for commission of cognizable offence, or not.

9. In the matter in hand, alleged betrayal of promises as made in Election Manifesto-2014 has been tried to be shown as cognizable offence and the learned Magistrate has been expected to issue a direction for investigation qua said commission of cognizable offences.

10. Before discussing the merits of the application under Section 156 (3) CrPC moved by the present petitioner, the scope of Section 156 (3) is required to be considered. Dealing with the scope of Section 156 (3) CrPC, Hon'ble Supreme Court in the matter of **Anil Kumar and others Vs. MK Aiyappa and others, reported in (2013) 10 Supreme Court Cases 705,** has expounded in paragraph 11 that the application of mind by the Magistrate should be reflected in the order passed under Section 156 (3) CrPC, which is quoted below:

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case (2008) 2 SCC (Cri) 692 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

11. In the case of **Priyanka Srivastava and another Vs. State of Uttar Pradesh and others, reported in (2015) 6 Supreme Court Cases 287**, Hon'ble Supreme Court has considered several decisions of the Apex Court and concluded that a principled and really grieved citizen with clean hands must have free access to invoke the powers under Section 156(3) CrPC. It is not the police taking steps at the stage of Section 154 CrPC. For ready reference, the relevant paragraphs of the said judgment is quoted hereinbelow:

"21. Dealing with the nature of power exercised by the Magistrate under Section 156(3) of the CrPC, a three-Judge Bench in Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others[2], had to express thus: (SCC p. 258, para 17)

"17. ....It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of

investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or chargesheet under Section 173."

23. In Dilawar Singh v. State of Delhi, this Court ruled thus: (SCC p. 647, para 18)

"18. ...11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

24. In CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd.[5], the Court while dealing with the power of Magistrate taking cognizance of the offences, has opined that having considered the complaint, the Magistrate may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. And again: (Madhao v. State of Maharashtra, [(2013) 5 SCC 615], SCC pp. 620-21, para 18)

"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. The Magistrate has discretion 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 itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

25. Recently, in Ramdev Food Products Private Limited v. State of Gujarat, while dealing with the exercise of power under Section 156(3) CrPC by the learned Magistrate, a three-Judge Bench has held that: (SCC p. 456, para 22)

"22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate.

When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed."

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same."

12. Full Bench of this Court, in the matter of **Jagannath Verma Vs. State of UP and another [2014(8) ADJ 439 (FB)]** has expounded, after considering the judgment passed by Constitutional Bench of Supreme Court in Lalita Kumari Vs. Government of Uttar Pradesh, (2014) 2 SCC 1, that though the registration of an FIR on the receipt of information relating to the commission of cognizable offence is mandatory, yet there may be instance where a preliminary enquiry is required. The relevant paragraph No. 13 of the judgment in **Jagannath Verma (supra)** is reproduced hereinbelow:

"The decision of the Constitution Bench in Lalita Kumari holds that though the registration of an FIR on receipt of information relating to the commission of a cognizable offence is mandatory, yet there may be instances where a preliminary enquiry is required. In that context, the observation of the Supreme Court are as follows:

"120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no

preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/ family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry."

The power which is conferred upon the magistrate to order an investigation under Section 156 (3) is before taking cognizance of an offence. Section 156 (3) provides that any magistrate empowered under Section 190 may order such an investigation into any cognizable case by an officer in charge of a police station."

13. Now the question would be as to whether the contents of the application under Section 156(3) CrPC, moved by the petitioner, discloses a cognizable offence for forwarding of the complaint to the police for investigation under Section 156 (3) CrPC. Definition of cognizable offence is enunciated under Section 2 (c) of the CrPC, which is reproduced hereinbelow:

"(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;"

14. At this juncture, in my opinion, it would not be befitting to elaborate the scope and nature of cognizable offence, which itself spell out from the definition as given above. In a complaint under Section 156(3) CrPC, the petitioner has made an allegation of committing a crime of criminal breach of trust, dishonesty, deceiving, defamation and false allurement on the ground that Bhartiya Janta Party led by respondent No. 2 has failed to fulfil his promise as enunciated in its Election Manifesto-2014. Voters are allured to cast vote in favour of the party by magical promises.

15. Paramount question for consideration in the present petition lies in a narrow compass as to whether non-fulfilment of any promise as made in the Election Manifesto-2014 amounts to commission of cognizable offence in the eye of law. On a pointed query, learned counsel for petitioner has failed to demonstrate any penal provision for betrayal of a party concerned from the promises as made in the Election Manifesto-2014. To discuss the nature and scope of election manifesto promulgated by political parties, Hon'ble Supreme Court in the case of **S. Subramaniam Balaji Vs. The Government of Tamil Nadu and others, (2013) 9 SCC 659** has expounded that the manifesto of political parties is a statement of its policy. Promises made in the manifesto cannot be treated to be corrupt practice as is denoted under Section 123 in The Representation of the People Act, 1951. No penal provision has been provided considering the non-fulfilment of the promises as made in the election manifesto as a crime. Though under The Representation of the People Act, 1951, there is a provision for registering the political parties but there is no specific provision for the cancellation of their registration on any ground including the alleged false promise as made in the election manifesto. Hon'ble Supreme Court in case of **S. Subramaniam Balaji (supra)** has laid down that i) the provisions of The Representation of the People Act, 1951 place no fetter on the power of political party to make promises in the election manifesto, and, ii) that it is not for the Courts to legislate as to what kind of promises can or cannot be made in the election manifesto, applies on all force.

16. In the case of **Mithlesh Kumar Pandey Vs. Election Commission of India and others, (2014) 6 AIR Del R 139**, Division Bench of Hon'ble Delhi High Court has discussed the post poll alliances of the political parties and their manifesto released. It was argued before the Hon'ble Court that the manifesto released by political party forms the basis of party's election campaign since it compiles in one document the policies of the party; the party explicitly seeks the votes of electorate on the basis of statements and promise made in the manifesto; the manifesto of a political party is analogous to making "offer' as understood in the law of contract, which contract is complete on the acceptance of the "offer', that is to say, at the time when the voters vote for that political party and the party ultimately comes to power or makes the Government, therefore, the political party should not be permitted to carry out acts which are in

blatant disregard and breach of their own manifestos. The relevant paragraph No. 3, 8 and 9 of the aforesaid judgment is quoted below:

"3. We, at the outset, invited attention of the petitioner appearing in person to the judgment of Justice R.C. Lahoti (as his Lordship then was) of this Court in ANZ Grindlays Bank Pie v. Commissioner, MCD 1995 II AD (Delhi) 573 where, dealing with an argument of promissory estoppel and legitimate expectations on the basis of election manifesto, it was held that election manifesto of a political party howsoever boldly and widely promulgated and publicised, can never constitute promissory estoppel or provide foundation for legitimate expectations. It was further held that it is common knowledge that political parties hold out high promises to the voters expecting to be returned to power but it is not necessary that they must be voted in by the electorate; the political parties may commit to the voters that they would enact or repeal certain laws but they may not succeed in doing so for reasons more than one and they know well this truth while making such promises and the electorate to which such promises are made also knows it. It was further held that neither the plea of promissory estoppel nor the plea of legitimate expectations can be founded thereon.

8. Reference in this regard may also be made to what Lord Denning, sitting in the House of Lords observed in Bromley London Borough Council Vs. Greater London Council 1982 (1) All England Law Reports 129. It was said:-

"A manifesto issued by a political party - in order to get votes - is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. It may contain - and often does contain - promises or proposals that are quite unworkable or impossible of attainment. Very few of the electorate read the manifesto in full. A goodly number only know of it from what they read in the newspapers or hear on television. Many know nothing whatever of what it contains. When they come to the polling booth, none of them vote for the manifesto. Certainly not for every promise or proposal in it. Some may by influenced by one proposal. Others by another. Many are not influenced by it at all. They vote for a party and not for a manifesto. I have no doubt that in this case many ratepayers voted for the Labour Party even though, on this one item alone, it was against their interests. And vice versa. It seems to me that no party can or should claim a mandate and commitment for any one item in a long manifesto. When the party gets into power, it should consider any proposal or promise afresh - on its merits - without any feeling of being obliged to honour it or being committed to it. It should then consider what is best to do in the circumstances of the case and to do it if it is practicable and fair."

The same view was followed by the High Court of Justice Queen's Bench Division Administrative Court in R (Island Farm Development Ltd.) Vs. Bridgend County Borough Council [2006] EWHC 2189 (Admin)."

"9. In view of the aforesaid legal position, post-poll alliances cannot be declared as illegal on the ground of being contrary to the manifesto of the political parties entering into the alliance and it is not within the domain of this Court to legislate or issue a direction therefore,

making the manifesto a legally binding document on the political party issuing the same."

17. Learned Senior Advocate has cited the case of **VP Ammavasai Vs. Chief Election Commissioner, Election Commissioner of India and others, reported in 2019 SCC OnLine Mad 5623,** wherein Division Bench of Hon'ble Madras High Court has expressed his view that the poll manifesto does not have any statutory backing. Hence, it is not enforceable in the eyes of law. Relevant paragraphs No. 12 and 13 are reproduced hereinbelow:

"12. Thus from the line of judgments of the Hon'ble Supreme Court in S.Subramaniam Balaji's case, duly followed by High Courts of Delhi, Rajasthan, Allahabad and this Court, it could been seen that there is consistency that election manifesto made by a political party or by an individual candidate, in its true construction would not mean, corrupt practice by the individual candidate or the party, as the case may be, and that apart, there is no provision in the Representation of Peoples Act, prohibiting an individual candidate from resorting to promises, which could be construed as corrupt practice, within the meaning of Section 123 of the Representation of the Peoples Act, 1951.

13. Clause 18.4 of the Model Code of Conduct enclosed in the typed set of papers filed by the petitioner also indicates that the Delhi High Court in Mithilesh Kumar Pandey v. Union of India, reported in 2014 SCC Online Del.4771 : AIR 2015 (MOC 103) 45, held that there is no provision in law, which makes promises made by political parties in their election manifestos enforceable against them."

18. Learned Senior Advocate has also invited the attention of the Court towards the judgment dated 26.4.2019 passed by the Division Bench of this Court in the case of **Vivek Kumar Mishra Vs. Union of India, Cabinet Secretary and others, reported in 2019 SCC OnLine All 5139.** Aforesaid petition was filed for cancellation of the registration of the political parties and for issuing a direction of appropriate nature that unless and until the proper accountability in dealing with election manifesto for translating them into action is fixed and accounted for participation of the erring political party in any election may be debarred and their election symbol may be forfeited. Dealing with the issue of non-fulfilment of the promise as made in the election manifesto, Hon'ble Division Bench dismissed the petition with observation that manifesto of political parties is a written statement declaring policy, the intention, motive or views of the said party, however, such declaration cannot have any binding effect or implemented through court of law. The relevant paragraphs No. 7, 8, 11, 12 and 14 are quoted hereinbelow:

7. The manifesto of a political party issued at the time of general election is a written statement declaring publicly the intentions, motives or views of the said party, what it hopes and vows to do if it is elected and forms the government in future. Such a hope and vow of a party can not have any binding effect or implemented through court of law and it can also not be de-registered for not fulfilling it even if some people or class of people are alleged to have been allured by it as admittedly it has no legal sanctity. The people, through their votes in the next election, can show their resentment.

"8. Lord Denning in regard to election manifesto has observed in Brobley

London Borough Council Vs. Greater London Council 1982 (1) 129 All England Law Reports, as under:-

"A manifesto issued by a political party, in order to get votes, is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. It may contain, and often does contain, promises or proposals that are quite unworkable or impossible of attainment. Very few of the electorate read the manifesto in full. A Goodly number only know of it from what they read in the newspapers or hear on television. Many know nothing whatever of what it contains. When they come to the polling booth, none of them vote for the manifesto. Certainly not for every promise or proposal in it. Some may be influenced by one proposal. Others by another. Many are not influenced by it at all. They vote for a party and not for a manifesto. I have no doubt that in this case many ratepayers voted for the Labour Party even though, on this one item alone, it was against their interests. And vice Versa. It seems to me that no party can or should claim a mandate and commitment for any one item in a long manifesto. When the party gets into power, it should consider any proposal or promise afresh, on its merits, without any feeling of being obliged to honour it or being committed to it. It should then consider what is best to do in the circumstances of the case and to do it if it is practicable and fair."

11. Therefore, since there is no legislation in this regard so no action can be taken for not fulfilling the promises and commitments made in a manifesto of a political party and reading down of the provision also does not arise. Therefore the contention of the learned counsel for the petitioner on the basis of observation of Lord Denning (Supra) is misconceived and repelled.

12. So far as the allegation of criminal liability in the form of fraud, cheating and criminal breach of trust are concerned, this Court is doubtful of having fulfilling the ingredients of the said offences. Even otherwise non fulfillment of the promise, made in a manifesto which has no legal sanctity, can not be a ground for criminal prosecution. However if any body is aggrieved, he may avail appropriate remedy available under criminal law.

14. The promises in the election manifesto can also not be read into Section 123 for declaring it to be a corrupt practice because the allegation of the corrupt practice can be levelled for an act against the candidate or his agent or by any other person with the consent of a candidate or his election agent which can not include the political party. The Hon'ble Apex Court in the case of S. Subramaniam Balaji Vs. State of Tamilnadu and Others; (2013) 9 SCC 659 has held as under in paragraph 84.1:-

"84.1. After examining and considering the parameters laid in Section 123 of RP Act, we arrived at a conclusion that the promises in the election manifesto cannot be read into Section 123 for declaring it to be a corrupt practice. Thus, promises in the election manifesto do not constitute as a corrupt practice under the prevailing law. A reference to a decision of this Court will be timely. In Prof. Ramachandra g. Kapse Vs. Haribansh Ramakbal Singh (1996) 1 SCC 206 this Court held that:-

"21. ... Ex facie contents of a manifesto, by itself, cannot be a corrupt practice committed by a candidate of that party."

19. In a recent judgment of Madras High Court in a case of **M. Chandramohan Vs. The Secretary, Ministry of Parliamentary Affairs and others (WP (MD) No. 18733** of 2020) decided on 31.3.2021, the Division Bench of Madras High Court has discussed the issues of freebies offered in the election manifesto to allure the voters to cast votes in their favour. Considering the dictum of Hon'ble Supreme Court in the case of S. **Subramaniam Balaji (supra),** Hon'ble Division Bench has laid down that no doubt the statutes provided in The Representation of Peoples Act, 1951 does not penalises the political parties indulging in the corrupt practice as clearly distinguished in the above judgment. The Representation of Peoples Act, 1951 was passed immediately after our country was made a republic in the year 1950 and the policy maker of that time did not foresee that the political parties would stoop down to the level of indulgence in corrupt practice in the name of election manifesto and that is the reason why they did not include the political parties under Section 123 of the Representation of Peoples Act, 1951, even though the candidates or his/her agents are included.

20. So far as the submission made by the learned counsel for the petitioners with respect to the pendency of the writ petition No. (s). 688/2019 is concerned, this Court has no authority to discuss the merits of the said case or impede the proceeding of the present petition, keeping in view the pendency of the aforesaid matter.

21. It is, thus, clear that the election manifesto promulgated by any political party is a statement of their policy, view, promises and vow during the election, which is not the binding force and the same cannot be implemented through the courts of law. Even there is no penal provision under any statute to bring the political parties within the clutches of enforcement authorities, in case, they fail to fulfil their promises as made in the election manifesto.

22. Learned counsel for the petitioner failed to substantiate his submissions in assailing the orders impugned, as to how cognizable offence is made out in the present matter for the purposes of issuing a direction for investigation as enunciated under Section 156 (3) CrPC. Even in a provision as embodied under Section 123 of The Representation of Peoples Act, 1951 only a candidate or his/her agents has been brought under law for adopting a corrupt practices of election but the aforesaid provision is not made applicable on any political party as a whole.

23. Learned Magistrate as well as the revisional court has discussed the contents of the application under Section 156 (3) CrPC moved by the present petitioner in detail and very consciously came to to conclusion that on the face of record, no case is made out for the purposes of investigating the cognizable offence. Record also reveals that the petitioner has casually invoked the authority of the Magistrate and the application under Section 156 (3) CrPC has been filed in a routine manner without taking any responsibility whatsoever only to harass the respondent No. 2. The application/complaint does not, prima facie, disclose any commission of cognizable offence.

24. After perusal of the judgment passed by the courts below, it cannot be said that they have decided the matter in a cursory manner without applying their

judicial mind. Non-occurrence of any cognizable offence is also one of the paramount condition which averted the courts below from issuing a direction for investigation in exercise of powers under Sections 156 (3) CrPC.

25. In this conspectus as above, I do not find any substance in the present writ petition. No justifiable ground has been made out warranting indulgence of this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of Indian to interfere in the impugned orders. There is no illegality, perversity and ambiguity in the impugned orders. The present writ petition, being devoid of merits and misconceived, is dismissed with no order as to the costs.

(2022)06ILR A389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.06.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters U/A 227 No. 2135 of 2022

M/S Ramon Motion Auto Corp. Pvt. Ltd. & Ors. ...Petitioner
Versus
Debt Recovery Appellate Tribunal & Ors. ...Respondents

Counsel for the Petitioner:
Abhishek Khare, Pritish Kumar

Counsel for the Respondent:
Prashant Kumar Srivastava

(A) Civil Law – Constitution of India, Article 226, 226(2) - Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 - Section -13(2), 14, 17 & 18 - Recovery Of Debts Due To Banks And Financial Institutions Act, Section 19 – Securitisation Application filed before DRT Tribunal bench at Lucknow – interim order vacated - Appeal filed before DRAT, Allahabad – Writ Petition at Lucknow Bench – objection - maintainability writ petition @ Lucknow bench - Power of High Courts to issue certain writs – High Court exercising jurisdiction in relation to its territory within which the cause of action wholly or in part arises - difference between 'cause of action' & 'right of action' - existence of an alternative remedy is not an absolute bar against this Court's discretionary jurisdiction under Article 226 of Constitution – objection turned down. (Para – 16, 17, 21, 22)

Writ Petition partly allowed. (E-11)

List of Cases cited: -

1. Manish Kumar Mishra Vs U.O.I., 2020 SCC Online All 535 : AIR 2020 All 97

2. Nasiruddin Vs St. Transport Appellate Tribunal, 1975 (2) SCC 671

3. 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 Sudeep Kumar, Advocate alongwith Sri Abhishek Khare, Advocate, the learned Counsel for the petitioners and Sri Prashant Kumar Srivastava, Advocate, the learned counsel for the respondent No. 3 & 4.

2. Briefly stated, the facts of the case are that the petitioners had taken a financial assistance from the Indian Overseas Bank, Main Branch, Lucknow (respondent No. 3). The respondent No. 3 has initiated proceedings for recovery of the aforesaid amount under provisions of The Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as "SARFAESI Act"), against which the petitioners had filed Securitisation Application No. 113 of 2017 before the Debts Recovery Tribunal, Lucknow (herein after referred to as "DRT"), in which the DRT had granted an interim protection to the petitioners, Thereafter the respondent Bank had withdrawn the action initiated against the petitioners. The respondent-Bank again initiated proceedings for recovery of certain amount by issuing the notice dated 05.03.2018 under Section 13 (2) of the SARFAESI Act to the petitioners. The petitioners submitted a reply on 31.03.2018 but without disposing off the reply, the Bank issued a possession notice dated 24.08.2018. The petitioners have challenged the aforesaid demand notice dated 05.03.2018 and possession notice dated 24.08.2018 before the DRT in Securitisation Application No. 186 of 2019 and the DRT had stayed the recovery proceedings by means of an order dated 12.03.2019.

3. The petitioners have further stated that meanwhile Sri O.P. Agarwal who was Director of the petitioner No. 1 Company, died on 27.05.2019 and the petitioners moved an application for substitution, which was allowed by means of an order dated 18.09.2019. The Securitisation Application No. 186 of 2019 was dismissed as being time barred by means of an order dated 29.10.2021 and an application for review of the aforesaid order is pending before the DRT.

4. The petitioners have further stated that meanwhile the respondent-Bank filed an application under Section 14 of the SARFAESI Act before the District Magistrate, Lucknow and on 28.03.2022, the Additional District Magistrate (Administration), Lucknow passed an order on the said application for taking possession of the petitioners' property.

5. The petitioners had challenged the order dated 28.03.2022 by filing Writ C No. 2192 of 2022 and this Court had passed an order dated 20.04.2022 directing the petitioners to challenge the aforesaid orders before the DRT under Section 17 of the SARFAESI Act.

6. The petitioners then filed Securitisation Application No. 249 of 2022 before the DRT in which notices were issued to the respondent-Bank. During pendency of the said application, on 22.04.2022, the Sub Divisional Magistrate, Sadar, Lucknow issued a letter to the Inspector, Police Station Ghazipur, Lucknow directed him to take possession of the petitioners' property. The petitioners filed an application for interim relief, upon which the DRT passed an order on 28.04.2022 restraining the Bank from taking physical possession of the property till the next date of listing and the matter was posed for 27.05.2022. The aforesaid order was passed in absence of the learned counsel for the Bank and the aforesaid order dated 28.04.2022 contains a subsequent noting that later on learned counsel for the Bank appeared at about 04:00 p.m. and he filed an application for urgent hearing of the matter. Upon which, the matter fixed for 29.04.2022 i.e. the day following the date of the order. On 02.05.2022, the DRT passed an order recording the submission of the learned counsel for the Bank that the loan account has been transferred to Assets Recovery Management Branch of the Bank, which has not been impleaded by the petitioners

and the petitioners had not approached the Tribunal with clean hands and they had suppressed the material facts. The Tribunal ordered the case to be listed on 15.07.2022 for further arguments and the petitioners were directed to correct the particulars of the respondent-Bank in the array of parties. After making the aforesaid narrations, the DRT passed an order that the stay granted to the petitioners is vacated on above facts.

7. The petitioners challenged the aforesaid order dated 02.05.2022 by filing Appeal No. 191 of 2022 before the Debts Recovery Appellate Tribunal (which will hereinafter referred to as "DRAT") and on 20.05.2022, DRAT has passed an order recording the submission of the learned Counsel for the respondent-Bank that the appeal was filed without complying with the fulfilling the requirement depositing 50% of the amount claimed as per Section 18 of the SARFAESI Act and, therefore, is not maintainable and recording the submission made by the learned counsel for the petitioners in reply that the appeal has not been filed against the final order passed under Section 17 of the Act and, therefore, no pre-deposit is required. The DRAT ordered the case to be listed on 28.07.2022 for consideration of the matter of waiver of deposit.

8. The petitioners have filed this writ petition in the aforesaid factual background, challenging the order dated 02.05.2022 passed by the DRAT whereby the stay order dated 28-04-2022 has been vacated, on the ground that the order has been passed hastily, without application of mind and that it will result in the petitioners' property being taken away without adjudication of the respective rights of the parties in the case before the DRT in which the final submissions are going on.

9. Sri Prashant Kumar Srivastava, the learned counsel for the respondent No. 3 & 4 has raised a preliminary objection against the maintainability of the writ petition before this Court sitting at Lucknow on the ground that the DRAT is situated at Allahabad. He has placed reliance on a Full Bench judgment of this Court in **Manish Kumar Mishra Vs. Union of India,** 2020 SCC OnLine All 535 = AIR 2020 All 97.

10. He has further submitted that the order dated 02.05.2022 has been challenged before the DRAT and the writ petition filed during the pendency of the appeal is misconceived. He has also submitted that the petitioner has not made the statutory deposit as required by Section 18 of the SARFAESI Act and, therefore, no order can be passed in the appeal.

11. Replying to the aforesaid objection, Sri Sudeep Kumar, the learned counsel for the petitioners has stated that the petitioners' had taken a loan from the respondent no. 3 Bank situated at Lucknow, for recovery of the aforesaid amount, the Additional District Magistrate (Administration), Lucknow passed an order on 28.03.2022 for taking possession of the petitioners' property situated at Lucknow, in an appeal filed by the petitioners the DRT sitting at Lucknow had passed an interim order on 28-04-2022 and the same has been vacated on 02-05-2022 at Lucknow, which is the cause of action for approaching this Court. He has submitted that judgment in the case of Manish

Kumar Mishra (supra) helps the petitioners.

12. The learned counsel for the respondent-Bank has also submitted that the petitioners had not approached the DRT with clean hands as they had impleaded "Indian Overseas Bank, Lucknow Main Branch, 3 Vidhan Sabha Marg, Lucknow-226001 through its authorized Officer" in the Securitisation Application whereas the petitioners' loan account has been transferred to the Assets Recovery Management Branch which has not been arrayed as a defendant.

13. Refuting this submission, the learned counsel for the petitioners has submitted that the petitioners had taken financial assistance from Indian Overseas Bank, Main Branch, Lucknow and it was Indian Overseas Bank Main Branch, Lucknow which had filed an application under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 for recovery of the aforesaid amount from the petitioners and, therefore, the petitioners had impleaded the Bank with the aforesaid description. He has further submitted that even if the Bank has transferred the account to any of its branch and still the Bank had filed an application under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 in the name of the Branch from which the loan had been taken the petitioners and, therefore, the petitioners cannot be blamed for having arrayed the said Branch. In any case, the defect in description of the parties is always curable and it does not affect the maintainability of the application.

14. I have considered the rival submissions made by the learned counsel for the parties.

15. Regarding the first objection raised by the learned Counsel for the respondent - Bank, I find the petitioners had taken loan from the respondent-bank at Lucknow, the recovery proceedings have been initiated by the respondent-Bank at Lucknow, the Securitisation Application No. 249 of 2022 filed by the petitioners is pending before the DRT at Lucknow and the DRT has passed an interim order dated 28-04-2022 in favour of the petitioners which has been vacated by means of the order dated 02-05-2022 passed by the DRT at Lucknow. In furtherance of the aforesaid order, the Sub Divisional Magistrate, Sadar Lucknow has sent a letter dated 06.06.2022 to the Inspector, In-charge of the Police Station Ghazipur, Lucknow for taking possession of the petitioners' property situated at Lucknow. The petitioners have challenged the order dated 02-05-2022 before the DRAT at Allahabad and they are aggrieved by an order of DRAT whereby the matter has been posted for 28-07-2022.

16. The relevant portion of the Article 226 of the Constitution of India provides as follows:-

"226. Power of High Courts to issue certain writs: *-*

(1) 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*

*(2) 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 i**n 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*

(3) ....."

(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. 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... 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....".***

(Emphasis Supplied)

19. 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 even if the petitioners allege that a part of the cause of action arose within the areas of Oudh.

20. 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".*

21. In **Manish Kumar Mishra Vs. Union of India,** 2020 SCC OnLine All 535 = AIR 2020 All 97, a Full Bench of this Court has explained the law regarding territorial jurisdiction and the difference between "cause of action" and "right of action" in the following words: -

*"**133.** The meaning of the expression "cause of action" as distinct from "right of action", as evolved in terms of the precedents, would go to show that **a right of action is a remedial right affording a redress for the infringement of a legal right and a right of action arises as soon as there is an invasion of rights whereas a cause of action would refer to the set of operative facts giving rise to such right of action**. A person residing anywhere in the country being aggrieved by an order of the Government (Central or State), or authority or person may have a right of action at law but the same can be enforced by invoking the jurisdiction under Article 226 of only that High Court, within whose territorial limits the cause of action wholly or in part arises.*

*134. The "**right of action" being the right to commence and maintain an action is therefore distinguishable from "cause of action" in that the former is a remedial right while the latter would comprise the operative facts giving rise to such remedial right.** The former would be a matter of right and would depend upon the substantive law whereas the latter would be governed by the law of procedure.*

*135. It is, therefore, seen that **a "cause of action" is the fact or corroboration of facts which affords a party right to judicial interference on his behalf. The "cause of action" would be seen to comprise : (i) the plaintiff's primary right and the defendant's corresponding primary duty; and (ii) the delict or wrongful act or omission of the defendant, by which the primary right and duty have been violated. The term "right of action" is the right to commence and maintain action or in other words the right to enforce a cause of action. In the law of pleadings, "right of action" can be distinguished from "cause of action" in that the former is a remedial right while the latter would comprise the operative facts giving rise to such remedial right. The former would be a matter of right and depend on the substantive law while the latter would refer to the bundle of operative facts and would be governed by the law of procedure.***

** *

146. We may therefore observe that Article 226(1) provides the source of power of the High Court as well as its territorial jurisdiction, whereas Article 226(2) amplifies the jurisdiction in relation to a cause of action by providing that the territorial jurisdiction would be exercisable in relation to the territories within which the cause of action, arises, wholly or in part. The cause of action would include material and integral facts and accrual of even a fraction of cause of action within the jurisdiction of the Court would provide territorial jurisdiction for entertaining the petition.

147. The territorial jurisdiction is to be decided on the facts pleaded in the petition and in determining the objection of lack of territorial jurisdiction the Court would be required to take into consideration all the facts pleaded in support of the cause of action without embarking upon an enquiry as to the correctness or otherwise of the said facts. The question whether a High Court has territorial jurisdiction to entertain a writ petition is to be answered on the basis of the averments made in the petition, the truth or otherwise, whereof being immaterial. The expression "cause of

action", for the purpose of Article 226(2), is to be assigned the same meaning as under Section 20(c) CPC, and would mean a bundle of facts which are required to be proved. However, the entire bundle of facts pleaded, need not constitute a cause of action as what is necessary to be proved are material facts on the basis of which a writ petition can be allowed.

148. In order to confer jurisdiction on the High Court to entertain a writ petition, the Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts constitute a cause so as to empower the Court to decide a dispute which has, at least in part, arisen within its jurisdiction. Each and every fact pleaded in the application may not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts are such which have a nexus or relevance with the lis that is involved in the case. Facts, which have no bearing with the lis or the dispute involved in the case would not give rise to a "cause of action" so as to confer territorial jurisdiction on the Court concerned, and only those facts which give rise to a cause of action within a Court's territorial jurisdiction which have a nexus or relevance with the lis that is involved in that case, would be relevant for the purpose of invoking the Court's territorial jurisdiction, in the context of clause (2) of Article 226."

22. Examining the facts of the case in light of the law laid down in the above noted case, I am of the considered opinion that the petitioners' immediate grievance, which compelled them to file the instance Writ Petition arose upon passing of the order dated 20-05-2022 by the DRAT at Allahabad, whereby the matter has been posted for 28-07-2022 without passing any interim order, and, therefore, "the right of action" can be said to have accrued to the petitioners at Allahabad. However, the "cause of action" for filing the Writ Petition, which is the bundle of facts leading to filing of the instant Writ Petition, is that the petitioners' had taken a loan from the respondent no. 3 Bank situated at Lucknow, for recovery of the aforesaid amount the Additional District Magistrate (Administration), Lucknow passed an order on 28.03.2022 for taking possession of the petitioners' property situated at Lucknow, in an appeal filed by the petitioners the DRT sitting at Lucknow had passed an interim order on 28-04-2022 and the same has been vacated on 02-05-2022 at Lucknow. Therefore, it cannot be said that the cause of action for approaching this Court, or at least a part thereof, has not accrued to the petitioners at Lucknow and I reject the preliminary objection raised by the learned Counsel for the respondent - Bank that the writ petition filed by the petitioners is not maintainable before this Court sitting at Lucknow

23. Regarding the second objection raised by the learned counsel for the respondents that the petitioners have not made statutory deposit required under Section 18 of the SARFAESI Act. The learned counsel for the petitioners has submitted that the Section 18 of the SARFAESI Act requires a deposit of 50% of the amount of debts due to be deposited by any person aggrieved by an order made by the DRT under Section 17 of the SARFAESI Act. He has submitted that the petitioners' application under Section 17 of the SARFAESI Act is still pending, and, therefore, the provision of making a deposit of 50% of the amount does not apply to the appeal filed by the petitioners. He has

further submitted that the petitioners have filed an application seeking exemption from making a deposit and the DRAT has fixed 28.07.2022 for disposal of the aforesaid application.

24. Regarding the objection raised by the learned Counsel for the respondent-Bank in respect of the petitioners having impleaded the Indian Overseas Bank, Main Branch, Lucknow, I find that the petitioners had taken the financial assistance from Indian Overseas Bank Main Branch, Lucknow and it was the said Branch which had filed the application against the Petitioners under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 for recovery of the aforesaid amount from them and, therefore, the petitioners had impleaded the Bank with the aforesaid description. In any case, the Asset Recovery Management Branch of the Bank is not a separate juristic person and is not a legal entity distinct from the Bank. In case, during pendency of the case the Bank has transferred the account to any of its branch and still the Bank had filed an application under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 in the name of the Branch which had granted the loan to the petitioners, the petitioners cannot be blamed for having arrayed the said Branch as a respondent. Even if there is a defect in the description of a arty, it is always curable and it does not affect the maintainability of the application.

25. The petitioners have approached the DRAT for redressal of their grievance against the order dated 02-05-2022 whereby the interim order dated 28-04-2022 granted in their favour has been vacated by the DRT without recording any reason or satisfaction for doing the same and although there is an imminent threat of the petitioners being dispossessed from their property, the DRAT has fixed the matter for 28-07-2022. This indicates that the alternative remedy available before the DRAT has proved not to be an efficacious remedy. Even otherwise, the existence of an alternative remedy is not an absolute bar against this Court's discretionary jurisdiction under Article 226 of the Constitution of India. The circumstances of the case warrant interference by this Court in exercise of its extraordinary jurisdiction.

26. As the DRT had granted an interim protection to the petitioners by means of the order dated 28-04-2022, which has been vacated by means of the order dated 02-05-2022 passed by the DRT merely by recording the submissions of the parties and without recording any finding or satisfaction of its own and keeping in view the fact that the final arguments in the case have already commenced and the same are going on and the case has been fixed for hearing further arguments, this Court finds that in case the petitioners are dispossessed from their property after commencement of the final arguments and before conclusion of the same and passing of a final verdict, it would occasion a failure of justice.

27. In view of the aforesaid discussion, this Writ Petition is partly allowed. The order dated 02-05-2022 passed by the DRT in S.A. No. 249 of 2022 is hereby quashed and it is provide that the order dated 28-04-2022 passed by the DRT in the aforesaid shall continue to remain in operation till a final order is passed after conclusion of arguments of the parties.

28. The DRT is directed to proceed with the hearing of S.A. No. 249 of 2022 expeditiously and to make an endeavor to

conclude the same as early as possible. All the parties to the case are directed to co-operate in expeditious disposal of the case. In case the petitioners do not co-operate in expeditious disposal of the matter and they seek any unnecessary adjournments, it will be open to the DRT to pass suitable orders in accordance with the law taking into consideration all the relevant facts and circumstances.

(2022)06ILR A397
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters U/A 227 No. 3265 of 2022 (Civil)

Smt. Rajani ...Petitioner
Versus
Vipul Mittal & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Aditya, Sri Radhey Shyam Dwivedi

Counsel for the Respondents:
Ms. Shreya Gupta, Sri Ravi Anand Agarwal

(A) Civil Law – Constitution of India, Article 227 – Civil Procedure Code, 1908 – Section - 151, Order - 17 Rule - 1, Order - 9 Rule – 6: - **Application for Recall of orders without Affidavit in support of delay Condonation – Rejected – Revision Dismissed – defendants are given enough opportunity - impugned orders are proper. (Para 5, 6)**

(B) Civil Law – Society Registration Act, 1860: - **Bar Associations are registered societies - established for positive contribution in welfare of its learned members - they cannot obstruct or interfere in the Sovereign function of the Court. (Para 7, 9)**

Writ Petition - dismissed. (E-11)

List of Cases cited: -

1. Ex-Capt. Harish Uppal v. U.O.I. & anr., (2003) 2 SCC 45

2. Common Cause, a registered society & ors. v. U.O.I. & ors., (2006) 9 SCC 295

3. Krishnakant Tamrakar v. St. of M.P., (2018) 17 SCC 27

4. District Bar Association, Dehradun *Vs* Ishwar Shandilya & ors., (2020) 17 SCC 672

(Delivered by Hon'ble J.J. Munir, J.)

This petition is directed against the order dated 13.04.2022 passed by the Additional District Judge, Court No. 5/Special Judge (U.P. Gangsters and Anti-social Activities (Prevention) Act, 1986) Muzaffarnagar, dismissing Civil Revision No. 18 of 2022 and affirming an order dated 07.03.2022 passed by the Civil Judge (Senior Division) Fast Track Court, Muzaffarnagar in Original Suit No. 372 of 2013, rejecting the petitioner's application 85C seeking to recall orders dated 26.10.2021 and 14.12.2021.

2. By the order dated 26.10.2021, an application for adjournment by the defendant has been rejected and his opportunity to cross-examine P.W.1 closed. The suit was directed to come up for arguments. By the order dated 14.12.2021, in the absence of the defendant, the suit was directed to come up for arguments ex-parte on 03.01.2022. A perusal of the record shows that Original Suit No. 372 of 2013 was filed by Vipul Mittal against Yogendra Kumar Garg before the Court of the Civil Judge (Senior Division), Muzaffarnagar for partition of his half share in House No. 212/1, situate at

Mohalla Civil Lines, West, Muzaffarnagar, detailed in Schedule A to the plaint. The plaintiff sought a decree in terms that after the determination of his share, the suit property be partitioned by metes and bounds and separate possession delivered to him. A decree for permanent injunction was also sought to the effect that the defendants, prior to the partition being effected, may not mortgage the suit property or alter the nature and character of the house in dispute. The original defendant to the suit, Yogendra Kumar Garg, appears to have passed away pending suit and was substituted by his heirs and L.Rs., numbering five, and arrayed as defendant nos. 1/1 to 1/5 to the suit. The suit is one of the year 2013. The suit has proceeded to trial and it appears that the plaintiff had filed his evidence on affidavit and 16.10.2021 was the date scheduled for cross-examination of P.W.1. On the said date, the Counsel for the defendant made an application for adjournment, which was opposed by the plaintiff. The application for adjournment was rejected and opportunity to cross-examine P.W.1 was closed. The suit was directed to come up for arguments on 09.11.2021. On 09.11.2021, 17.11.2021 and 01.12.2021, the suit was adjourned eventlessly. It was adjourned on 09.11.2021 because the Presiding Officer was on leave, but the parties were also absent. On 17.11.2021, it was adjourned because the learned Members of the Bar had abstained from judicial work. Again, on 01.12.2021, the case was adjourned because the Presiding Officer was on leave. On 01.12.2021, it was adjourned to 14.12.2021. On 14.12.2021, when the suit came up for arguments, the Counsel for the plaintiff was present, but no one appeared on behalf of the defendant. It was in those circumstances that the Trial Court directed that the suit may come up for arguments ex-parte on 03.01.2022. In the said order, it was recorded that the Bar Association has proposed no work from 17.12.2021, due to elections of the Bar.

3. By the application dated 04.01.2022, the defendant has sought recall of the order dated 14.12.2021 that directs the suit to come up for address of arguments ex-parte. This application bears Paper No. 85C. By the other application dated 07.03.2022, the defendant has sought recall of the order dated 26.10.2021 that has closed the defendant's opportunity to cross-examine P.W.1 and once again asked for recall of the order dated 14.12.2021, setting down the suit for address of arguments ex-parte. It is these applications that the Trial Judge has rejected vide his order dated 07.03.2022.

4. Heard Mr. Anil Kumar Aditya, learned Counsel for the petitioner in support of the motion to admit this petition to hearing and Ms. Shreya Gupta, learned Counsel appearing for the plaintiff-respondents at length. The records have been carefully perused.

5. The impugned order passed by the Trial Judge shows that he has rejected the Application 85C seeking recall of the order dated 14.12.2021 alone, that is to say, the application dated 04.01.2022 on the ground that there is no order dated 14.12.2021. That remark or reason to reject by the Trial Court is not borne out from the record. There is definitely an order dated 14.12.2021 passed by the Trial Court, directing the suit to come up for address of arguments ex-parte. So far as the other application is concerned, the Trial Court has dismissed it on the ground that the order dated 14.12.2021 is non-existent and

the order dated 26.10.2021 ought not to be recalled, because the defendant is merely trying to delay the trial. It has also been remarked that the Application 85C (the application dated 07.03.2022 that seeks recall of both orders dated 26.10.2021 and 14.12.2021) is not supported by an affidavit. It is for the reason that Application 89C has been rejected. The Revisional Court has upheld the orders impugned on the ground that both the applications 85C and 89C have been made much beyond limitation, without an application or prayer for condonation of delay; but, this is one facet of the reasoning that the Revisional Court has adopted. The Revisional Court has looked wholesomely into the record to arrive at a conclusion that the defendant is attempting to delay trial of the suit, which has been expedited under orders of this Court dated 14.09.2018 passed in some supervisory proceedings. It appears that there is some order of this Court, directing the suit to be decided within two years and that schedule was violated because of the dilatory tactics adopted by the defendant. It is bearing all these facts in mind that the Revisional Court has declined to interfere with the orders made by the learned Trial Judge.

6. This Court has carefully looked into the order-sheet. It must be remarked that indeed, there have been determined efforts to delay trial of the suit. On 08.01.2021, the plaintiff's evidence on affidavit was accepted and the suit was scheduled for cross-examination of P.W.on 28.01.2021. From 28.01.2021 to 26.10.2021, 18 dates were fixed prior to 26.10.2021, but for one reason or the other, the defendant did not cross examine P.W.1. The Trial Judge in between 28.01.2021 and 26.10.2021 has taken note of the orders of this Court in the order recorded on 02.08.2021, saying that the High Court has issued directions for concluding the trial within two years, and further, that the suit has been assigned to him by the District Judge. It is not that the order dated 26.10.2021, closing the defendant's opportunity has been passed surreptitiously or suddenly. The defendant has been given enough opportunity by the orders passed by the Trial Court on earlier dates, and also, by all those ominous resolutions of the Bar, directing its members to abstain from judicial work. It must be remarked that Resolutions of the Bar, asking its Members to abstain from judicial work, are absolutely unlawful, in view of the directions of the Supreme Court in **Ex-Capt. Harish Uppal v. Union of India and another1, Common Cause, a registered society and others v. Union of India and others2, Krishnakant Tamrakar v. State of Madhya Pradesh, (2018) 17 SCC 273 and District Bar Association, Dehradun through its Secretary v. Ishwar Shandilya and others4**. Such resolutions being per se illegal, no litigant can derive any advantage out of these. The orders passed on 01.09.2021, 13.09.2021, 14.09.2021, 08.10.2021 and 26.10.2021 must be taken particular note of, as these immediately preceded the order dated 26.10.2021 passed by the learned Trial Judge. These orders are extracted below :

01.09.2021

Called out.

Pf. did not turn up.

Counsel on behalf of the df. Present and filed adjournment 82D stating that O.S. 982/10 is a connected case and is pending in the Court of Civil Judge S.D. df. are trying to get the connected case transferred to one Court. Hence adjournment is moved.

Application allowed in interest of justice.

Put up on 13-09-2021.

13-09-2021

Called out.

None present.

Proposal of Bar to abstain from judicial work.

Hon'ble H.C. has pass direction to dispose off the case within 2 years. Even on repeated requests to the counsels, no sides are appearing.

In the interest of justice, last opportunity is granted to parties. Put up on 24-09-2021.

24.09.2021

पुकार करायी। पक्षकार अनुपस्थित। अधि०गण कार्य से विरत है। पत्रावली मा० उच्च न्यायालय द्वारा दिशा निर्देशीत है। पक्षकारों को अंतिम अवसर दिया जाता है वाद वास्ते F.O. दिनांक 08.10.2021 को पेश हो।

ह० अ०/-

08.10.2021

पुकार करायी गयी। स्थगन प्रतिवादी 83घ स्वीकृत। वाद वास्ते F.O. दिनांक 20.10.2021 को पेश हो।

ह० अ०/-

20.10.2021

पुकार करायी। वादी उपस्थित। अधि०गण कार्य से विरत है। वाद वास्ते F.O. / जिरह दिनांक 26.10.2021 को पेश हो।

ह० अ०/-

7. This Court takes particular notice of the order dated 13.09.2021, where the learned Trial Judge has observed that the High Court has directed the suit to be decided within two years, but despite repeated requests to the learned Counsel, no one is appearing. This was so because the Bar had abstained from judicial work. This conduct of the Bar is not only reprehensible, but also downright illegal. The Bar Association is, after all, a registered society and cannot hold up the functioning of a Sovereign Court by their resolutions. Whatever they do, they do it at the peril of the litigants whose interest their Members represent. If the learned Counsel refuse to appear and so do the parties, the Court is supposed to pass orders in accordance with the Code of Civil Procedure, 1908 that provides for orders to be made when parties, both or one, are absent. The impugned order passed on 26.10.2021, which follows the order dated 10.10.2021 recorded hereinabove, reads :

26.10.2021

Called out.

Pf. along with Counsel present.

Counsel of Df. filed an adjournment 84D which is strongly opposed by pf.

On perusal it is observed that df. is continuously delaying the case by not turning up. In the light of conduct of df., opportunity to cross examine PW1 is closed. Adjournment rejected.

Put up on 09/11/2021 for argument.

8. The other order of which recall was sought is the one dated 14.12.2021. It reads :

14.12.2021

Called out.

Counsel on behalf of pf. present.

Df. did not turn up.

Put up on 03-01-2022 for ex-parte arguments, as BAR proposed no work from 17-12-2021 due to elections of BAR.

9. Again on 14.12.2021, the Members of the Bar abstained from judicial work, because Bar Elections were going on. It is beyond imagination that the work of a Court would be brought to a grinding halt, because the elections of a registered society are to be held. No doubt, learned Members of the Bar are superior officers of the Court, but the Bar Association is no more than a registered society established for the welfare of the learned Members of the Bar and to positively contribute to the functioning of its individual Members. The Bar Association is not established to obstruct functioning of the Court and interfere with the discharge of its sovereign functions. The Trial Court was, therefore, absolutely right when it made the order dated 14.12.2021, directing the suit to come up for address of arguments ex-parte.

10. It must be noted that on 14.12.2021, learned Counsel for the plaintiff was present. Had the learned Counsel for the plaintiff not been present on 14.12.2021, the Trial Court would have dismissed the suit in default also. But, it was the defendant's Counsel alone who was absent and not the plaintiff. The order dated 14.12.2021, like the order dated 26.10.2021, is unexceptionable. It must be noted that on 26.10.2021 also, the plaintiff, along with his Counsel, was present. The Revisional Court has upheld the order on the ground of limitation, besides taking the conduct of the defendant into account, though not eloquently said in the order impugned passed by the learned Additional District Judge.

11. For the added reasons mentioned, this Court concurs in the conclusion reached by the two Courts below unanimously.

12. In the result, this petition **fails** and stands **dismissed.**

13. There shall, however, be no order as to costs.

14. The Registrar General is directed to circulate this order to all the learned District Judges, the Presiding Officers of Land Acquisition, Rehabilitation and Resettlement Tribunals, the Principal Judges of Family Courts, the Presiding Officers of Motor Accident Claim Tribunals and the Chairman, Board of Revenue.

(2022)06ILR A401
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.06.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 61 of 2010
connected with
Criminal Appeal No.120 of 2010

Sarafat & Anr. ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rahul Agnihotri, Sri Amrendra Singh, Sri Anil Kumar Mishra, Sri Brijesh Kumar, Sri Kamaljeet Mani Mishra, Sri Nadeem Murtaza, Sri Vivek Kumar Singh

Counsel for the Respondent:
G.A.

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Sections 302, 504, 506 , The Code of criminal procedure, 1973 - Section 161,313 , the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (2) (v).

Three persons murdered father of informant (P.W.1, witnesses of fact) - by inflicting injuries of sword upon his neck - time of incident 18/19.4.2004 - small kerosene oil lamp (Dibbi) was burning - cause of death - autopsy report of the deceased - shock and haemorrhage as a result of ante-mortem injuries – trial court acquitted convicts/appellants for the offences under Sections 504, 506 (2) I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act - convicted and sentenced them under Section 302 read with Section 34 I.P.C. **(Para -2,6,11,)**

(B) Criminal Law - Delay in lodging F.I.R. - 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 - later substantiated by the evidence, unless there are indications of fabrication - held - some delay in lodging F.I.R. - same cannot be attributed to the informant or can be said to be deliberate with the object of implicating the convicts/appellants - has been satisfactory explained by P.W.1 and P.W.2.**(Para -31,35)**

(C) Criminal Law - Evidence of 'interested witnesses' - mere fact that relatives of the deceased are the only witnesses is not sufficient to discredit their cogent testimonies - distinction between "interested" and "related" witnesses - mere fact that the witnesses are related to the deceased does not impugn the credibility of their evidence if it is otherwise credible and cogent - held - no basis to discredit the presence of the three eye-witnesses i.e. P.W.1, P.W.2 and P.W.3 - nothing has been elicited out in the course of the cross-examination to doubt their presence - nature of the injuries found to have been sustained by the deceased is consistent with the account furnished by the eye-witnesses. **(Para - 39,40)**

(D) Criminal Law - Contradictions in the statements of the eye-witnesses P.W.1, P.W.2 and P.W.3 - the Indian Evidence Act, 1872 - Section 145 - manner in which cross-examination of the witnesses is to be made as to any previous statement made in writing - only contradictions in material particulars and not minor contradictions can be a ground to discredit the testimony of the witnesses - held - version given by P.Ws-1, 2 and 3 broadly bears up the same story without any vital contradictions and therefore, their evidence is found to be trustworthy. **(Para - 42,46,47)**

(E) Criminal Law - Motive - held - trial Court rightly concluded that there was motive on the part of the convicts/appellants to commit the murder of the deceased. **(Para - 50)**

(F) Criminal Law - Non-examination of Independent Witness - merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated - examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case - conviction can even be based on the testimony of a sole eyewitness - held - P.W.1, P.W.2 and P.W.3 have fully supported the case of the prosecution and, therefore, non-examination of the aforesaid persons shall not be fatal to the case of the prosecution. **(Para -52,53,54,55,56)**

(G) Criminal Law - Source of Light on Spot - 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 an 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 - held - non-mentioning the availability of '*Dibbi*' (a kerosene oil lamp) and torch by the informant P.W.1 in the written report is not fatal for the prosecution. **(Para - 58,59)**

(H) Criminal Law - Medical Evidence - FIR is certainly the starting point of the investigation, but it is well within the rights of the prosecution to produce witness statements as they progress further into the investigation and unearth the specific roles of accused persons - FIR only sets the investigative machinery, into motion - plea of the appellants in this regard has no substance - evidence of P.W.1 & P.W.2 shows that convicts/appellants dragged the deceased on the way; pushed him on the ground; and assaulted him with sword - conclusion of trial court - injuries no. 5 and 6 i.e. contusions could be attributable to the deceased - held - it cannot be said that medical evidence does not corroborate the testimonies of the prosecution witnesses.**(Para -66,67,68)**

HELD:-Prosecution has proved its case beyond reasonable doubt against convicts/appellants and their conviction and sentence for the murder of deceased in the intervening night of 18/19.4.2004 by the impugned judgment is fully justified.**(Para - 69,70)**

Criminal Appeals dismissed. (E-7)

List of Cases cited:-

1. Ravinder Kumar & anr. Vs St. of Punj. , AIR 2001 SC 3576

2. St. of H.P. Vs Gian Chand , AIR 2001(1) SC 2075

3. Mohd. Rojali Vs St. of Assam , (2019) 19 SCC 567

4. V. K. Mishra & anr. Vs St. of Uttarakhand & anr. , (2015) 9 SCC 588

5. Narayan Chetanram Chaudhary & anr. Vs St. of Mah. , (2000) 8 SCC 457

6. Surinder Kumar Vs St. of Punj. , (2020) 2 SCC 563

7. Rizwan Khan Vs St. of Chhattisgarh , (2020) 9 SCC 627

8. Gulam Sarbar Vs St. of Bihar , (2014) 3 SCC 401

9. St. of U.P. Vs Naresh & ors. , (2011) 4 SCC 324

10. Nathuni Yadav Vs St. of Bihar , (1998) 9 SCC 238

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

(A) Introduction

(1) Three accused persons, Sarafat, Noor Mohammad and Ajay, were tried by the Additional Sessions Judge/F.T.C.-4, Lakhimpur Kheri in Sessions Trial No. 879 of 2004 : *State Vs. Sarafat and two others*, arising out of Case Crime No. 130 of 2004, under Sections 302, 504, 506 Indian Penal Code, 1860 (in short, **"I.P.C.")** and Section 3 (2) (v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short, **"S.C./S.T. Act"**), Police Station Nighasan, District Kheri.

(2) Vide judgment and order dated 14.12.2009, the learned Additional Sessions Judge/F.T.C.-4, Lakhimpur Kheri, acquitted **Sarafat, Noor Mohammad and Ajay,** for the offences under Sections 504, 506 (2) I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act, however, convicted and sentenced them under Section 302 read with Section 34 I.P.C. to undergo life imprisonment and fine of Rs.7,000/- each.

In default of payment of fine, to undergo additional two years imprisonment.

(3) Aggrieved by their aforesaid conviction and sentence, convicts/ appellants, **Sarafat and Noor Mohammad**, preferred before this Court Criminal Appeal No. 61 of 2010, whereas convict/appellant Ajay preferred Criminal Appeal No. 120 of 2010.

(4) Since both the above-captioned appeals arise out of a common factual matrix and impugned judgment and order dated 14.12.2009, hence this Court is disposing of the above-captioned appeals by a common judgment.

(B) Factual Matrix

(5) Shortly stated the prosecution case runs as under :-

Informant Brahmadeen (P.W.1) had filed a written report (Ext. Ka.1) before Police Station Nighasan, District Kheri on 19.04.2004, at 10:00 a.m., alleging therein that in the intervening night of 18/19.04.2004, at about 02:00 a.m., Sarafat, Noor Mohammad and Ajay (convicts/appellants) came in front of his house and started to drink water by plying handpump installed in front of his house, upon which his father (deceased Kadhiley) objected. Thereafter, all three persons (convicts/appellants) used abusive language against his father (deceased Kadhiley) and when his father (deceased Kadhiley) objected them from use of abusive language, then, all three persons (convicts/appellants) brought his father (deceased Kadhiley) towards road. Seeing that, he (P.W.1) and his sister Maina Devi (P.W.2) ran to save their father (deceased Kadhiley) but all three persons (convicts/appellants) murdered his father (deceased Kadhiley) with sword by inflicting it on his neck. On hue and cry, Gauri Shanker (P.W.3), Tulsi and a large number of other persons came there and challenged the convicts/appellants, then, all three persons (convicts/ appellants), while threatening them to kill, ran towards south direction of the village. On account of fear, he did not go to lodge report in the night, however, he went to lodge report in the morning.

(6) The informant (P.W.1) got the aforesaid report scribed from one person, namely, Ramesh, outside the police station Nighasan, district Kheri, who after scribing, read it over to him. He, thereafter, affixed his thumb impression on it and lodged at police station Nighasan, district Kheri.

(7) The evidence of H.C. Bachnesh Singh (P.W.5) shows that on 19.04.2004, he was posted as Constable Moharrir at police station Nighasan, district Kheri. On the said date, at 10:00 a.m., on the basis of written report (Ext. Ka.1), he prepared chik F.I.R., bearing No. 84 of 2004, and registered a case crime no. 130 of 2004, under Sections 302, 504, 506 I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act, against the accused persons. He proved F.I.R. (Ext. Ka.10).

In cross-examination, P.W.5 had deposed that no date has been mentioned in the order passed by the Circle Officer on the Chik F.I.R. He denied the suggestion that F.I.R. was lodged after 10:00 a.m.

(8) A perusal of the chik FIR shows that the distance between the place of incident and police station Nighashan, district Kheri was 13 kilometers. It is

significant to mention that the perusal of chik FIR also shows that on its basis, case crime no. 130 of 1994, under Sections 302, 504, 506 I.P.C. and Section 3 (2) (v) of S.C/S.T. Act was registered against convicts/appellants, Sarafat, Noor Mohammad and Ajay.

(9) The evidence of P.W.4-S.I. Satyendra Kumar Verma shows that on 19.04.2004, he was posted as Sub-Inspector at Police Station Nighasan. On the said date, he sealed the corpse of the deceased Kadhiley and sent it for post-mortem after preparing "panchayatnama' and other relevant papers viz speciman seal, challan lash, paper no.33, photo lash, report to C.M.O. He proved Ext. Ka.2 to Ext. Ka. 8. He collected blood stained soil and plain soil in separate containers, sealed it and prepared recovery memo (Ext. K.9) in the presence of witnesses.

In cross-examination, P.W.4 had denied the suggestion that chik F.I.R. was not with him till the time of "panchayatnama'. He also deposed that Circle Officer met him at the place of the incident but he did not remember the time of arrival of Circle Officer at the place of the incident.

(10) The evidence of P.W.7-Athar Hussain shows that the investigation of Case Crime No. 130 of 2004, under Sections 302, 504, 506 I.P.C. and Section 3 (2) (v) of S.C./S.T. Act was conducted by Circle Officer of Polia, namely, Shri Ashok Kumar Verma and site plan of the aforesaid case (Ext. Ka. 13) was in his handwriting and signature. He identified the signature and handwriting of CO Shri Ashok Kumar Verma. He further deposed that charge-sheet (Ext. Ka.14) was also in the handwriting and signature of CO Shri Ashok Kumar Verma.

In cross-examination, P.W.7 had deposed that Circle Officer Ashok Kumar Verma was posted in the office of D.G.P. Brahmdeen (P.W.1), in his statement under Section 161 Cr.P.C., stated that three persons murdered his father by inflicting injuries of sword upon his neck. At the time of the incident, small kerosene oil lamp (Dibbi) was burning.

(11) The post-mortem of the corpse of the deceased Kadhiley was conducted on 20.04.2004, at 03:00 p.m., by Dr. J.P. Bhargav (P.W.6), who found on his person the ante-mortem injuries, enumerated hereinafter :-

1. I.W. 3 cm x 1 cm x bone deep over left ear.

2. I.W. 3 cm x 1 cm x bone deep over Rt. ear.

3. I.W. 1 cm x 1 cm x muscle deep over upper lip just below nose.

4. I.W. 3 cm x 1 cm x bone deep over lower lip and below front 3 incisor teeth found cut.

5. Contusion 30 cm x 20 cm over front of chest below Rt. collor bone on dissection underlying 1st to 4th ribs on both sides found fractured. Both pleurae, both lungs found lacerated & 1 litre clotted and fluid blood present in chest cavity.

6. Contusion 15 cm x 6 cm over Rt. side of head and 3 cm above Rt. ear. Underlying Rt. temporal parietal bone, occipital bone & left temporal & parietal

bone found fractured. Brain and its membrane found lacerated."

The cause of death spelt out in the autopsy report of the deceased Kadhiley was shock and haemorrhage as a result of ante-mortem injuries.

(12) It is significant to mention that in his deposition in the trial Court, Dr. J.P. Bhargav (P.W. 6) has reiterated the said cause of death and stated that ante-mortem injuries suffered by the deceased person could be attributable by a sharp edged weapon like sword on 18/19.04.2004 at 2:00 a.m. He also deposed that the ante-mortem injuries of the deceased could also be caused during altercation or by pushing or hit by a hard object. He proved the post-mortem report (Ext. Ka. 12).

In cross-examination, P.W.6 had deposed that it is clear from the ante-mortem injuries that ante-mortem injuries could be attributable by two types of objects like sharp edged weapon and blunt object. Injuries no. 5 and 6 could be attributable when a person be hit by a big stone or became injured on falling on it.

(13) The case was committed to the Court of Sessions by the Chief Judicial Magistrate, Lakhimpur Kheri on 19.08.2004 and the trial Court framed charges against appellants under Sections 302/34, 504, 506 (2) I.P.C. and Section 3(2) (v) of S.C./S.T. Act. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(14) During trial, in all, the prosecution examined seven witnesses viz. P.W.1-Brahmadeen, who is the informant of the case and son of the deceased Kadhiley; P.W.2-Maina Devi, who is the daughter of the deceased, P.W.3-Gauri Shanker, who is the nephew of the deceased Kadhiley, P.W.4-S.I. Satyendra Kumar Verma, who has prepared "panchayatnama', photo lash, challan lash etc. and sent the corpse of deceased Kadhiley for post-mortem; P.W.5-H.C. Bachnesh Singh, who has lodged F.I.R. (Ext. Ka.10) on the basis of the written report (Ext. Ka.1); P.W.6-Dr. J. P. Bhargav, who conducted the post-mortem of the corpse of the deceased Kadhiley; and P.W.7-Athar Hussain, who has proved the fact that the investigation of the case was conducted by CO Sri Ashok Kumar Verma.

(15) Reverting to the testimony of the witnesses of fact, P.W.1-Brahmdeen, who is the informant of the case and son of the deceased Kadhiley, had deposed before the trial Court in his examination-in-chief that before one year ago, at 02:00 a.m., when Sarafat, Noor Mohammad and Ajay (convicts/appellants) were drinking water by plying handpump installed near to his house, his father (deceased Kadhiley) made objection, upon which convicts/appellants used abusive language against his father Kadhiley (deceased). Thereafter, when his father Kadhiley (deceased) asked the convicts/appellants not to use abusive language, convicts/appellants brought his father towards road. After that, when he (P.W.1) and his sister Maina (P.W.2) ran to save their father, then, convicts/appellants murdered their father by inflicting injuries on the neck of their father with sword. Meanwhile, Gauri Shanker (P.W.3) and Tulsi came there and upon being challenged by them, the convicts/ appellants fled away towards south direction threatening them. Thereafter, on account of fear, he did not go to lodge the report in the night. In the morning, he got the report scribed from a person outside the

police station on his own dictation and after scribing, the scribe read it over to him. He, thereafter, affixed his thumb impression on it and lodged it at police station Nighasan. He proved the written report (Ext. Ka.1).

In cross-examination, P.W.1-Brahmadeen had deposed that on the date and time of the incident, his mother Shakuntala, his brother Sunder Lal and his wife went to attend marriage function of brother-in-law of his brother Sunder Lal at Munna Purwa, which is situated at a distance of 3 Kms. from his village. He, therefore, sent an information of the incident to them at 06:00 a.m. at village Munna Purwa, however, he deposed that he did not remember from whom the said information was sent to Munna Purwa. All the aforesaid family members came from Munna Purwa at 07:00 a.m. After reaching home, his brother Sunder Lal enquired from him about the incident. He further deposed that when his brother Sunder Lal came at home, he went after one hour of sunrise to police station Nighasan, which is situated about 18 Kms. away from his village, on foot and reached Nighasan at about 09:00 a.m. On the crossroad of Nighasan, he found a person named Ramesh. He narrated the whole incident to Ramesh, who after bringing paper and pen from stationery shop, scribed the report on his dictation. After that he affixed his thumb impression on the report and proceeded to lodge it to police station Nighasan. He further deposed that half an hour was spent in scribing the written report and after that he went to police station, where he sat about half an hour and thereafter, report was lodged. After lodging the report, the Inspector came along with him at the place of occurrence on Jeep at 11:30 a.m. The Circle Officer did not come with the Inspector.

In cross-examination, P.W.1 had deposed that he went from the police station before the Inspector through bicycle. He went alone to lodge the report and returned back from there alone. He came home at about 12:00 O'clock. After one hour of reaching his house, the Inspector came. The corpse was lying there till he (P.W.1) and Inspector reached there. The Inspector sealed the corpse before him.

P.W.1 had further deposed in his cross-examination that eight years ago, a countrymade pistol 12 bore was not recovered from him. However, he went to jail in relation to a case pertaining to the said pistol and that case is still going on. Before 11 years ago, his father had lodged a case under Section 307 I.P.C. against Kamlesh and his son. The father of Ajay (convict/appellant), namely, Kamlesh, was the forest guard in his area and after that he became Forester therein. He denied the suggestion that he and his father Kadhiley were caught by Kamlesh while cutting wood in the forest. He also denied the suggestion that after cutting wood, he supplied that to Nepal. He also denied the suggestion that due to monitoring by Kamlesh of his family, his business of wood was closed. However, he himself stated that he went to the forest to cut *''wasti'* (by which wood is collected).

P.W.1 had further deposed in his cross-examination that hand-pump was installed 10-12 steps to the southern direction of the corridor. Anyone can drink water from handpump. His house and thatch are adjacent to corridor and his house is at a distance of 5-6 steps north of it. He was not living in this house. The house in which he was living, was 5-6 steps north of that house and at the time of incident, he was living in this house. His

father Kadhiley (deceased) and his sister Maina Devi (P.W.2) used to live in thatch adjacent to corridor and none else were living there. First of all, sound of screaming of his father Kadhiley (deceased) came and after that sound of screaming of his sister Maina Devi (P.W.2) came. Maina Devi (P.W.2) was with his father. When he reached there, he saw the three accused (convicts/appellants) were assaulting his father. He saw a sword in the hand of Sarafat (convict/appellant no.1) and he did not see any weapon with the other accused. He saw Sarafat only (convict/appellant no.1) cutting his father's neck with sword and other two accused (Noor Mohammad and Ajay) caught hold his father Kadhiley (deceased). He did not see all three accused persons inflicting injuries on the neck of his father with sword.

P.W.1 had further deposed in his cross-examination that at the time of the incident, "Dibbi' (a kerosene oil lamp), which was placed on *''Kathla'* (box made with soil), was burning inside the thatch. The sword injuries were inflicted upon Kadhiley (deceased) after his falling on earth. When sword was inflicted upon Kadhiley (deceased), Kadhiley (deceased) was fallen flatways. Except sword, none of the convicts/appellants were having lathi and danda. He did not remember the number of sword blows inflicted upon the deceased Kadhiley.

P.W.1 had further deposed in cross-examination that Noor Mohammad and Sarafat (convicts/appellants) were working in Forest Department. Before the incident, he (P.W.1) and his father Kadhiley (deceased) brought small pieces of wood, then, Noor Mohammad and Sarafat (convicts/appellants) caught them (P.W.1 and his father Kadhiley). He denied the suggestion that as Noor Mohammad and Sarafat (convicts/appellants) restrained him (P.W.1) from bringing wood, hence he falsely implicated them.

(16) P.W.2-Maina Devi, who is the sister of the informant P.W.1 Brahmadeen and daughter of the deceased Kadhiley, had deposed in her examination-in-chief that hand-pump was stationed in front of her house. One year and one month ago, at 02:00 a.m., Sarafat, Noor Mohammad (convict/appellant) of her village and their companion Ajay (convict/appellant) were drinking water by plying handpump. When her father (deceased Kadhiley) made objection to it, convicts/appellants used abusive language against him. Thereafter, her father Kadhiley asked the convicts/appellants not to use abusive language, then, convicts/appellants brought her father (Kadhiley). Thereafter, she and her brother Brahamadeen (P.W.1) ran to save their father Kadhiley and raised alarm. On alarm, Gauri Shanker (P.W.3) and Tulsi came there. Meanwhile, three accused (convicts/appellant) murdered her father Kadhiley by cutting neck of her father (Kadhiley) with sword. Thereafter, on challenging, accused persons (convicts/appellants), while threatening to kill them, fled away towards south direction.

In cross-examination, P.W.2 had deposed that at the time of the incident, she did not solemnize her third marriage. After the death of her second husband, she used to reside at her parents' home (ek;dk) and not at her in-laws' home. Her relation with in-laws was cordial. It is not so that in-laws had driven away her. Her second husband hanged himself.

P.W.2 had further deposed in her cross-examination that when police reached

at the place of occurrence, she was present near the deadbody of her father (Kadhiley). The police did not record the statement of her brother Brahmadeen (P.W.1) before her. After 2½ months of the incident, the police recorded her statement and during 2½ months, he used to reside at her parental home and the police came at her parental home frequently.

P.W.2 had further deposed that her brother (P.W.1) did not go to lodge report in the night. She further deposed that her brother (P.W.1) was going to lodge report but her brother (P.W.1) saw the accused persons barricading the way, hence her brother returned back to home. She further deposed that when she saw the convicts/appellants assaulting her father, at that moment, her father was lying on the back. Noor Mohammad (convict/appellant) caught hold the leg of her father Kadhiley (deceased); Ajay (convict/appellant) caught hold the hand of her father Kadhiley; Sarafat (convict/appellant) assaulted her father with sword. Sarafat (convict/appellant) inflicted three blows of sword upon her father Kadhiley; one on her father's neck; second one on her father's nose; and third one was, the sword was pierced on her father's ear. Except sword, her father was not assaulted with any other weapon.

P.W.2 had further deposed that Pummy is her niece and the daughter of Sunder. At the time of incident, Pammi was sleeping near her father Kadhiley, whereas she was sleeping along with her sister Kanyawati on a cot inside the room. At the time of incident, there was no source of light. Her brother Brahmadeen (P.W.1) was having torch at the time of incident and she had also stated the same to the Circle Officer but if the same was not written in her statement recorded under Section 161 Cr.P.C., then, she could not tell reasons for it. The said torch was seen by the Circle Officer, in her presence in the morning. She further deposed that at the time of incident, she was standing in the corridor and her brother (P.W.1) also came behind her. She disclosed the place from where she saw the incident, to the Circle Officer. She further deposed that when convicts/appellants fled away, Gauri Shanker (P.W.3) and Tulsiram came there. She further deposed that houses of her brothers Sunder and Brahmadeen (P.W.1) were in the same premises partitioned with "Deharia' (wall made with soil). At the time of incident, her brother Brahamadeen (P.W.1) did not come to wake up her nor she went to wake up to her brother Brahmadeen (P.W.1).

(17) P.W.3-Gauri Shanker, who is the nephew of the deceased Kadhiley, had deposed in his examination-in-chief that the incident had occurred three years ago. His house is adjacent to the house of Kadhiley (deceased). On the date of incident, he was sleeping in his house. At about 02:00 a.m., on noise, he woke up; came outside his house; and saw towards the house of Brahmadeen (P.W.1) in the light of torch that Sarafat, Noor Mohammad and Ajay (convicts/appellants), while using abusive language, were dragging Kadhiley (deceased) and at the same time, Maina Devi (P.W.1) ran to save Kadhiley (deceased). Then, Sarafat, Noor Mohammad and Ajay (convicts/appellants) hit on the neck of Kadhiley with a sword, as a consequence of which, Kadhiley (deceased) died on the spot. Thereafter, convicts/appellants, while threatening to kill, ran away. Tulsi came there on alarm raised.

In cross-examination, P.W.3 had deposed that his house is on the western

side of the house of Kadhiley. He denied that he reached on the spot when assailants fled away. He reached on the spot when accused assaulted the deceased. He denied that Brahmadeen (P.W.1) told the name of murderers to him. The exit of his house is towards southern direction. At the time of the incident, he was not sleeping in his house but he was awake; his family members were sleeping; he returned from the field after sprinkling medicine on wheat; and after taking food, he had just lying on the bed. He came outside the house on hearing the noise of Maina Devi (P.W.2). He did not listen the alarm of Kadhiley (deceased) "Maar dala maar dala'. When he reached the spot, Maina Devi (P.W.2) and Pammi were there and apart from them, no one was present in the house. When he came from home, he saw that Kadhiley was dead and was lying on the back; Maina Devi and Pammi were crying on clinging the deadbody of Kadhiley; and there were blood on their cloths.

P.W.3 had further deposed that there was no light on the spot but he had a torch. The police personnel did not see his torch nor memo of his torch was prepared. Apart from him, he did not see the torch of anyone. He further deposed that before this case, Kadhiley (deceased) had lodged a case under Section 307 I.P.C. against the accused, in which he was a witness. He was not aware whether the accused were acquitted or not in the said case. In the said case, he had deposed before the Court that he had not seen the incident. He further deposed that Kadhiley (deceased) had lodged another case under Section 307 I.P.C. against the accused, wherein he was also a witness. He further deposed that from the place where the deadbody of Kadhiley was lying, inner portion of the house of Kadhiley was visible and a lamp was lighting inside the house of Kadhiley.

P.W.3 had further deposed that after cutting forest wood, he was preparing "Jhabai'. Kamlesh (father of convict/appellant Ajay), who was working as Forester, caught him once and asked him not to cut the wood again and since then, he had stopped the work of cutting wood. He denied the suggestion that on account of the aforesaid, he falsely deposed against the son of Kamlesh, namely, Ajay. He also denied that the incident did not occur before him.

P.W.3 had further deposed in his cross-examination that the deceased Kadhiley was the elder brother of his father. At the time of incident, Noor Mohammad and Sarafat (convicts/ appellants) were working as "Watch-man' in the forest. When he used to prepare "Jhabai' after cutting the wood from forest and sold that, his business was going on but when Noor Mohammad and Sarafat (convicts/appellants) did strictness, then, his business of preparing "Jhabai' after cutting the wood from forest was stopped. He denied the suggestion that on account of the aforesaid, he falsely deposed against Noor Mohammd and Sarafat (convicts/appellants). He also denied that he had not seen any incident.

P.W.3 had also deposed in his cross-examination that Inspector had recorded his statement. The Investigating Officer of the case had recorded his statement after 1-1½ month from the date of incident. When the "panchayatnama' of the deadbody was prepared, he was present but his statement was not recorded by the Inspector, who was preparing the "panchayatnama' of the deadbody. His

statement was recorded by another police personnel. The place where he was standing at the time of incident, was shown by him to the Inspector.

(18) After completion of the prosecution evidence, statement of the convicts/appellants under Section 313 Cr.P.C. was recorded in which they have denied the entire prosecution case and had stated that Sarafat and Noor Mohammad (convicts/appellants) were the "Watchman' in the Forest Department, whereas father of Ajay (convict/appellant), namely, Kamlesh, was the Forester in the Forest Department. The informant (P.W.1) and his family members used to cut wood of forest stealthily, therefore, they (convicts/appellants Sarafat, Noor Mohammad and father of convict/appellant Ajay, namely, Kamlesh) restrained the informant (P.W.1) and his family members from cutting the wood in the forest and due to this reason, the convicts/ appellants were falsely implicated in the instant case.

(19) The learned trial Court believed the evidence of Brahmadeen (P.W.1), Maina Devi (P.W.2) and Gauri Shanker (P.W.3) and found the appellants guilty for the offence punishable under Section 302 read with Section 34 I.P.C. and, accordingly, convicted and sentenced the appellants in the manner stated in paragraph-2 here-in-above. The trial Court, however, acquitted the appellants for the offences punishable under Sections 504, 506 (2) I.P.C. and Section 3(2)(v) of the S.C./S.T. Act.

(20) It is pertinent to mention that the State of U.P. has not preferred any appeal under Section 378 (1) of the Code of Criminal Procedure against the acquittal of the appellants under Sections 504, 506 (2) I.P.C. and Section 3 (2) (v) of the S.C./S.T. Act.

(21) As mentioned earlier, aggrieved by their conviction and sentences, convicts/appellants Sarafat and Noor Mohammad preferred Criminal Appeal No. 61 of 2010 before this Court and convict/appellant Ajay also preferred another appeal i.e. Criminal Appeal No. 120 of 2010.

(22) Heard Shri Nagendra Mohan assisted by Shri Anil Kumar Mishra, learned Counsel for the convicts/appellant Ajay in Criminal Appeal No. 120 of 2010, Shri Nadeem Murtaza, learned Counsel for the convicts/appellants Sarafat and Noor Mohammad in Criminal Appeal No. 61 of 2010 and Smt. Smiti Sahai, learned Additional Government Advocate for the respondent/State.

(23) Shri Abhishek Mishra, learned Counsel for the complainant did not appear.

(C) ARGUMENTS ON BEHALF OF THE CONVICTS/ APPELLANTS

(24) Shri Nagendra Mohan assisted by Shri Anil Kumar Mishra, learned Counsel for the convicts/appellant Ajay in Criminal Appeal No. 120 of 2010 has argued as under :-

I. The alleged incident was said to be occurred on 18/19.04.2004, at 02:00 a.m., whereas the F.I.R. of the alleged incident was lodged on 19.04.2004 at 10 a.m. The distance between the place of the incident and police station Nighasan was 13 Kms. Thus, there was an unexplained delay of about eight hours in lodging the FIR which indicates that the alleged eyewitnesses i.e. P.W.1, P.W.2 and P.W.3 were not present at the scene of occurrence;

II. There was no motive on the part of the convicts/ appellants to commit the murder of the deceased Kadhiley. However, motive for falsely implicating the convicts/appellants was available on the part of the informant (P.W.1) and his family members inasmuch as informant (P.W.1) and his family members used to cut the wood of forest by theft and the convicts/appellants Sarafat, Noor Mohammad and father of convict/appellant Ajay, namely, Kamlesh, being Watchman and Forester, respectively, used to restrain the informant (P.W.1) and his family members from cutting the wood from the forest illegally.

III. P.W.1, P.W.2 and P.W.3, the alleged eyewitnesses, were son, daughter and nephew of the deceased Kadhiley and they were interested witnesses, hence testimonies of all three eyewitnesses being interested testimony cannot be said trustworthy;

IV. Though at the time of incident, the prosecution had alleged that the independent witnesses were also present but none of the independent witness was produced by the prosecution to prove the prosecution case.

V. The alleged incident occurred on 18/19.04.2004, at 02:00 a.m. in a dark night and, hence identification of convicts/appellants was not possible as there was no source of light available. Prosecution story of ''*Dibbi*' (a kerosene oil lamp), placed on "*Kuthla'* (box made with soil) in the thatch of the deceased Kudhiley burning and P.W.3 Gauri Shanker armed with torch at the time of incident, is incredible as during investigation also no alleged "Dibbi' (a kerosene oil lamp) and no torch were seized by the Investigating Officer and therefore, in absence of any source of light, claim by the witnesses that they had identified the convicts/appellants, was impossible and is not creditworthy.

VI. The evidence of PW-1, PW-2 and PW-3 indicates that there was prior enmity between the deceased Kadhiley and convicts/appellants because of which false implication cannot be ruled out;

VII. The investigation of the case was tainted as the blood stained clothes were not seized by the Investigating Officer at the time of panchayatnama. P.W.3-Gauri Shanker had deposed in his cross-examination that when he reached at the place of occurrence, Maina Devi (P.W.2) and Pammi were crying by clinging the deadbody of the deceased Kadhiley and stains of blood was present on the cloths of Maina Devi (P.W.2) and Pammi. But the Investigating Officer did not seize the clothes of Maina Devi (P.W.2) and Pammi;

VIII. The prosecution story does not find any corroboration from medical evidence. In the F.I.R., it was alleged that all the three convicts/appellants murdered the deceased Kadhiley by inflicting injuries with sword. All the alleged three eye-witnesses had deposed before the trial Court that at the time of incident, Sarafat (convict/appellant) assaulted the deceased with sword, whereas other two convicts, namely, Noor Mohammad and Ajay only caught hold the legs and hands of the deceased Kadhiley. However, injuries no. 5 and 6, are contusions, which could be attributable by blunt object like lathi and danda but the prosecution had denied the use of any blunt object like lathi and danda in the alleged incident. Hence, looking to the aforesaid contradictions, convicts/ appellants be granted benefit of doubt.

(25) Shri Nadeem Murtaza, learned Counsel for the convicts/appellants in Criminal Appeal No. 61 of 2010 has supported the aforesaid arguments and argued that he has nothing to add further.

(D) ARGUMENTS ON BEHALF OF THE RESPONDENT/ STATE

(26) Mrs. Smiti Sahai, learned Additional Government Advocate for the respondent/State, on the other hand, has vehemently opposed the aforesaid submissions of the learned Counsel for the convicts/appellants and has argued as under :-

I. The prosecution version stood proved beyond all reasonable doubt on the basis of testimonies of witnesses of facts i.e. P.W.1, P.W.2 and P.W.3 during the trial proving the charge framed against the convicts/ appellants.

II. The delay in lodging the FIR has been satisfactorily explained by P.W.1 and P.W.2 in their respective testimonies. Both these witnesses have categorically stated that the incident was occurred on 18/19.04.2004, at 02:00 a.m. but on account of fear, informant (P.W.1) did not go to the police station for lodging the report of the incident and he went to the police station only in the morning.

III. At the time of incident, there was sufficient light at the place of incident to recognize the convicts/appellants as P.W.1 and P.W.2 had deposed that at the time of incident, *''Dibbi'* (a kerosene oil lamp) placed beneath thatch was burning, whereas P.W.3 had deposed that he was having torch at the time of incident.

IV. The medical evidence on record fully corroborates the ocular testimonies, and despite embellishments and deviations, is not going to change the texture of prosecution case.

V. The recorded conviction of the convicts/appellants is based upon cogent and clinching evidence and the sentence of imprisonment for life awarded to them is also supported by relevant considerations.

VI. So far as minor contradictions in the statement of the prosecution witnesses viz. P.W.1, P.W.2 and P.W.3 are concerned, she argued that there is much gap in recording the examination-in-chief and cross-examination of P.W.1, P.W.2 and P.W.3, hence possibility of minor contradictions in their statements cannot be ruled out and on that basis, the convicts/appellants cannot be granted benefit of doubt as the prosecution has proved it's case beyond all reasonable doubts on the basis of evidence available on record.

VII. Hence, the impugned order passed by learned trial Court does not suffer from any illegality, infirmity or perversity warranting any interference by the Court.

(E) ANALYSIS

E.1. Delay in lodging the F.I.R.

(27) The first issue relates to the credibility of the F.I.R. Learned counsel for the convicts/appellants has questioned its reliability on the ground that there was unexplained delay of 8 hours in lodging of the F.I.R. which has rendered the entire prosecution liable to be rejected.

(28) It is pertinent to mention here that the issue whether prosecution case is liable to be thrown out merely on the ground of delay itself or not has been examined by the Apex Court in a catena of decisions and this Court deem it apt to refer to some of the authorities on the issue.

(29) In **Ravinder Kumar and another Vs. State of Punjab : AIR 2001 SC 3576,** the Apex Court has observed as under :-

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly lodged FIR is not an unreserved guarantee for the genuineness of the version incorporated therein.

When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquility of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is, the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident.

We are not providing an exhausting catalogue of instances which could cause delay in lodging the FIR. Our effort is to try to point out that the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodgment cannot be approved as a legal corollary. In any case, where there is delay in making the FIR the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version no consequence shall be attached to the mere delay in lodging the FIR. [Vide Zahoor vs. State of UP (1991 Suppl.(1) SCC 372; Tara Singh vs. State of Punjab (1991 Suppl.(1) SCC 536); Jamna vs. State of UP (1994 (1) SCC 185). In Tara Singh (Supra) the Court made the following observations:

"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." "

(30) In **State of Himanchal Pradesh Vs. Gian Chand : AIR 2001(1) SC 2075**, the Apex Court has observed as under :-

"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."

(31) In view of the aforesaid dictum of the Apex Court, the legal position which emerges out 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 further to 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.

(32) In the instant case, the incident was occurred in the intervening night of 18/19.04.2004, at 02:00 a.m., whereas the F.I.R. of the incident was lodged on 19.04.2004 at 10:00 a.m. by Brahmadeen (P.W.1), the son of deceased. The distance between the place of occurrence and the police station Nighasan was 13 Kms. Thus, in order to ascertain whether the prosecution has come up with any satisfactory explanation for the delay in lodging the F.I.R., it would be useful to look into the evidence of PW1 and PW2 in this regard.

(33) PW1, Brahmadeen, informant, in his examination-in-chief, had deposed that on account of fear, he could not go to lodge the report in the night. In his cross-examination, he had categorically deposed that at the time of incident, his mother Shakuntala, his brother Sunder Lal and his wife went to in-law's house of his brother Sunder Lal at Munna Purwa, which is situated 3 Kms. away from his village, for attending the marriage function of brother-in-law of his brother Sunder Lal. In the morning at 06:00 a.m., he sent the information with regard to the incident to his brother Sunder Lal, his wife and mother Shakuntala, who, on receiving the information of the incident, returned back to his village at about 07:00 a.m. Thereafter, he proceeded to police station

for lodging the report of the incident at police station Nighasan on foot and reached Nighasan at 09:00 a.m. On the crossroad of Nighasan, he found a person named Ramesh and he narrated the incident to him. Thereafter, the said Ramesh, after bringing a paper and pen from the stationery shop, scribed the report on his dictation and after that he affixed his thumb impression on that and proceeded to lodge the report at Police Station Nighasan. He categorically stated that half an hour was consumed in scribing the report and after that he went to police station Nighasan, wherein he sat at police station Nighasan at about half an hour. He proved the written report (Ext. Ka.1).

(34) P.W.2-Smt. Maina Devi, in cross-examination, had deposed that her brother (P.W.1) was going to lodge the report of the incident in the night but he (P.W.1) returned back to home on seeing that convicts/appellants was barricading the way in southern direction of her house.

(35) Thus, from the relevant extracts of the statement of PW1 and PW2, it transpires that although there was some delay in lodging the F.I.R. but the same cannot be attributed to the informant or can be said to be deliberate with the object of implicating the convicts/appellants. The delay in lodging the F.I.R., in our opinion, has been satisfactory explained by P.W.1 and P.W.2.

E.2 Evidence of ''interested witnesses'

(36) The contention of the learned Counsel for the convicts/ appellants is that all the prosecution witnesses P.W.1, P.W.2 and P.W.3 (so called eye-witnesses) are all related and interested witnesses as they are son, daughter and nephew, respectively, to the deceased Kadhiley, hence their evidence cannot be said to be a trustworthy.

(37) To prove its case, the prosecution has relied upon the evidence of three eye-witnesses viz. PW-1 Brahmadeen, PW-2 Maina Devi and PW-3 Gauri Shanker. PW-1, who is the son of the deceased, had deposed that on the day of incident i.e. in the intervening night of 18/19.04.2004, at about 2:00 am, convicts/appellants Sarafat, Noor Mohammad and Ajay, were drinking water from the hand-pump installed in front of his house, upon which his father Kadhiley (deceased) had made objection. Thereafter, convicts/appellants used abusive language against his father Kadhiley, to which his father Kadhiley asked convicts/appellants not to use abusive language. After that convicts/appellants brought his father Kadhiley towards road. On seeing this, he (P.W.1) and his sister Maina Devi (P.W.2) ran to save his father Kadhiley but convicts/appellants were inflicting injuries on the neck of his father Kadhiley with sword, as a consequence of which, his father Kadhiley died on spot. On hue and cry, Gauri Shanker (P.W.3) and Tulsi were also came there and they challenged the convicts/appellants. After that, convicts/appellants, while threatening to kill them, ran away towards southern direction. PW-1 also deposed that he did not immediately went to the police station due to the fear of the convicts/appellants and lodged his report on 19.04.2014 at 10:00 a.m. He also deposed that a case under Section 307 I.P.C. was contested between the deceased Kadhiley and Kamlesh and his son before 11 years ago. During the course of his cross-examination, PW-1 was questioned in detail about the location of the incident and the position of

the deceased. He also deposed that first of all, he heard the noise of his father Kadhiley and after that he heard the noise of his sister Maina Devi. At the time of the incident, Maina Devi (P.W.2) was with his father Kadhiley. His house and thatch where his father (deceased) and his sister (P.W.2) used to live, were joined with a corridor. At the time of incident, he was at his house, which was 5-6 steps away from the house where his father Kadhiley and Maina Devi (P.W.2) were living. He denied the fact that he had written in the report that all the three convicts/appellants murdered his father by inflicting injuries on the neck of his father with sword, but he deposed that when he reached at the place of incident, he saw sword in the hands of Sarafat (convict/appellant) and no weapon was seen by him in the hands of other convicts/appellants. P.W.1 had also deposed that lamp was burning inside the thatch of his father Kadhiley. P.W.2 - Maina Devi specifically deposed about the proximity of her house from the house of her brothers Brahmadeen (P.W.1) and Sunder Lal. She denied that at the time of incident, she went to wake up his brother Brahmadeen nor his brother Brahmadeen came her house to wake up her. She furnished a cogent reason to be present at the place of incident stating that she being daughter of the deceased Kadhiley was sleeping on a cot inside the house along with his sister Kanyawati. During his deposition, PW-2 specifically referred to the role and presence of the convicts/appellant Sarafat being armed with sword and other convicts/appellants caught hold the legs and hands of the deceased Kadhiley. PW-3 Gauri Shanker, in similar terms, deposed about the place where convicts/appellants inflicted injuries on the person of the deceased. PW-3 stated that at the time of incident, he was sleeping in his house, which is adjacent to the house of the deceased Kadhiley. On hearing the noise of Maina Devi (P.W.2), he came outside his house and saw in the light of his torch that while using abusive language, Sarafat, Noor Mohammad and Ajay were pulling the deceased Kadhiley and then Maina Devi (P.W.2) ran to save his father. After that Sarafat, Noor Mohammad and Ajay hit with sword on the neck of the deceased Kadhiley, as a consequence of which, the deceased Kadhiley died instantaneously. Thereafter, the convicts/ appellants, while threatening to kill them, fled away. On screaming, Tulsi came.

(38) Having carefully considered the depositions of P.W.1, P.W.2 and P.W.3, there is no material inconsistency regarding the nature or genesis of the incident. All the three witnesses have deposed to (i) the presence of the deceased at the place of incident; (ii) the presence of the convicts/appellants at the place of occurrence; and (iii) convicts/appellants while using abusive language pulled out the deceased and killed the deceased with sword; as a result of which the deceased died instantaneously.

(39) It is well-settled in law that mere fact that relatives of the deceased are the only witnesses is not sufficient to discredit their cogent testimonies. The Apex Court in **Mohd. Rojali v. State of Assam** : (2019) 19 SCC 567 reiterated the distinction between "interested" and "related" witnesses and has held that the mere fact that the witnesses are related to the deceased does not impugn the credibility of their evidence if it is otherwise credible and cogent. The relevant extract of the report is reproduced as under :-

"13. As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well settled

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 SCC298). 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 inState 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"..."

14. 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..."

15. 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."

(40) Keeping in mind the aforesaid dictum of the Apex Court and also considering the testimonies of P.W.1, P.W.2 and P.W.3 as well as on perusal of the impugned order, this Court find that the evidence on the record has been carefully

evaluated by the trial Court. There is no basis to discredit the presence of the three eye-witnesses i.e. P.W.1, P.W.2 and P.W.3 and nothing has been elicited out in the course of the cross-examination to doubt their presence. The nature of the injuries found to have been sustained by the deceased is consistent with the account furnished by the eye-witnesses.

E.3 Contradictions in the statements of the eye-witnesses P.W.1, P.W.2 and P.W.3

(41) From examination of the statements made by the witnesses PWs-1, 2 and 3, it would apt to mention here that it cannot be said that the omissions/improvements in the version of the witnesses makes their testimony untrustworthy due to contradiction therein. As a matter of fact, from a close scrutiny of the Case Diary, this Court find that the statements of the witnesses had been recorded by the Investigating Officer in a concised form by confining the same to the substance of the statement, without going into every details and therefore, it is possible that the minute details which the witnesses had deposed before the Court were not recorded by the police in the statement recorded under Section 161 Cr.P.C.

(42) Section 145 of the Indian Evidence Act, 1872, lays down the manner in which cross-examination of the witnesses is to be made as to any previous statement made in writing. Section 145 of the Evidence Act is quoted herein below :-

"145. **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."

(43) In **V. K. Mishra and another Vs. State of Uttarakhand and another : (2015) 9 SCC 588**, the Apex Court also had the occasion to consider the correct manner of proving contradictions as to any previous statement made by a witness. Upon interpretation of Section 145 of the Evidence Act, the following observations have been made by the Apex Court in paragraph 19 of the aforesaid decision, which are as follows :-

"19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it become the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this

process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction."

(44) In the instant case, this Court finds that the Counsel for the appellants had failed to invite the attention of the witnesses PWs-1, 2 and 3 as to any previous statements in writing so as to contradict the witnesses. On the contrary, an attempt has been made to prove such contradictions.

(45) It is pertinent to mention here that from depositions of the prosecution witnesses i.e. P.Ws. 1, 2 and 3, it transpires that the examination-in-chief of P.W.1 was recorded by the trial Court on 18.05.2005, whereas his cross-examinations was recorded before the trial Court on five different dates i.e. on 24.05.2005, 02.09.2005, 18.11.2005, 12.06.2006 and 11.10.2006. The examination-in-chief of P.W.2 was recorded before the trial Court on 18.05.2005 and her cross-examination was recorded before the trial Court on 11.10.2006. The examination-in-chief of P.W.3 and some part of his cross-examination were recorded before the trial Court on 04.11.2006, whereas some part of his cross-examination was recorded on 11.12.2006. Thus, it clearly shows that there were quite long gaps/intervals between recording the examination-in-chief and cross-examination of the eye-witnesses (P.Ws. 1, 2 and 3). Hence, it is quite possible that contradictions as pointed out by the learned Counsel for the appellants could be made on account of loss of memory. More so, sense of observation differs from person to person.

(46) In **Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra :(2000) 8 SCC 457**, the Apex Court has considered the minor contradictions in the testimony, while appreciating the evidence in criminal trial and has held that only contradictions in material particulars and not minor contradictions can be a ground to discredit the testimony of the witnesses. Relevant portion of Para 42 of the judgment reads as under :-

"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if

found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness....."

(47) Having regard to the ratio of law laid down in **Narayan Chetanram Chaudhary (supra)** and **V. K. Mishra (supra)**, this Court is of the view that learned Counsel for the convicts/ appellants had failed to prove the contradictions in the statements, made by the prosecution witnesses as per the requirement of law and therefore, they could not be permitted to avail the benefit of such alleged contradictions, if any, in the testimony of the prosecution witnesses and further such contradictions do not erode the credibility of the prosecution witnesses since the basic facts stated by them before the police do not contradict their earlier statements in such a manner so that both their statements cannot co-exist. Moreover, this Court finds that the version given by P.Ws-1, 2 and 3 broadly bears up the same story without any vital contradictions and therefore, their evidence is found to be trustworthy.

E.4. Motive

(48) Learned Counsel for the appellants/convicts has argued that there is nothing on record which may attract or warrants the commission of offence at deadly hours of night. According to him, there was no motive on the part of the convicts/appellants to commit the murder of the deceased Kadhiley.

(49) It transpires from perusal of the impugned judgment and order dated 14.12.2009 that convicts/appellants themselves had shown previous enmity with the informant by filing list Kha-8 as earlier also a report was made against the convicts/appellants for the deadly attack on the informant by them. Paper No. Kha 8/2 filed before the trial Court related to the report of the incident occurred on 13.05.1996, at 12 O'clock in the night when accused Kamlesh, Ajai, Sarafat and Noor Mohammad (convicts/appellants) armed with lathi, danda and countrymade pistol had entered the house of the informant and with intention to kill him fired upon the informant and also inflicted injuries upon other family members of the informant with lathi and danda. Paper No. Kha 8/4 filed before the trial Court related to the report of the incident occurred on 23.05.1994 at mid night when Kamlesh and other accused persons entered the house of the informant and fired on the chest of the informant. Paper No. Kha 9/2 filed before the trial Court is related to the judgment in Case Crime No. 83 of 1994. The trial Court, after considering the aforesaid documents, came to the conclusion that these documents shows that before the incident, convicts/appellants had entered into the house of the informant and fired upon him with intention to kill him and further in the statement recorded under Section 313 Cr.P.C., convicts/appellants themselves admitted the fact that there was enmity with the informant. The trial Court had also found that vide orders dated 31.08.2009 and 23.09.2009 passed in Sessions Trial No. 991 of 1997 : State Vs. Sarafat, which was relating to the incident when the convicts/ appellants entered into the house of the informant and caused injuries with intention to kill him, the trial Court had convicted the convicts/appellants. In these backgrounds, the trial Court had came to the conclusion that the prosecution had established the

motive to commit the murder of the deceased.

(50) On due consideration, this Court is of the view that the trial Court has rightly came to the conclusion that there was motive on the part of the convicts/appellants to commit the murder of the deceased.

E.5. Non-examination of Independent Witness

(51) It has been contended by the learned Counsel for the appellants that though at the time of incident, the prosecution had alleged that the independent witnesses were also present but none of the independent witness was produced by the prosecution to prove the prosecution case.

(52) In **Surinder Kumar v. State of Punjab** : (2020) 2 SCC 563, the Apex Court has observed that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated.

(53) In **Rizwan Khan v. State of Chhattisgarh** : (2020) 9 SCC 627, after referring to **State of H.P. v. Pardeep Kumar** (2018) 13 SCC 808, the Apex Court has observed that the examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case.

(54) In **Gulam Sarbar v. State of Bihar** : (2014) 3 SCC 401, the Apex Court has held as under :-

"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight.

Thus, conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide Vadivelu Thevar v. State of Madras [AIR 1957 SC 614: 1957 Cri LJ 1000] , Kunju v. State of T.N. [(2008) 2 SCC 151: (2008) 1 SCC (Cri) 331] , Bipin Kumar Mondal v. State of W.B. [(2010) 12 SCC 91: (2011) 2 SCC (Cri) 150 : AIR 2010 SC 3638] , Mahesh v. State of M.P. [(2011) 9 SCC 626 : (2011) 3 SCC (Cri) 783], Prithipal Singh v. State of Punjab [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] and Kishan Chand v. State of Haryana [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807: JT (2013) 1 SC 222].)"

(55) Applying the law laid down by the Apex Court in the aforesaid decisions to the facts of the case on hand and when, as observed by the trial Court, the prosecution witnesses have fully supported the case of the prosecution, more particularly P.W.1, P.W.2 and P.W.3 and they are found to be trustworthy and reliable, non-examination of the independent witnesses is not fatal to the case of the prosecution.

(56) Nothing is on record that Tulsi son of Tekan and other persons as mentioned in the FIR reached the spot were mentioned as witnesses in the chargesheet. In any case, P.W.1, P.W.2 and P.W.3 have fully supported the case of the prosecution and, therefore, non-examination of the aforesaid persons shall not be fatal to the case of the prosecution.

E.6. Source of Light on Spot

(57) Learned Counsel for the appellant has contended that availability of source of light has not been mentioned in the written report submitted by the informant P.W.1. According to him, though P.W.1 had stated before the trial Court that "Dibbi' (a kerosene oil lamp) was lighting under chappar of the deceased at the time of the incident, whereas P.W.2 had stated that there was no source of light and P.W.3 claimed to see the incident in the light of torch but during investigation, the Investigating Officer had neither seized the alleged "Dibbi' (a kerosene oil lamp) nor seized the torch, hence in absence of any source of light, claim of P.W.1, P.W.2 and P.W.3 that they had identified the convicts/appellants was impossible and is not trustworthy.

(58) In **State of Uttar Pradesh v. Naresh and Ors.** : (2011) 4 SCC 324, the Apex Court observed that 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 an 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 been falsely 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 the same. Some people may miss even the most important details in narration.

(59) In view of the aforesaid dictum, this Court is of the view that non-mentioning the availability of ''*Dibbi*' (a kerosene oil lamp) and torch by the informant P.W.1 in the written report is not fatal for the prosecution.

(60) So far as other contentions of the learned Counsel for the appellant regarding absence of source of light on spot is concerned, the evidence of P.W.1 shows that at the time of the incident, "Dibbi' (a kerosene oil lamp) was lighting under chappar of the deceased Kadhiley. The evidence of P.W.2 shows that though she had stated that there was no source of light at the time of the incident. P.W.3-Gauri Shanker had stated before the trial Court that though he had not seen any source of light on the spot but he was having a torch at the time of the incident. P.W.3-Gauri Shanker had also stated that from the place where the deadbody of the deceased was lying, the inner portion of the house of the deceased was visible, where "Dibbi' (a kerosene oil lamp) was burning. All these circumstances have established the fact that the prosecution witnesses had pointed out the source of light in any manner on spot at the time of the incident.

(61) So far as non-seizure of ''*Dibbi*' (a kerosene oil lamp) and torch by the Investigating Officer is concerned, no doubt, the Investigating Officer had committed mistake in not seizing the "Dibbi' (a kerosene oil lamp) and torch

under recovery memo but the benefit of same cannot be permitted to be given to the convicts/appellant, particularly when eye-witnesses of the incident P.W.1, P.W.2 and P.W.3 had supported the prosecution case beyond reasonable doubt.

(62) At this juncture, it would be apt to mention that in **Nathuni Yadav vs State of Bihar :** (1998) 9 SCC 238, with regard to identification in the dark, the Apex Court observed as under :-

"9.... Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedybound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers.

We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meager, was enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focused their eyes on the faces of the intruders standing in front of them."

(63) In the instant case, from perusal of the testimonies of P.W.1, P.W.2 and P.W.3, it transpires that there is evidence about the availability of light near the place of occurrence. Even otherwise there may not have been any source of light is hardly considered relevant in view of the fact that the parties were known to each other from earlier. The criminal jurisprudence developed in this country recognizes that the eye sight capacity of those who live in rural areas is far better than compared to the town folks. Identification at night between known persons is acknowledged to be possible by voice, silhouette, shadow, and gait also. Therefore, this Court do not find much substance in the submission of the convicts/ appellants that identification was not possible in the night to give them the benefit of doubt.

E.7. Medical Evidence

(64) Learned Counsel for the convicts/appellants had contended that in the F.I.R., it has been stated that all three convicts/appellants armed with sword had murdered the deceased but P.W.1, P.W.2 and P.W.3 had deposed before the trial Court that at the time of the incident, Sarafat (convict/appellant) assaulted the deceased with sword, whereas other two convicts, namely, Noor Mohammad and Ajay only caught hold the legs and hands of the deceased Kadhiley. According to him, injuries no. 5 and 6 are contusions, which could be attributable by blunt object like lathi and danda but the prosecution witnesses had denied the use of any blunt object like lathi and danda in the alleged incident, hence, the prosecution story does not find any corroboration from medical

evidence as the prosecution has failed to explain the injuries no. 5 and 6 sustained by the deceased Kadhiley.

(65) From the testimonies of P.W.1 and P.W.2 recorded before the trial Court, it appears that Sarafat (convict/appellant) inflicted the injuries with sword on the neck of the deceased Kadhiley, whereas other two convicts/appelalnts, Noor Mohammad and Ajay, were caught hold the legs and hands of the deceased Kadhiley. P.W.1-Brahmadeeen, in his cross-examination, had denied that he has mentioned in the F.I.R. that all three accused (convicts/appellants) had murdered by inflicting injuries on the neck of his father with sword. P.W.1 had also deposed that if the aforesaid fact has been mentioned in the F.I.R., then, he could not tell the reasons thereof. Thus, the trial Court has rightly observed that the meaning of the prosecution could not be that all the three accused (convicts/appellants) had sword and all of them had inflicted injuries to the deceased with sword but it means that the deceased was murdered by the accused, in order to fulfill their common intention, with sword.

(66) It is true that the FIR is certainly the starting point of the investigation, but it is well within the rights of the prosecution to produce witness statements as they progress further into the investigation and unearth the specific roles of accused persons. The FIR as is known, only sets the investigative machinery, into motion. Thus, the plea of the appellants in this regard has no substance.

(67) P.W.6 Dr. J.P. Bhargava, who conducted the post-mortem of the deceased Kadhiley, had found six ante-mortem injuries on the person of the deceased, as referred in paragraph-11 hereinabove, out of which, four were incised wounds and two were contusions. P.W.6 Dr. J.P. Bhargava, in his cross-examination, had deposed before the trial Court that the death of the deceased could be caused on 18/19.04.2004 at 2:00 p.m.; incised wounds on the person of the deceased could be attributable by sharp edged weapons. In cross-examination, P.W.6 had deposed that ante-mortem injuries of the deceased could be attributable by two objects; (i) sharp edged weapon; (ii) blunt object. P.W.6 had further deposed that injuries no.5 and 6 could be attributable if injured was hit by big stone or injured was fallen on it. The evidence of P.W.1-Brahmadeen and P.W.2-Maina Devi shows that convicts/appellants dragged the deceased on the way; pushed him on the ground; and assaulted him with sword. Considering the aforesaid, the trial Court came to the conclusion that it is possible that during dragging the deceased; pushing him on the ground; and thereafter assaulted him, injuries no. 5 and 6 i.e. contusions could be attributable to the deceased.

(68) Considering the facts and circumstances of the case, this Court is of the view that it cannot be said that medical evidence does not corroborate the testimonies of the prosecution witnesses. Hence the submission of the learned Counsel for the appellant has no substance in this regard.

F. Conclusion

(69) From the above analysis, this Court is of the view that the prosecution has proved its case beyond reasonable doubt against convicts/appellants and their conviction and sentence for the murder of deceased Kadhiley in the intervening night

of 18/19.4.2004 by the impugned judgment is fully justified.

(70) In view of the foregoing discussions, the conviction and sentence of the appellants, **Sarafat, Noor Mohammad and Ajay**, for the murder of deceased Kadhiley by means of the impugned order dated 14.12.2009 does not call for any interference by this Court.

Appellants **Sarafat, Noor Mohammad and Ajay** are in jail and they shall serve out the sentence as ordered by the trial Court by means of impugned order dated 14.12.2019.

(71) Both the above-captioned appeals stand dismissed.

(72) Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for information and necessary compliance.

The instant appeal is **dismissed** vide our order of date passed on separate sheets contained in Criminal Appeal No. 61 of 2010 : *Sarafat and another Vs. State of U.P.*

(2022)06ILR A426
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No.210 of 1997
WITH
Criminal Appeal No.478 of 1997

Suresh @ Chaveney ...Appellant (In Jail)

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.O.P. Agarwal, Sri Anurag Khanna , Sri Dhirendra Kumar Srivastava , Sri Rajiv Sisodia, Sri Vivek Saran, Sri Jai Raj Singh Tomar (Amicus Curiae)

Counsel for the Respondent:
D.G.A.

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 374(2) – Appeals from conviction - Indian Penal Code, 1860 - Sections 302/201, 34, 201 - circumstantial evidence - where there is no direct evidence against the accused and the prosecution rests its case 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 - Suspicion, however, strong cannot be allowed to take the place of proof - Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof.(Para -22, 51)

Case of circumstantial evidence - (P.W.-1-informant) lodged F.I.R. for murder of his brother (deceased) - Trial Court convicted accused appellants - merely on the basis of testimonies of informant P.W.1 and P.W.5 - recoveries made on the pointing out of accused/appellant(Mahesh) - from the house of accused appellant(Suresh) - P.W.2 and P.W.6 declared hostile - prosecution completely failed to prove beyond reasonable doubt - involvement and guilt of the appellants - failed to establish any motive to the accused appellants for committing murder of deceased.**(Para -21,53)**

HELD:-Various lacunae in the case of prosecution in establishing the chain of circumstantial evidence against the accused appellants. No cogent or clinching evidence on record which proves the guilt of the accused appellants beyond reasonable doubt. Impugned judgment of conviction, found

unsustainable, liable to be set aside and the appellants entitled to be acquitted by giving them the benefit of doubt. **(Para -54)**

Criminal Appeals allowed. (E-7)

List of Cases cited:-

1. Padala Veera Reddy Vs St. of A.P. , AIR 1990 SC 79

2. St. of U.P. Vs Ashok Kumar Srivastava ,(1992) 1 SCR 37

3. Sanatan Naskar & anr. Vs St. of W.B. , (2010) 8 SCC 249

4. Sharad Birdhichand Sarda Vs St. of Mah. , 1984 Cri. L.J. 178

5. Sampath Kumar Vs Inspector of Police Krishnagiri , 2010 Cri. L.J. 3889 (SC)

6. Bhagwan Jagannath Markad Vs St. Of Mah. , (2016) 10 SCC 537

7. St. of U.P. Vs Ashok Kumar Srivastava , (1992) 1 SCR 37

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Shamim Ahmed, J.)

1. The above-captioned appeals have been preferred under Section 374(2) of the Code of Criminal Procedure against the judgment and order dated 28.01.1997 passed by the Fifth Additional District & Sessions Judge, Bijnore in Session Trial No. 11 of 1995, arising out of Case Crime No. 800 of 1994, under Sections 302/201 I.P.C., Police Station Kotwali Shahar, District Bijnor, whereby the Additional District & Sessions Judge, Bijnor has convicted and sentenced the appellants to undergo life imprisonment under Section 302 read with section 34 IPC and to undergo five years rigorous imprisonment under Section 201 IPC.

INTRODUCTORY FACTS

2. In brief, the prosecution case is that one Roshal Lal (P.W.1) the informant, the brother of the deceased, submitted a written report dated 13.10.1994 (Ext. Ka-1) to In-charge Kotwali Shahar, Bijnor stating therein that his elder brother Surendra Singh had given testimony against Sumer (elder brother of appellant Suresh alias Chaveney) in a murder case in which Sumer was convicted. Since then the family members of Sumer were having grudges with him. For the last few days, accused/appellant Suresh alias Chaveney used to take away his elder brother Rajendra (deceased) for buying lottery tickets and was developing friendship with him. On 12.10.1994 at about 6.30 PM, his elder brother Rajendra (deceased) was standing with Raju (P.W.2) at the Ramlila ground then accused/appellant Mukesh came while pulling rickshaw on which accused/appellant Suresh alias Chaveney was sitting. Both the appellants took away his brother Rajendra in the presence of Raju (P.W.2) saying that they will enjoy the party of meat and wine at the hotel of Virendra situate at Chamarpeda as they had won the lottery. It was around 6.30 p.m., Prem Chand son of Ramswaroop and Tilak Raj (P.W.6) had witnessed the accused/appellants with Rajendra (deceased) at the hotel of Virendra.

Following day, i.e on 13.10.1994 in the early morning at about 4.00 AM, Yadram (P.W.5) went to the house of accused/ appellant Suresh alias Chaveney to book a car and there he saw that the accused/appellants were keeping a corpse in a sack whose legs were protruding outside. Both the appellants took out the said sack from the house and kept it on a rickshaw. Yadram (P.W.5) asked them as to what was in the sack, on which appellant Suresh alias Chaveney replied him that he

took the revenge of enmity. They warned him (P.W.5) not to tell about it to any one, otherwise consequences would be bad to him.

On 13.10.1994 itself, when Roshan Lal (P.W.1) and his family members were searching for Rajendra then aforesaid persons disclosed the above facts and while searching for Rajendra the first informant reached near Singhal Dharmkanta where some women, men and children were standing. He had identified the dead body of his brother which was lying behind the Singhal Dharmakanta.

3. On the basis of the written report (Ext. Ka-1), First Information Report (Ext. Ka-4) was registered against the appellants as Case Crime No. 800 of 1994, under Sections 302/34 and 201 IPC at the Police Station- Kotwali Shahar, Bijnor on 13.10.94 at 9.05 AM. Check report (Ext.Ka-4) was prepared by Head Constable Ram Krapal (P.W.-8) and it has been disclosed in "Nakal Rapat' and accordingly "Roznamcha" was prepared.

4. After registration of the first information report, the postmortem of deceased- Rajendra was conducted by Dr. R. K. Maheshwari (P.W.-3) on 12/13.10.1994 at 11:00 PM. The corpse of the deceased was brought by C.P. 573, Harswaroop Singh (P.W.-4), and C.P. 1109 Ramveer, to the Mortuary. In the postmortem report (Ext. Ka-2), 14 ante-mortem injuries were reported as under :-

1. 5 lacerated wounds in an area of 9 cmx 8cm on the left side and right side of forehead and eyebrow, nose and right side of faces measuring 3.5 cmx1cm scalp, 5.5cmx1cm scalp deep,6cmx1cm bone deep, 2cmx1cmxbone deep, 2.5cmx0.5 cmx bone deep.

2. Lacerated wound 2cmx1cmxscalp deep on right side of head, 6cm on above left ear.

3. Abrasion 3cmx0.5cm on the right ear pinna.

4. Abraded contusion 4cmx2cm on right side face, 5.5cm on face of mouth from right side.

5. Lacerated wound 4cmx1cmx scalp deep on the left side forehead just above left eyebrow.

6. Abraded contusion 3cmx2cm on left side face and 4cm in front of ear.

7. Lacerated wound 3.5cmx1.5cm x scalp deep on left ear pinna.

8. Multiple abraded contusion over an area of 10cmx2.5cm on left side neck and chin 6cm below left ear.

9. Lacerated wound 3cmx1cmx scalp deep on the right side top of head 13cm in front of right ear.

10. Abrasion 9cmx1cm on back of left fore arm 5cm above wrist.

11. Abrasion 2cm.x0.5 cm on radial aspect of right forearm below elbow joint.

12. three lacerated over an area of 8cmx5cm on back of head 2.5cmx1cmxscalp deep, 2cmx0.5cmx scalp deep and 2.5cmx1cmx scalp deep.

13. Contusion with traumatic swelling over in area of 7cmx5cm on right side face in front of 1 cm right ear.

14. Blood was oozing from left ear.

5. The investigation of the case was initially conducted by the Investigation Officer, A.R. Mishra, Sub Inspector (P.W.9), who prepared inquest of the corpse of the deceased (Ext. Ka-6) and related papers, i.e., chalan lash (Ext. Ka-7), report of R.I. (Ext. Ka-8), photo lash (Ext. Ka-9), report of C.M.O. (Ext. Ka-10). The corpse of the deceased was sent by the Constable Harswaroop Singh (P.W.4) and Constable Ramvir Singh after sealing it for postmortem. The Investigating Officer prepared recovery memo of blood stained earth and plain earth (Ext. Ka-11), blood stained Bori Taat (printed in hindi and english "Maida Hari Bogh') and blood stained wooden broken danda (1 ft. 5 inch in length) (Ext. Ka-12), blood stained Chadar and blood stained broken piece of danda (Ext. Ka-14) and blood stained earth and blood stained piece of concrete (Ext. Ka-15). The Investigating Officer has also prepared the site plan of the place of occurrence (Exts. Ka-13 and 16) and sent the recovered articles to the Forensic Science Laboratory, Agra, through Chief Judicial Magistrate, Bijnor. He further deposited the recovered articles at the police station. The report of the Forensic Science Laboratory (Ext. Ka-17) is on record. The Investigating Officer recorded the statements of the witnesses and arrested the accused appellant Mukesh from outside his house, who confessed his guilt.

6. Following day, i.e., on 14.10.1994, the investigation of the case was entrusted to Rajvir Singh (P.W.-7) who recorded the statements of the witnesses Premchand, Tilak Raj (P.W.6) and Yadram (P.W.5) and also recorded the statements of accused/appellant Suresh alias Chaveney in the District Jail, Bijnor. After completion of the investigation, charge-sheet (Ext. Ka-3) was submitted against the accused appellants for the offence under Sections 302/34 and 201 IPC.

7. After receipt of the charge-sheet (Ext. Ka-3) cognizance of the offence was taken by the Chief Judicial Magistrate, Bijnor on 23.12.1994 and the case was committed to the Court of Sessions for trial. The trial court framed charges against the accused appellants for the offences under Sections 302/34 and 201 IPC on 25.02.1995, to which they denied and claimed to be tried.

PROSECUTION EVIDENCE

8. To bring home the guilt of the accused appellants, the prosecution examined as many as nine witnesses, viz.- informant Roshan Lal (P.W.-1) (brother of deceased Rajendra), who supported the prosecution version; Raju (P.W.-2) was declared hostile; Dr. R. K. Maheshwari (P.W.-3) proved the post-mortem report (Ext. Ka-2); Constable Harswaroop Singh (P.W.-4) brought the corpse of the deceased to the Mortuary for postmortem; Yadram (P.W.-5) a witness of fact who supported the prosecution case; Tilak Raj (P.W.-6) was declared hostile; S.H.O. Rajveer Singh (P.W.-7) proved the charge-sheet (Ext. Ka-3); Head Constable Ram Krapal Singh (P.W.-8) proved the check report (Ext. Ka-4) and G.D. (Ext.Ka-5); Sub-Inspector A. R. Mishra (P.W.-9) proved the inquest(Ext. Ka-6).

9. After completion of the prosecution evidence, the statements of the accused appellants were recorded under Section 313 Cr.P.C. They were confronted with the incriminating evidence adduced against

them during the course of trial, which they denied and pleaded innocence and stated that they were falsely implicated.

TRIAL COURT FINDINGS

10. The trial court after examining the evidence available on record believed the evidence of the prosecution witnesses as trustworthy and reliable, hence, by means of the impugned judgment and order convicted and sentenced the accused appellants for the offence as stated hereinabove.

11. Hence, these appeals at the behest of the convicted appellants.

12. Since the above-captioned appeals arise out of the common factual matrix and the judgment, both the appeals are being decided of by a common judgment.

13. Heard Shri Jai Raj Singh Tomar, learned Amicus Curiae on behalf of appellant-Suresh alias Chaveney in Criminal Appeal No. 210 of 1997 and Shri Vinod Kumar Tripathi, learned Advocate for the appellant-Mukesh in Criminal Appeal No. 478 of 1997 and Shri Patanjali Mishra, learned Advocate appearing on behalf of State-respondents in both the appeals and scanned the entire record and considered the arguments advanced.

SUBMISSIONS ON BEHALF OF APPELLANTS

14. Learned counsel for the appellants has submitted that the accused/appellants have been convicted and sentenced under Sections 302/34 and 201 IPC without there being any concrete evidence against them. The judgment of the trial court is based on surmises and conjectures. It was a case of circumstantial evidence and without there being a complete chain of circumstances, the appellants have been convicted.

15. To substantiate the aforesaid submission, it has been argued by the learned counsel for the appellants that informant Roshan Lal (P.W.1) had lodged the first information report against the accused appellants on a false story as disclosed by Raju(P.W.2), Premchand (not examined) and Yadram (P.W.5). Informant Roshan Lal(P.W.1) is not witness of any circumstance related to the alleged incident. There are discrepancies in the testimonies of the witnesses.

16. Learned counsel for the appellants further submitted that the deceased had sustained 14 injuries on his person caused by danda but there is no injury on the vital part of the body. In the post mortem report, as per the doctor (P.W.3) the death would have been occurred in between 9-10 PM till 4.00 AM in the morning of 12.10.1994, whereas in the cross- examination P.W.3 had stated that there was a possibility of death at 4.00 PM in the evening on 12.10.1994, therefore, there is a vast variation in the estimated time of death which creates a serious doubt about the time of the alleged incident testimony of prosecution witnesses.

17. Learned Counsel for the appellants further argued that there was no independent witness of the alleged recovery allegedly made at the instance of the accused appellants, the recovery was planted in order to frame the accused appellants by false and fabricated means. It is further submitted that the case rests on circumstantial evidence but none of the circumstances from which inference of guilt against the accused appellants could

be drawn had been proved by cogent evidence.

18. Learned Counsel for the appellants has also argued that the motive to commit murder of deceased Rajendra was not proved by the prosecution but even then the trial court had convicted the accused appellants by misappreciation of evidence adduced by the prosecution.

SUBMISSION ON BEHALF OF THE STATE-RESPONDENTS

19. Learned counsel appearing for State-respondent, on the other hand, submitted that though the case rests on circumstantial evidence, but the chain of circumstances established on the basis of cogent evidence available on record which clearly indicate involvement of the accused appellants in the commission of the crime in question.

20. It is pointed out that the accused appellants committed murder of Rajendra(deceased) and threw his body. The dead body of the deceased Rajendra and several articles were discovered at the pointing out of the accused appellants. All these circumstances established the guilt of the accused appellants in committing the murder of the deceased.

ANALYSIS

21. We have heard learned counsel for the parties and gone through the material brought on record, it is manifestly clear that the trial Court has convicted the accused appellants merely on the basis of testimonies of the informant P.W.1-Roshan Lal and P.W.5-Yadram as well as recoveries made on the pointing out of accused/appellant Mahesh from the house of accused appellant Suresh alias Chaveney. It may be noted that P.W.2-Raju and P.W.6-Tilak Raj had been **declared hostile**.

22. To examine the guilt of the accused appellants, we must appreciate the evidence adduced by the prosecution. The present case being a case of circumstantial evidence, it is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case 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. In other words, 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 probability, the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved by cogent evidence.

23. In the case of **Padala Veera Reddy v. State of A.P. : AIR 1990 SC 79,** wherein the Hon'ble Supreme Court laid down the guiding principle with regard to **appreciation of circumstantial evidence:-**

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the

conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of 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."

24. In the case of **State of U.P. v. Ashok Kumar Srivastava : [1992] 1 SCR 37,** the Apex Court pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

25. In the case of **Sanatan Naskar and Anr. v. State of West Bengal** reported in **(2010) 8 SCC 249,** the Hon'ble Supreme Court propounded as under:-

"13. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard. "

26. In regard to **appreciation of circumstantial evidence,** the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharshtra : 1984 Cri. L.J. 178** was pleased to observe in paras-150 to 158, which are quoted below:-

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The fundamental and basic decision of the Apex Court is **Hanumant v. The State of Madhya Pradesh.(1)** This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of **Tufail (Alias) Simmi v. State of**

Uttar Pradesh(2) and Ramgopal v. State of Maharashtra(3). It may be useful to extract what Mahajan, J. has laid down in **Hanumant's** case (supra):

"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 far 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."

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in **Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra** where the following 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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus deliciti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in **The King v. Horry,(l)** thus:

"Before he can be convicted, the fact of death should be proved by such

circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression, morally certain by 'such circumstances as render the commission of the crime certain'.

156. his indicates the cardinal principle' of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. The State of Bombay(2) Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases Tufail's case (supra), Ramgopals case (supra), Chandrakant Nyalchand Seth v. The State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19.2.58), Dharmbir Singh v. The State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4.11.1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration(l). Mohan Lal Pangasa v. State of U.P.,(2) Shankarlal Gyarasilal Dixit v. State of Maharashtra(3) and M.C. Agarwal v. State of Maharashtra(4)-a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in **Deonandan Mishra v. The State of Bihar(5)**, to supplement this argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation-such absence of explanation of false explanation would itself be an additional link which completes the chain."

158. t will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation."

27. In regard to motive, in the case of **Sampath Kumar v. Inspector of Police Krishnagiri : 2010 Cri. L.J. 3889 (SC),** the Apex Court was pleased to observe in para 15 which is quoted below :-

"15. .....One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."

28. In the case of **Bhagwan Jagannath Markad v. State Of Maharashtra : (2016) 10 SCC 537** the Hon'ble Apex Court summarized the principles for the appreciation of the credibility of witness where there are discrepancies or infirmaries in the statement:

"19. While appreciating the evidence of a witness, the Court has to assess whether read as a whole it is truthful. in doing so the court has to keep in mind the deficiencies, drawback and infirmaries to find out whether such discrepancies shake the truthfulness. ...Only when discrepancies are so incompatible as to effect the credibility of the version of witness , the Court may reject the evidence. ...The Cout has to sift the chaff from the grain and find out the truth. A statement may be partly rejected accepted."

29. In the present case, Roshan Lal (P.W.-1) has lodged the F.I.R. for the murder of his brother Rajendra. In cross-examination, the informant P.W.1 had deposed before the trial Court that when his brother Rajendra did not return home, he did not go to trace out his brother Rajendra (deceased) on 12.10.1994, rather on the following day, i.e., on 13.10.1994, he searched for his brother Rajendra on the basis of the information given by witnesses Premchandra (not produced), Yadram (P.W.5) and Raju (P.W.2). He further stated that the accused/appellants after killing his brother Rajendra kept his dead body in a sack and threw it at the Dharam Kanta. P.W.1 also deposed that he came to know about all the facts as they were told by Premchandra (not examined), Yadram (P.W.5) and Raju (P.W.2) (declared hostile).

30. For the sake of convenience, the testimonies which have been relied upon by the trial court are being referred hereinafter, which would go to show that there are **material contradictions in their statements**, which cannot be thrown away lightly.

31. Roshan Lal (P.W.-1), in his testimony deposed that Surendra was his elder brother, who had given testimony against Sumer (elder brother of appellant Suresh alias Chaveney) in a murder case in which Sumer was convicted. Since then the family members of Sumer were having enmity with him. From the last few days, accused appellant Suresh alias Chaveney used to take away his elder brother Rajendra for buying lottery tickets and was developing friendship with him. He further stated that on 12.10.1994 his elder brother Rajendra was standing with Raju at the Ramlila ground then the accused appellant Suresh came and accused appellant Mukesh came pulling rickshaw. He further deposed that the appellants took away his elder brother Rajendra on a rickshaw. It was 4:00 p.m. and, thereafter, he stated that it was 7:00-7.30 p.m. He further stated that Yadram had gone to the house of Suresh for booking a car where Yadaram saw a

corpse, which was kept in a sack on a rickshaw. The legs of the corpse were protruding out side the sack. They took away the corpse from the house of Suresh. Yadram asked appellant Suresh alias Chaveney about the corpse, and he told that it was the dead body of Rajendra and that he has taken revenge of his brother. Appellant Suresh alias Chaveney also warned Yadram that if he narrated anything to anyone, the consequences would be bad. This witness (P.W.1) further deposed that on the date of the recovery of the dead body he and his family members were searching Rajendra in the Mohalla. He saw that there was a lot of crowd at the Ramlila ground near the Dharmkanta on Ganj Road then Premchandra, Raju and Yadram told that the corpse of Rajendra was lying at the Dharmkanta, where he reached and saw that the dead body of his elder brother was in a sack. Blood was oozing from his mouth and head. Thereafter, P.W.1 told the incident to his family members. He wrote the written report (Ext. Ka-1) in his hand writing and submitted in the Police Station on the basis of which the case was registered.

32. P.W.1, in cross examination, further stated that when his brother Rajendra did not return at night, he did not start his search. Following day, i.e., 12.10.1994 he made his searches. At the point of time of search, the witnesess told him about his brother Rajendra and the written report scribed giving narration as per the version of the witnesses. P.W.1 further stated that in the criminal case in which Surendra had given testimony against Sumer, 10-12 years back, deceased Rajendra was not a witness whereas, Vishnu and Chhote Lal were witnesses, they were living at Bijnor along with their family. In the case of murder, Sumer was convicted, wherein he was granted bail and the appeal was pending in the High Court. He further stated that Premchandra, Yadram and Raju had told him about the corpse of Rajendra. They also told him about this incident, then he went to see the corpse. He had narrated in the report that appellant Mukesh and others took away his brother Rajendra and after committing his murder kept his corpse in a sack and threw it on the land belonging to Nagarpalika. He had not mentioned about these things in the report and after some time he stated that he had mentioned the above in the report. He then stated that he did not tell the Inspector about this thing. He stated that he could not tell the reason about not mentioning the word "Dharmkanta' in the report. He further deposed in the cross examination that he had written in the report that both the accused, after committing murder of his brother, threw his corpse at the Dharmkanta. The witness then stated that if that was not written in his statement he could not tell the reason.

33. Raju (P.W.-2), in his testimony, deposed that he knew the accused Mukesh and Suresh. They neither came on rickshaw before him nor they took away deceased Rajendra with them. The accused did not say anything to deceased Rajendra in his

34. In the cross examination P.W.2 deposed that he did not know deceased Rajendra, he was not his friend. He did not know that decased Rajendra was habitual of playing lottery. He came to know about the murder of Rajendra but did not go to the place where the body was lying. The investigating officer had not recorded his statement. When the statement of P.W.2 recorded under Section 161 Cr.P.C. was read out to him, he stated that he had not given any such statement to the Inspector,

if as to how it was written was not known to him. This witness was, **declared hostile.**

35. Dr. Rajesh Kumar Maheshwari (P.W.-3), in his testimony, stated that on 13.10.1994, he was posted at T.B. Clinic Bijnor as the Medical Officer. He conducted postmortem of the deceased Rajendra at 11.00 P.M. through artificial light on the direction of the District Magistrate, Bijnor and Chief Medical Officer, Bijnor. The corpse was sent by the Sub-Inspector, P.S. Kotwali, Bijnor in a sealed cover alongwith 10 police papers. The corpse was brought by C.P.573 Harsh Swaroop Singh and C.P.1109 Ramveer of Police Station Kotwali, Bijnor. He found 16 antemortem injuries on the person of the deceased. He opined that the injuries on the body might have been caused by Danda. All the injuries inflicted upon the deceased were sufficient to cause death. He opined that the cause of death was due to shock and hemorrhage as a result of ante mortem injuries. He also opined that the death might have taken place in between 9:00-10:00 A.M. to 4.00 PM on 12.10.1994. However, in his cross-examination, this witness stated that the death might have occurred on 12.10.1994 in the evening of around 4.00 o'clock, therefore, there is a vast difference in time of death in his statement.

36. Constable Har Swaroop Singh (P.W.-4) in his testimony, stated that on 13.1.1994 he was posted at the Police Station Kotwali Shahar, District Bijnour on the post of Constable. The Sub-Inspector had carried out the Panchayatnama of the deceased Rajendra and, thereafter, the sealed cover dead body was handed over to him and one Constable Ramveer for carrying to the mortury for postmortem examination. The doctor had conducted the post mortem of the deceased.

37. In the cross-exmination, P.W.-4 stated that he reached the mortury at 5.30 P.M. along with the dead body and delivered the papers to R.I. and, thereafter, he had handed over the papers to the doctor. The doctor after conducting the postmortem examination of the dead body handed over the dead body to him at about 10.30 PM and, thereafter, he got the postmortem report received at the police station and registered his arrival at 11.00 o'clock, in the general diary.

38. Yadram (P.W.-5), in his testimony, stated that he knew the accused-appellant. The appellant, Suresh alias Chaveney was a Driver of a Maruti Car. He had gone to the house of the accused-appellant for taking the car on hire basis to visit Delhi, where he saw the accused-appellant Mukesh alias Chaveney coming out of his house holding a sack fromwhere the legs of a corpse were protruding. This witness further stated that the accused-appellants were keeping the corpse in the rickshaw and seeing him they were amazed. On being asked as to what was happening the accused-appellants told him that they had taken the revenge of their enmity. The witness had further stated that the accused-appellants had droppped the corpse on an empty land behind the Dharamkanta at the Ramlila ground. He further stated that he saw that in the next morning the crowd was assembled at that point of rcovery of the body. He had also seen the corpse which was of Rajender who was known to him from earlier. P.W.5 further stated that he had disclosed all this to the brother of Rajender, the informant, Roshan Lal. The accused-appellants had threatened him that, in case, he told anyone, he would be killed. He had also seen that Bora (sack) and one blood stained Danda was also found near the corpse.

39. In his cross-examination, P.W.5, stated that when the accused-appellants were carrying the corpse in sack, he identified the corpse by seeing its face as he knew deceased Rajendra from earlier and told that fact to Roshan Lal, the brother of the deceased, however he did not tell this fact to his family members and neighbours. This witness had further stated that he had told the Investigating Officer that he had identified the corpse while the accused-appellants were carrying the same and denied the fact that he did not tell the Investigating officer that he did not know that the corpse was of Rajendera, otherwise he would have told this fact to the family members of the deceased.

40. Constable Prem Chandra (P.W.-6), in his testimony, stated that he had not seen the accused-appellants sitting with the deceased-Rajendra at the hotel of Rajendra at 7.00-7.30 PM, as such this witness was declared hostile.

41. Raj Veer Singh, S.H.O. (P.W.-7) in his testimony, stated that on 14.10.1994, he was posted as Incharge/Inspector at Kotwali Shahar, Bijnor. The investigation was handed over to him from one A.R. Misra (previous I.O.). After taking over the investigation, he had recorded the statements of witnesses Prem Chandra, Tilak Raj and Yadram, and started searches for the accused-appellants on 25.2.1994. He also recorded the statement of Suresh alias Chavaney in the District Jail, Bijnor. After completion of the investigation, he submitted the charge sheet in the Court against the accused-appellants Mukesh and Suresh alias Chavaney.

42. Head Constable Ram Krapal (P.W.-8), in his testimony, stated that informant Roshal Lal had submitted the Tehrir (Ext.4) at the Police Station and he had scribed the Check F.I.R. No. 496. The Nakal Rapat No. 21, 9.05 dated 13.10.1994 was entered in the G.D. which was in his signature and that he prepared the G.D. (Ext. 5).

43. Sub Inspector A.R. Misra (P.W.-9) who is the first I.O., in his testimony, stated that on 13.10.1994, he was posted at Kotwali Shahar, Bijnor. The investigation of this case was entrusted to him. He, after recording the statement of scribe of the F.I.R. and G.D. alongwith jild including its papers, alongwith constables reached at the place of incident and prepared panchayatnama of deceased Rajendra. He sent the dead body for postmortem through constables Har Swaroop Singh and Ramveer Singh and recorded the statement of the informant. The Panchayatnama (Ext. Ka-6) was written and signed by him. Related papers Chalan lash (Ext. Ka-7), report R.I. (Ext. Ka-8), photo lash (Ext. Ka-9), report C.M.O (Ext. Ka-10) were written and signed by him. Recovery memo (Ext. 11) of blood stained plain earth collected from the place of incident was written and signed by him. Recovery memo (Ext. Ka-12) of blood stained bori taat and blood stained danda collected from the spot of recovery of the dead body was written and signed by him. He recorded the statements of witnesses of panchayatnama and recovery memo. He inspected the place of the recovery of the body and prepared the site plan (Ext.Ka-13) which was written and signed by him. He further stated that he recorded the statement of Raju (P.W.2), made searches for accused-appellants and arrested Mukesh (accused appellant) and recorded his statement wherein he confessed his guilt and at his pointing out he visited the house of accused appellant Suresh alias Chaveney from where he

collected a blood stained broken piece of Danda and a Chadar, and prepared recovery memo (Ext.14). He collected blood stained earth and blood stained piece of concrete from the house of Suresh and prepared recovery memo (Ext. Ka-15). He further stated that he collected blood stained earth, blood stained piece of concrete blood stained chadar, blood stained broken piece of Danda from the place of occurrence and prepared the site plan (Ext. 16), which was written and signed by him. Thereafter, he came to the police station and deposited the said artices in the Malkhana. After that, the investigation was conducted by the Incharge Ramveer Singh.

44. In his cross-examination, P.W.9, stated that except the case diary he had not prepared the memorandum of the statement of the accused. He further stated that he did not remember whether family members (Parents and others) of Suresh were residing in the house of Suresh or not. He further stated that description of danda was written in the recovery memo. Seeing the recovery memo, this witness stated that there was no mention of any kind of Hulia in it. He further stated that he had not obtained signature of the accused and he did not hand over carbon copy of the recovery memo to the accused. He further stated that on the recovery memo his name was not written because he himself scribed it.

45. It would be relevant to point out that Premchandra was not examined by the prosecution for the reasons best known to it. Raju (P.W.-2), in his deposition, stated that he was not standing at the Ramlila ground with Rajendra (deceased) on 12.10.1994 at 6.30 A.M. The appellants neither came on rickshaw nor took away Rajendra (deceased) with them. The accused appellants did not tell him that they were taking the deceased with them for drinking wine and having meat at the hotel of Virendra. He further stated that though he came to know about the murder of Rajendra, but did not go to the place where the dead body of the deceased was recovered. The Investigating Officer did not record his statement under Section 161 Cr.P.C. Thus, P.W.2 was **declared hostile**. Tilak Raj (P.W.6) also denied that he saw the deceased Rajendra along with the accused appellants at the hotel of Virendra at 07:30 p.m., hence he was also **declared hostile**.

46. It is true that the F.I.R. of the incident was lodged as per the story told by P.W.2-Raju, P.W.6-Tilak Raj and Prem Chandra, but no one had seen the deceased going along with the accused appellants before the murder of the deceased or the body was found. As stated hereinabove, P.W.2-Raju and P.W.6-Tilak Raj were declared hostile and these witnesses had completely denied in their testimonies that they had seen the deceased along with the accused appellants before the murder of the deceased, hence the very basis of lodging the F.I.R. against the accused/ appellants appears to be doubtful and creates suspicion on the prosecution story.

47. So far as the recovery of blood stained "broken piece of danda' and blood stained chadar (Ext. Ka. 14) made on the pointing out of accused appellant Mukesh from the house of accused appellant Suresh alias Chaveney, is concerned, it may be pointed out that the accused appellant Mukesh has though admitted that he was arrested while he was standing near his house but had denied the alleged recovery in the statement recorded under Section 313 Cr.P.C. and stated that the said

recovery was not made from his house. The First Investigating Officer S.I. A.R. Mishra (P.W.9), in his cross-examination, admitted that there was no signature of the accused appellants on the recovery memo (Ext. Ka-14) of blood stained broken piece of danda and blood stained chadar nor a copy of it had been supplied to the accused/appellants. It is also relevant to note that a perusal of the recovery memo (Ext. Ka-14) would show that the Investigating Officer himself did not prepare the recovery memo but it was prepared on the dictation of S.H.O. Rajveer Singh, the second investigating officer (PW.7). From this fact, it can be easily inferred that the recovery memo was not prepared at the place of recovery in the presence of the witnesses rather it was prepared either at the police station or at some other place and the same was prepared at the instance of the Station House Officer Rajveer Singh (second investigating officer), who was not the investigating officer on the date of recovery. Thus the recovery memo does not appear to be a genuine paper and creates strong suspicion on the prosecution story.

48. So far as the evidence of P.W.5-Yadram is concerned, he, in his cross-examination, though had deposed that he had identified the dead body of the deceased when the accused appellants were taking it in a sack but he had not stated so to the Inspector. It is clear that he did not recognize that the dead body was of Rajendra, otherwise, he would have informed the family members of the deceased. This testimony of P.W.5 casts a serious doubt itself as normally on seeing the dead body particularly when it had been identified, naturally, the person definitely would go tell the same to either the family members or to anyone known, but this aspect of the matter had not been considered by the trial court. It may further be pointed out that the trial court had committed a manifest error in not considering the fact that there were apparent contradictions in the testimony of P.W.5-Yadram as he, at one place, in his testimony, stated that he had identified the deceased on seeing its face and, at another place, he stated that he had identified the deceased by seeing its legs when the dead body was being carryied in a sack by the appellant, but later on he denied the identification of the deceased.

49. The instant case purely rests on circumstantial evidence. In order to sustain conviction, a complete chain of circumstantial evidence must be formed which is incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard-and-fast rule can be laid to say that the particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done by the Court in the facts and circumstances of each case.

50. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists an eyewitness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or ***factum probandum***. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, at 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 one on one hand and inference of facts to be drawn from them on the other hand. 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 facts lead to an inference of guilt of the accused person should be considered.

51. It would be significant to add that while dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering in the mind may take place of proof. Suspicion, however, strong cannot be allowed to take the place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof.

52. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistence 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.

53. The present case, which undoubtedly, is a case of circumstantial evidence, is to be looked into in the backdrop of the aforesaid legal principles. The prosecution has completely failed to prove beyond reasonable doubt complete chain of event and circumstances which unerringly points towards the involvement and guilt of the appellants. The prosecution also failed to establish any motive to the accused appellants for committing the murder of the deceased, the brother of the informant.

54. In the aforesaid facts and circumstances of the case, we are of the considered view that there are various lacunae in the case of the prosecution in establishing the chain of circumstantial evidence against the accused appellants. Further, there is no cogent or clinching evidence on record which proves the guilt of the accused appellants beyond reasonable doubt. Henceforth, we hold that the prosecution has failed to produce evidence to complete chain of circumstances and the guilt of the appellants beyond all reasonable doubt, and the benefit undoubtedly has to go the accused-appellants herein. The impugned judgment of conviction, thus found unsustainable and is liable to be set aside and the appellants are entitled to be acquitted by giving them the benefit of doubt.

55. Accordingly, both the appeals are **allowed**. The impugned judgment and order dated 28.1.1997 passed by the Fifth Additional District and Sessions Judge, Bijnor in Session Trial No. 11 of 1995 (State Vs. Mukesh and another), arising out of Case Crime No. 800 of 1994, under Sections 302/201 I.P.C., Police Station Kotwali Shahar, District Bijnor, is hereby set aside.

56. Appellants, **Suresh alias Chavaney and Mahesh** are acquitted of the charges under Sections 302/34 and 201 IPC. They are on bail and need not to surrender. Their bail bonds are cancelled and sureties are discharged.

57. Shri Jai Raj Singh Tomar, learned *Amicus Curiae* rendered valuable assistance to the Court. The Court quantifies Rs.15,000/- to be paid to Shri Jai Raj Singh Tomar, Advocate towards fee for

the able assistance provided by him in hearing of the Criminal Appeal No. 210 of 1997. The said payment shall be made to Shri Jai Raj Singh Tomar, Advocate by the Registry of the Court within the shortest possible time.

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

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

(2022)06ILR A442
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 388 of 1984

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

Counsel for the Appellant:
Sri R.B. Sahai, Sri Amrish Sahai, Sri R.B. Sahai

Counsel for the Respondent:
D.G.A., A.G.A.

Criminal Law- Indian Evidence Act, 1872- Section 9- Test Identification Parade- Acquittal of two co-accused while conviction of the appellant - Before relying upon the evidence of identification of suspects in the test identification parade, the Court is required to determine as to whether prosecution had taken all necessary precautions to ensure that the identity of the suspect be kept concealed before the parade- If the prosecution has led evidence to show that from the time of arrest of an accused to the time of his admission into the jail, precautions were taken to ensure that he was not seen by any outsider, and if the identifying witnesses depose that they never saw him at any time between the crime and the identification parade, the burden lying on the prosecution has been discharged. It is then for the accused to establish that he was shown. The law does not require him to do so affirmatively; it is sufficient in creating a reasonable doubt in the mind of the Court. But if he fails to raise a reasonable doubt the law enjoins that the prosecution evidence on the matter be accepted.

One of the requirements for establishing a test identification parade as valid and legal is that the prosecution must discharge its burden that the accused was not seen by any outsider from the time of his admission in jail till his test identification parade.

Indian Evidence Act, 1872- Section 9- Test Identification Parade- Unnecessary delay in the holding of the test- While answering the question as to whether the witness did have opportunity of seeing the offenders, the requirement of holding test identification parade at the earliest opportunity without avoidable and unreasonable delay after the arrest of the accused has been insisted by the Courts from time to time. The idea behind such insistence is that the witness concerned would get fair opportunity of identifying the suspect leaving the possibility of his memory being faded and rule out all chances of suspect having been seen during the period, i.e from the date of arrest till the date of identification- No explanation could be offered by the Investigating Officer nor any question was put to him by the trial court as to why one month was taken by the Investigating Officer to conduct test identification parade of the appellant Rakesh, leaving behind the acquitted accused persons for whom test identification parade was conducted after two months - It is proved that the prosecution has failed to explain the unnecessary delay in holding the

identification test though the witnesses were very much available being the police personnel posted in the same police station wherein first information report was lodged.

Test Identification Parade has to be conducted without any unnecessary delay in order to not only rule out the possibility of any outsider having seen the accused between the time he was admitted in jail till his identification parade, but also to provide the witness a fair opportunity of identifying the accused before his memory fades with the passage of time.

Indian Evidence Act, 1872- Section 9- Test Identification Parade – Requirement of corroboration- The test identification of the accused in test identification parade is an evidence which requires corroboration from the testimony of the witnesses in the Court and without corroboration, the result of test identification parade cannot be made sole basis of conviction - The result of the test identification parade was not corroborated with the evidence of implication of the appellant Rakesh in the Court- Only witness who allegedly had identified appellant Rakesh in the test identification parade also identified him in the Court but this identification was only by the police personnel posted in the convoy duty on the fateful night and not by any other witness. As it is settled that the test identification report do not constitute substantive evidence and its corroboration from the surrounding circumstance is required. In the instant case, the circumstances discussed above, do no corroborate the result of the test identification parade.

Result of a Test Identification Parade is only corroborative evidence and where the same is not corroborated by the other evidence and circumstances, the sole witness is a police personnel, then conviction solely on the basis of such test identification may not be legal and proper. (Para 41, 42, 43, 44, 45, 47, 59, 62, 64)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Asharfi Vs State, AIR 1961 Alld 153

2. Rameshwar Singh Vs St. of J&K, (1971) 2 SCC 715

3. Ram Babu Vs St. of U.P, (2010) 5 SCC 63

4. R. Shaji Vs St. of Ker., (2013) 14 SCC 266

5. Munshi Singh Gautam & ors. Vs St. of M.P, (2005) 9 SCC 631

6. Matru Vs. St. of U.P, (1971) 2 SCC 75

7. Santokh Singh Vs Izhar Hussain ,(1973) 2 SCC 406

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

1. Heard Sri Amrish Sahai learned Advocate for the appellant and Sri Patanjali Mishra learned A.G.A for the State.

2. This appeal is directed against the judgment and order dated 06.02.1984 passed by the Second Additional Sessions Judge, Fatehpur in Sessions Trial no.145 of 1993 arising out of Case Crime no.139 of 1982 under Section 396 IPC, P.S- Malwan, District-Fatehpur whereby sole appellant Rakesh has been convicted for the offence punishable under Section 396 IPC and sentenced to undergo imprisonment for life.

3. The first report of the incident was given in writing by P.W-1-Naresh Chandra s/o Jagdish Chandra, a driver of the truck no.3901 URQ. The averments in the said report are that the first informant was driver of the aforesaid truck and on 14.10.1982, at about 2.00 a.m., while they were going to Bhogaon from Varanasi, three persons namely Suresh Chandra s/o Matadeen (second Driver) Shyam Singh s/o Puselal

(Cleaner) and one Ram Sewak Dubey were sitting in his truck. At about 2.00 a.m., when they reached near the village Allipur in a convoy, about 3 kms away from the said village, the road was blocked by placing branches of Babool tree across the road. Seeing that, the first informant slowed down his vehicle (truck) and at that time, 8-10 miscreants armed with weapons gheraoed his vehicle pointing out Tamancha and Gun. The miscreants started looting money and then one of them fired which hit deceased Ram Sewak Dubey who died in the vehicle itself. The cleaner Shyam Singh got injuries in his right leg. The police personnel on convoy duty present in the vehicle behind namely Truck no.UTM 2400 also fired. The miscreants looted Rs.3800/- from the first informant and the persons sitting in the truck. It is stated in the written report that this incident was witnessed by the drivers of the vehicle No.UTM2400, Bhagwan Singh s/o Bhupal Singh and Lalaram s/o Ulfat Singh as also the driver of vehicle no.8030HRU namely Laxman Singh s/o Chatur Singh as well as others present on the spot. It was stated in the written report that they all had seen and identified the assailants in the light of the trucks and they could identify the miscreants if they were brought before them. The body of the deceased Ram Sewak and the injured Shyam Singh (cleaner) were taken to the police station. The Check report and the GD entry of the report were proved by P.W-6 being in his writing and signature as Exhibit Ka-4 and 5. It was stated by P.W-6 that the written report was given by the first informant Naresh Chandra at about 2.30 a.m on 13/14.10.1982 who came along with the driver Suresh Chandra and injured cleaner Shyam Singh and also brought the dead body of Ram Sewak. Two constables Ramdeo Singh and Vinay Kumar who were on convoy duty came along with them.

4. The G.D entry of the movement of Constable Ramdeo Singh and Vinay Kumar from the Police Station on 13.10.1982 at about 9.30 p.m in Rapat no.32 was proved by P.W-6 being in his hand writing by bringing the original G.D and filing the copy with his signature proved as Exhibit Ka-3. In cross, P.W-6 stated that the convoy used to be prepared in front of the police station, one Constable used to make the convoy and two Constables accompany it. On confrontation, it was stated, in cross, by P.W-6, that G.D entries of the duty of the Constables, on convoy duty, was before him and as per the GD dated 17.10.1982, Constable Vinay Kumar was on Santri duty from 6.00 p.m till 9.00 p.m and Constable Ramdeo was on Convoy duty from 17.10.1982 at 19.00 hours till 18.10.1982 at 4.00 a.m. However, the movement of these constables from the police station on the said dates ie 17.10.1982-18.10.1982 was not recorded in the GD.

5. The written report of the incident reported by P.W-1 was read over to him during his deposition before the Court, who admitted his signature and handwriting on the same, it was proved as Exhibit Ka-1. After lodging of the report, blood from inside the truck, found on the seat and near the engine and plain soil which came there from the foot of the people entering in the truck found near the window of the truck, were collected and sealed, and the recovery memo of the same was proved as Exhibit Ka-18. The blood stained clothes of deceased Ram Sewak Dubey were seized and recorded in the recovery memo Exhibit Ka-9. The inquest was conducted on 14.10.1982, which commenced at 6.30 am and ended at 8.30 am. The injured Shyam Singh was sent to the Sadar hospital, Fatehpur on 14.10.1982 for investigation of his injuries. Two gunshot wounds with

blackening and tattooing were found on the lower limb (right) of injured Shyam Singh.

6. One gun shot wound of entry on left side of neck behind the left ear cavity deep below occipital area with blackening and tattooing was present on the person of deceased Ram Sewak Dubey. One wadding piece and 23 small pellets were recovered from the neck muscles and two small pellets from left lung. The post mortem report exhibited as Exhibit Ka-7 indicates that the death was caused due to shock and hemorrhage as a result of fire arm injuries.

7. P.W-1, the first informant stated on oath that on 13.10.1982 his truck no.3901 URQ was looted and at that time carrying coal in the truck he was going to Bhogaon from Varanasi and in the truck three persons namely second driver Suresh Chandra, Cleaner Shyam and one Ram Sewak were sitting. Other trucks were also coming behind him in the convoy and police was accompanying them. At about 2.00 a.m., 3 kms away from Village Allipur on GT Road, branches of wild babool were lying on both sides of the road blocking it. He had to slow down the truck and then 7-8 miscreants came and gheraoed the truck from all four sides. The dacoits were carrying weapons and they started loot. From the right side one dacoit opened fire which hit at the back of the head of the deceased Ram Sewak Dubey and he fell in the cabin below the back seat. One fire which came from the left side hit the cleaner Shyam Singh. The miscreants looted Rs.3800/-.

8. In the meantime, two constables posted on the convoy duty reached with their truck,they fired and the miscreants ran away with the money towards North South. P.W-1 stated that when his truck reached the place of the incident, the truck light was on but when the loot was started then they forced him to put off the light.The light of the truck behind him were, however, 'On'. Ramsewak Dubey died inside the truck. The report was written and signed by him and was lodged in P.S-Malwan at about 2.30 a.m. The report was read over to him and he proved it as Exhibit Ka-1.

9. The injured Shyam Singh was sent to the Sadar hospital, Fatehpur. P.W-1 stated that the Investigating Officer interrogated him and took out the dead body from the truck, conducted inquest and sent it for the postmortem. He categorically stated in chief that he did not participate in the identification parade of the accused persons.

10. In cross, P.W-1 stated that he did not mention the appearance of the assailants in the report nor he disclosed anything about this to the Investigating Officer. The night of the incident was dark and when his truck was stopped the miscreants forced him to put off the light. On a suggestion, he stated that when the trucks are parked, the lights get dim. He then stated that the trucks which were behind him in the convoy, their headlights were on. He could not see the miscreants and that is why, their appearance was not disclosed in the report nor was disclosed to the Investigating Officer in his statement. Lastly, P.W-1 stated that he could not get intimation of the date of identification parade in time and whenever it was held, he was somewhere else on duty.

11. P.W-2 is Constable Ramdeo Pandey C.P-324 P.S Malwan, District-Fatehpur who on 13.10.1982 was on convoy duty. He stated that he moved from the police station at about 9.30 p.m on

convoy duty accompanied with Constable Vinay Kumar. They both were sitting on the front seat of the truck. Two-three trucks were in front of their truck and some were behind. At around 2.00 a.m, they reached at the G.T. road between Village-Allipur, and Village Saura, a road jam was created there by the branches of Babool tree. The dacoits were looting the truck on the front and the head light of the truck in which they were sitting was on. The headlights of the truck which was looted and all other trucks in the convoy were also on. P.W-2 stated that he had 12 bore personal gun and his companion was carrying official rifle. They both challenged the dacoits and fired, who ran towards the North and could not be nabbed. P.W-2 stated that he had seen the faces of the dacoits in the headlight of the truck and identified them. They were unknown, 8-10 in number.

12. P.W-2 further stated that he went to the District Jail-Fatehpur in the identification parade and identified two dacoits, and then stated that they were also present in the Court. P.W-2 then went to the place where the accused persons were standing, touched two of them and said that those were the persons who were identified by him in the jail. On being asked to give names of the dacoits, he stated that one of them was Ram Kishun @ Kripali, and then said that he was Ram Ashrey @ Ghonchey. P.W-2 further stated in chief that he had seen the said dacoits for the first time at the place at the time of the incident and then in jail, and that he had never seen them in between.

13. When confronted by the accused, in cross, about his posting, P.W-2 admitted that two of the accused person namely Ram Kishun and Ghonchey were residents of the Mohalla Lahauri wherein P.S-Bindki situated. PW-2 denied the suggestion that he knew both the above named accused persons before the incident and that the accused persons were caught from their homes by the Investigating Officer and then detained in the Police Station Malwan for two days and, thereafter, challaned in the case. He then narrated as to how the identification parade was conducted in the jail.

14. It is further stated by P.W-2, that on the fateful day, his convoy duty was from Malwan to Nawabag and it was his 6th round. It was further stated by P.W-2 that the truck of Naresh (P.W-1) was ahead in the convoy, there were 15-20 trucks and there were 10-15 trucks behind the truck wherein he was sitting.

15. The headlights of all the trucks which were behind were on and the truck in which he was sitting was brought forward and parked besides the truck which was looted and the assailants fled away towards the North. It was a dark night.

16. On a query, P.W-2 stated to the Court that he gave appearance of the miscreants in his statement on the next day when he was interrogated by the Investigating Officer.

17. P.W-3 is Constable Vinay Kumar who was also on convoy duty on the fateful night. He narrated the incident in the same manner as has been stated by P.W-2 Ram Deo Pandey and stated that he was on convoy duty along with P.W-2. P.W-3 stated that all dacoits were unknown, and when they ran away, the witnesses reached near the truck and saw that one person was killed and cleaner was injured in his right leg. The identification of the dacoits was made in the District jail Fatehpur and he

had identified three of them. P.W-3 stated that he had seen the dacoits firstly at the spot of the incident and then during the identification parade in jail and did not see them in between. He also identified three accused persons standing in the Court stating that they were the same persons who had been identified by him in the jail.

18. On a suggestion, P.W-3 stated that when the accused persons were earlier caught by the police and brought to the police station, he was not present there. He further stated that he heard the sounds of two fires. On a suggestion to P.W-3 he denied that he was posted in the police station Bindki before the incident and admitted that at the time of incident he was posted in the Police Station Malwan. He further denied the suggestion that the accused were shown to him when they were brought from the jail to the Court.

19. He expressed ignorance to the suggestion that accused Rakesh was brought without veil in the Court on the date of his appearance, before the identification parade. He denied that accused Kripali and Ghonchey were identified by him earlier as they were without veil behind the bar. On confrontation by the accused, P.W-3 stated that he identified three accused persons correctly and 3-4 wrongly.

20. He stated, in cross, that the headlight of the truck at the front was on and lights of all other trucks were also on. He stated that the entire incident occurred in about 2-3 minutes and as soon as they reached and fired the assailants fled away. They came down from their truck and challenged the assailants and fired at them, the assailants, however, escaped. The suggestion that he did not see or identify any of the assailant was denied. P.W-3 also denied that he had seen the accused persons before the identification parade. He said that he identified the accused persons in jail during the actual identification parade. The suggestion that there was no light at the time of the incident was denied by P.W-3.

21. P.W-4 is Constable Harnath Singh who was posted in the Police Station Malwan in October, 1982. He was produced in the witness box to prove that, two accused namely Ram Kishun @ Kripali, Gonchey were brought with their covered faces handed over in his custody and Constable Chandra Bhan. His testimony is not relevant as the said two accused persons have been acquitted by the trial court.

22. P.W-5- Lal Singh Chandel is the Investigating Officer, who stated that initially the investigation was made by one Sub-Inspector, Phool Singh Sachan. On 15.10.1982, the investigation was handed over to him under the orders of the Superintendent of Police. He recorded the statement of witnesses and the police officials posted in convoy duty on the date of the incident.

23. On 16.10.1982, on the clue of the informant who told that the perpetrators of the crime was a gang of Chandrapal Khatik, search was conducted, but no one could be nabbed. He then stated that he came to know that the incident was carried out by the brother of Chandrapal Khatik and it was verified by the statement of other witnesses.

24. On 17.10.1982, accused Ram Kishun @ Kripali was arrested. He brought in the police station by covering his face. On his interrogation he confessed the crime

and disclosed the names of other accused persons. The accused Ram Kishun was lodged in the lockup in the police station at 3.15 p.m and instructed to keep him under veil. The accused Ghonchey was arrested on 17.10.1982 at about 8.30 p.m from another place. The said accused also confessed the crime and disclosed the names of his co-accused and he was lodged in the police station covering his face. P.W-5 came to know on 22.11.1982, that the accused appellant Rakesh had surrendered and was sent to jail under veil. The result of the identification parade was received on 07.01.1983 and the chargesheet was submitted against the above named three accused persons in his handwriting and signature which was proved as Exhibit Ka-2.

25. The papers pertaining to the deceased such as inquest, site plan and the recovery memo were proved by P.W-5, having been prepared in his writing and signature. P.W-5 further stated that he recorded statement of the first informant, injured witness Shyam Singh and another witness Suresh Chandra and blood found inside the truck was seized. On a suggestion, P.W-5 denied that the accused persons were first identified by two constables on convoy duty and that they were kept in the police station with bare faces. On another question, P.W-5 stated that he came to know that accused Rakesh had surrendered in the Court on 22.11.1982 through Pairokar and that the fact that he was sent to jail under veil came to his knowledge through papers. He denied that accused appellant Rakesh appeared bare face in the Court on 22.11.1982 and then he was identified by the Constables on convoy duty.

26. P.W-7 is the Constable posted in the Police-station Malwan and stated that the accused Ram Kishun @ Kripali and Ghonchey, were lodged in the lockup under veil.

27. Before we enter into further discussion, it may be noted that the trial court had acquitted two accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey on the ground that the prosecution did not produce any positive evidence that the identification of the aforesaid two accused persons by the witnesses P.W-2 and P.W-3 was independent and that these witnesses had no occasion to see the accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey from the time when they were arrested on 17.10.1982 up to when they were taken out from the police station lock up and sent to the District jail Fatehpur on 18.10.1982 at about 8.30 am. However, for the third accused Rakesh namely the appellant herein, it was opined by the trial court that since the appellant Rakesh had surrendered in the Court there was no chance for the witnesses P.W-2 and P.W-3 to see him on any of such occasion, between his surrender and lodging in the jail.

28. The controversy in the present case, thus, revolves around the issue of identification of appellant Rakesh by two constables on convoy duty namely Ram Deo Pandey and Vinay Kumar, examined as P.W-2 and P.W-3; respectively.

29. To challenge the conviction of the appellant Rakesh, it was vehemently argued by the learned counsel for the appellant that the identification of the appellant was made by the police personnels and the eye witness P.W-1 who had the best chance to identify the miscreants and stated that he witnessed the assailants clearly in the headlight of the

truck and could identify them, did not participate in the identification parade. The prosecution has very conveniently withheld the best evidence by not getting identification of the accused persons from the first informant, namely P.W-1. The appellant Rakesh herein had taken a categorical stand in his examination under Section 313 that the Investigating Officer got him identified by the witnesses (P.W-2 and P.W-3) on the date when he was brought in the Court and that he was kept bare face.

30. The submission is that the procedure for conducting identification parade of unknown accused as provided in the U.P. Police Regulations and the procedure laid down for test identification by this Court in Asharfi vs State reported in AIR 1961 Alld 153 had not been followed. No explanation could be offered by the prosecution as to why the identification of accused appellant was not made by P.W-1 who was the eye-witness and the first informant of the case. Even according to the testimony of P.W-1, there was no chance for anyone else to identify the accused persons as the assailants were over 7-8 in number and they ran away after committing loot as soon as the Police Personnel on convoy duty reached near his truck. The statement of P.W-2 and P.W-3 that they identified the assailants/ dacoits clearly on the spot, is unbelievable in view of the statement of P.W-1 and their own statement that when they reached at the site of the incident and fired, the miscreants ran away. There is nothing on record nor any whisper in the statement of P.W-2 and P.W-3, Constables on convoy duty, that they chased the assailants rather they both admitted that the dacoits were not known to them and that they did not chase them.

31. In the statement of P.W-3, it has clearly come that the entire incident happened within 2-3 minutes. In such a short gap of time, it was not possible for the police personnels on convoy duty who were behind the truck of P.W-1 to identify the accused persons.

32. Learned A.G.A in rebuttal had defended the judgment of the trial court with the contention that the trial court had committed no illegality in distinguishing the case of the appellant Rakesh from that of other two accused persons who were arrested by the police.

33. As the appellant herein had surrendered in the Court and he was lodged in the jail directly, there was no occasion for the police personnels (P.W-2 and P.W-3) to see him or identify him before his identification in the identification parade. No infirmity can be found in the identification parade and the conviction of the appellant cannot be set aside.

34. Having heard learned counsel for the parties and perused the record.

Before entering into the controversy in light of the facts of the present case it would be apt to note the law pertaining to test identification parade, i.e the procedure prescribed in law and the legal pronouncements pertaining to the matter.

35. It is settled that the test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court. It is held in ***Ashrafi vs State*** (supra) that of all evidence of fact, evidence about the identification of a stranger is perhaps the most elusive, and the Courts are generally agreed that the evidence of identification of a stranger based on a

personal impression, even if the veracity of the witness is above board, should be approached with considerable caution, because a variety of conditions must be fulfilled before evidence based on the impression can become worthy of credence. While discussing general precautions regarding identification proceedings, it was held that the Court is bound to follow the rule that evidence as to the identification of an accused person must be such as to exclude with reasonable certainty the possibility of an innocent person being identified. The Division Bench judgment of the Madhya Pradesh High Court was noted in para-'33' of the report to put a note of caution and lay down a guideline to accept the evidence as to the identification, in the shape of 12 questions.

36. The relevant portions of para-'33' is quoted as under:-

"The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to fight shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification."

With great respect we agree with their Lordships.

The following twelve questions are apt to arise and must be answered by the Court to its satisfaction before it can accept the evidence:--

(1) Did the identifier know the accused from before?

(2) Did he see him between the crime and the test identification?

(3) Was there unnecessary delay in the holding of the test?

(4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one?

(5) What was the state of the prevailing light?

(6) What was the condition of the eye-sight of the identifier?

(7) What was the state of his mind?

(8) What opportunity did he have of seeing; the offenders?

(9) What were the errors committed by him?

(10) Was there anything outstanding in the, features or conduct of the accused which impressed him?

(11) How did the identifier fare at other test identifications held in respect of the same offence?

(12) Was the quantum of identification evidence sufficient?

We proceed to discuss these questions ad seriatim but before we do so we should like to utter, the warning that no hard and fast rules can be laid down and that each case must be dealt with on its own merits, for rules cannot be so worded as to include every conceivable case -- it is sufficient that they apply to those things which most frequently happen.

37. In the case of ***Rameshwar Singh vs State of Jammu and Kashmir*** reported in ***(1971) 2 SCC 715,*** it was held that before dealing with the evidence relating to identification of the accused it may be remembered that the substantive evidence of a witness is his evidence in the court but when the accused person is not previously known to the witness concerned, then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. Much emphasis has been laid that such identification shall be held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards must be effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It was observed that it would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chances of his memory fading are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It was held that it is thus and thus alone that justice can be fairly assured both to the accused and to the prosecution. The identification during police investigation is not a substantive evidence in law and it can be used for corroborating or contradictory evidence of the witness concerned as given in the Court. It was further stated that the identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the Court to safely form appropriate judicial opinion about its evidentiary value for the purpose of corroborating or contradicing the statement in Court of the identifying witnesess (emphasis added).

38. In ***Ram Babu vs State of Uttar Pradesh*** reported in ***(2010) 5 SCC 63*** while dealing with the case for the commission of the offence of dacoity punishable under Section 395 of the Penal Code, it was held that :-

*"14. As per Section 9 of the Evidence Act, facts which establish the identity of an accused are relevant. Identification parade belongs to investigation stage and if adequate precautions are ensured, the evidence with regard to test identification parade may be used by the court for the purpose of corroboration. The purpose of test identification parade is to test and strengthen trustworthiness of the substantive evidence of a witness in court. It is for this reason that test identification parade is held under the supervision of a magistrate to eliminate any suspicion or unfairness and to reduce the ch*ances of testimonial error as magistrate is expected to take all possible precautions."

39. In ***R. Shaji vs State of Kerala*** reported in ***(2013) 14 SCC 266*** while referring to the various decisions of the Apex Court, it was noted in para-'58' that the evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. The test identification parade is conducted by the police. The actual evidence regarding identification is that which is given by the witnesses in Court. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in Court.

40. It was discussed in ***Munshi Singh Gautam and others vs State of M.P***

reported in ***(2005) 9 SCC 631*** that the identification test did not constitute substantive evidence and the identification during investigation can only be used as corroborative of the statement in Court. Reference had been made to the decision of the Apex Court in case of ***Matru vs State of U.P*** reported in ***(1971) 2 SCC 75 and Santokh Singh vs Izhar Hussain*** reported in ***(1973) 2 SCC 406.*** Relevant paragraphs '16' and '17 of the said report are to be extracted hereunder:-

"16. As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

17. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating

agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration (AIR 1958 SC 350), Vaikuntam Chandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340, Budhsen and another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir (AIR 1972 SC 102).

41. Considering the above principles, in light of the language employed in Section 9 of the Evidence Act, it is settled that the test identification of the accused in test identification parade is an evidence which requires corroboration from the testimony of the witnesses in the Court and without corroboration, the result of test identification parade cannot be made sole basis of conviction.

42. Before relying upon the evidence of identification of suspects in the test identification parade, the Court is required to determine as to whether prosecution had taken all necessary precautions to ensure that the identity of the suspect be kept concealed before the parade.

43. It is duty of the prosecution to show that from the time of the arrest of accused person to the time of his admission into the jail, precautions were taken to ensure that he was not seen by any outsider. Once evidence has been laid to show this, the burden shifts on the accused to show otherwise.

44. It was held in ***Asharfi (supra)*** that where a witness gives evidence on oath the presumption is that he is speaking the truth. If, therefore, the prosecution has led evidence to show that from the time of arrest of an accused to the time of his admission into the jail, precautions were taken to ensure that he was not seen by any outsider, and if the identifying witnesses depose that they never saw him at any time between the crime and the identification parade, the burden lying on the prosecution has been discharged. It is then for the accused to establish that he was shown. The law does not require him to do so affirmatively; it is sufficient in creating a reasonable doubt in the mind of the Court. Direct evidence may not be available, but he may discharge his burden by showing, for example, that he and the witnesses were present in the police-station at the same time, or that he was marched through the village of the witnesses or that the witnesses were present at the office of the Prosecuting Inspector when his jail warrant was being prepared. But if he fails to raise a reasonable doubt the law enjoins that the prosecution evidence on the matter be accepted.

45. Another precaution to be taken by the prosecution and the test laid down to assess the evidence as to the identification of an accused person is, which is for the Court to answer, Was there unnecessary delay in the holding of the test ?

46. It was held in ***Asharfi's case (supra).*** that since human memory is apt to get dulled with the passage of time it is desirable both in the interest of the honest

witness and of the suspect himself that the latter be put up for identification without delay.

It was further observed in para-'36' that:-

"Accordingly the test is not that the identification parade was held after a long period but whether the power of observation of the witness was adequate. Were delay alone to be made the test, a premium would manifestly be placed on absconding, and all that would be necessary for a criminal for evading justice would be to promptly abscond and to appear only after the lapse of a long period of time. We refuse to believe that this could be the intention of the law. At the same time we must stress that whenever a test identification is discovered to have been held with delay, the-prosecution should explain it, and that the absence of a reasonable explanation will detract from the value of the test. The police can seldom be blamed for arresting a suspected criminal with delay, but once his arrest has been effected there can be no excuse for failure to hold his identification within two or three weeks."

47. While answering the question as to whether the witness did have opportunity of seeing the offenders, the requirement of holding test identification parade at the earliest opportunity without avoidable and unreasonable delay after the arrest of the accused has been insisted by the Courts from time to time. The idea behind such insistence is that the witness concerned would get fair opportunity of identifying the suspect leaving the possibility of his memory being faded and rule out all chances of suspect having been seen during the period, i.e from the date of arrest till the date of identification.

48. Reverting to the instant case, which rests purely on evidence of personal identification of the accused appellant Rakesh, we may note that there are three witnesses of the occurrence, amongst whom, P.W-1 driver of the truck refused to identify any of the accused persons and admitted in his testimony that he did not participate in the identification parade. In cross, P.W-1 stated that he could not see the miscreants who attacked and looted his vehicle as it was a dark night and when the truck was parked the miscreants asked him to put off the light. He further stated that even otherwise as soon as the vehicle was parked, headlights got dim. Though headlights of vehicles behind his vehicle were on but he could not see miscreants and as such he did not narrate appearance (huliya) of the miscreants to the Investigating Officer nor stated any thing in his previous statements.

49. P.W-2, the Constable on convoy duty, did not identify the accused appellant Rakesh though he had identified two other accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey who have been acquitted by the trial Court giving benefit of doubt as the test identification parade with respect to the said accused persons was doubted by the trial court with the finding that the prosecution had not been able to prove by positive evidence that the witnesses P.W-2 and P.W-3 had no occasion to see the accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey from the point of time, when they were arrested up to the time when they were taken out from the police lockup and sent to the District Jail Fatehpur.

50. Only evidence of P.W-3 is against the accused appellant Rakesh who stated on oath that he had clearly identified the accused appellant Rakesh as also co-accused Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey.

51. From the testimony of P.W-3, it may be noted that he categorically stated that he had seen the faces of the miscreants (dacoits) in light of the truck and there was sufficient light as headlights of all trucks behind the looted truck were 'On'.

52. As to the occurrence, P.W-2 and P.W-3 the Police Personnel who were on convoy duty, stated that they reached at the spot on hearing the sounds of fire and challenged the miscreants. P.W-3 stated that both of them (P.W-2 and P.W-3) opened one-one fire but both the witnesses admitted that they did not chase the miscreants who were 8-10 in number.

53. It is stated by P.W-3 that when he along with P.W-2 reached at the looted truck, after the miscreants ran away, they saw that one person was killed inside the truck and another got injured in his right leg, who was cleaner, two drivers in the truck told that the miscreants had looted Rs.3800/-. It was stated by P.W-2 that there were 15-20 trucks in the convoy and there were 10-15 trucks behind the truck in which he was sitting. The looted truck was at the front of the convoy and all the trucks behind were parked as soon as the truck at the front stopped. He then stated that the truck in which they were sitting was taken ahead and was parked besides the looted truck and all other trucks were parked behind them. From the statement of P.W-2, it seems that the truck in which the Constables (P.W-2 and P.W-3) were on duty, was in between the convoy. As from the statement of P.W-2, it is evident that the looted truck was at the front and out of the total 15-20 trucks in the convoy, 10-15 were behind the truck, in which the constables on convoy duty namely P.W-2 and P.W-3, were sitting, whereas as per the statement of P.W-3, there were total 10-15 trucks in the convoy. P.W-3, however, stated that he could not remember as to whether number was ten or fifteen. As per the version of P.W-3, they opened fires as soon as they reached near the looted truck and the miscreants ran away and before that the incident occurred for about 2-3 minutes, P.W-3 stated that when their truck stopped besides the looted truck, the loot was going on and they got down from the truck to challenge the miscreants and fired at them, then they ran away.

54. In the entire scenario of the occurrence as narrated by P.W-2 and P.W-3, possibility of them seeing the miscreants clearly in the lights of the trucks of the convoy seems remote. However, before forming any opinion on this part of the evidence, two questions are required to be answered by the Court. Firstly, as to whether there was any delay in conducting the identification parade and if there was delay whether the same has been explained by the prosecution to the satisfaction of the Court. The second question is as to whether there was any possibility of identifying witness P.W-3 to see the accused appellant between the time of his lodging in the jail and the date of the identification parade.

55. As to the first question, we may record that certain dates are relevant to be noted from the record. We have, therefore, gone through the original record pertaining to the test identification parade namely (Exhibit Ka-22) on record and the case diary.

56. Before referring to the said documents, we may further record that the Investigating Officer namely P.W-5 did not give the date of the test identification parade in his testimony. He only stated that the report of the test identification parade was submitted by him and the result of the same was received on 07.01.1983 and on the same day chargesheet was submitted against three accused persons.

57. The case diary Parcha no.15 dated 22.11.1982 records that the appellant Rakesh and another suspect Sundar had surrendered on 22.11.1982 in the Court of Munsif Magistrate and had been sent to jail on remand. It was further recorded therein that the test identification report of the two above noted suspects and other suspects previously arrested would be given after conducting the said proceedings. Admittedly, other accused persons namely Ram Kishun @ Kripali and Ram Ashrey @ Ghonchey were arrested earlier. The case diary parcha no.16 dated 27.11.1982 further records that the test identification parade of the arrested suspects was to be held and the pairokar was directed to fix the date for conducting test identification parade so that further proceedings be held. Parcha no.18 dated 24.12.1982 of the case diary further records that one suspect Badlu s/o Shyam lal Khatik had surrendered on 09.12.1982 in the Court of CJM, Fatehpur and had been sent to jail. It further records that the report of the identification would be submitted after completion of the test identification proceedings.

58. Form no.55 in the record is the report of the test identification parade of six suspected persons which is dated 27.12.1982. The place of conducting the test identification parade as indicated therein is District jail Fatehpur. The report bears the signature of the Magistrate first class which also endorsed with the date 27.12.1982. The name of the officer namely Magistrate first Class has also been indicated therein. The report records that out of six suspected persons, three namely Ram Kishun @ Kripali, Ram Ashrey @ Ghonchey, residents of Bindki and Rakesh s/o Budhhu Khatik residents of Lohari P.S-Bindki were correctly identified by two witnesses namely Constable 324 CP Ramdeo Pandey and Constable Vinay Kumar CP 513 of Police Station-Malwan, namely P.W-2 and P.W-3 herein. It was noted that Constable 324 CP Ram Deo Pandey identified only two accused persons namely Kripali and Ghonchey and Constable Vinay Kumar-P.W-3 had identified three accused namely Ram Kishun @ Kripali, Ram Ashrey @ Ghonchey and the appellant Rakesh. There are two more papers nos.25/10 and 25/11 on form no.55 in the record, which contain thumb impressions of suspect accused appellant Rakesh identified on 27.12.1982 whereas the thumb impressions of two other accused identified by P.W-2 and P.W-3 namely Ram Krishun @ Kripali and Ghonchey finds place on Ka-22 namely Paper no.25/9, Form 55 which has been signed by the Magistrate first class. We may further note that paper nos.25/10 and 25/11 are not signed by the Magistrate first class and the relevant columns therein are blank. All three documents namely paper nos.25/9, 25/10 and 25/11 contain the date of the proceeding of the test identification parade as 27.12.1982 held at the District Jail, Fatehpur. The case diary Parcha no.19 dated 07.01.1983 records that result of the test identification parade of six suspects, Ram Kishun @ Kripali, Ghonchey, Rakesh, Nanka, Sunder and Badlu was received on that day. As per the report, the identification parade was conducted on

27.12.1982 in the District Jail-Fatehpur. Two witnesses identified three suspects and with the completion of the investigation, charge sheet was submitted.

59. From the above, for the accused appellant herein namely Rakesh, at least, it is evident that he was put to test identification parade on 27.12.1982 whereas he had surrendered before the Magistrate on 22.11.1982 and was sent to jail on the same day whereas, other accused persons namely Kripali @ Ram Kishun and Ghonchey were arrested on 18.10.1982. No explanation could be offered by the Investigating Officer nor any question was put to him by the trial court as to why one month was taken by the Investigating Officer to conduct test identification parade of the appellant Rakesh, leaving behind the acquitted accused persons for whom test identification parade was conducted after two months.

60. I t may be noted that, the trial court has committed illegality in noting a wrong date of test identification parade from Exhibit Ka-22 by reading the said document incorrectly. The date 07.01.1983 which has come in the evidence of P.W-5, the Investigating Officer is the date of submission of the report of the test identification parade.

61. The answer to the question whether there was opportunity for identifying witnesses to see the accused appellant Rakesh between the date of the arrest and the date of the test identification parade is in affirmative for the obvious reason that the identifying witness P.W-3 was a police personnel posted in the same Police Station Malwan wherein the report of the incident was lodged. The trial court itself did not believe the results of the identification parade with regard to two suspected accused raising doubt that there were possibility of the witnesses to see the accused persons in the lock up as the witnesses were posted in the police station. Whereas a distinction was drawn that the accused Rakesh had surrendered in the Court and lodged in jail on the same day and, thus, there was no possibility of witnesses to see the accused appellant Rakesh in such a short time. The appellant accused Rakesh had taken a categorical plea in his statement under Section 313 Cr.P.C that he was shown to the identifying witness when he was brought in the Court by the Investigating Officer. No independent witness who was present on the spot, inside the truck, namely the Driver P.W-1 or the injured cleaner Shyam Singh was called to participate in the identification parade. All three accused persons who were put to trial resided in Bindki town. The zeal of the Investigating Officer to solve the crime and that of the Police personnel on convoy duty to prove them upright officers cannot be overlooked.

62. From the above discussion, at least, it is proved that the prosecution has failed to explain the unnecessary delay in holding the identification test though the witnesses were very much available being the police personnel posted in the same police station wherein first information report was lodged. It is noteworthy that in the instant case, the prosecution had relied upon the results of the test identification parade, correctness of which had been examined above, to assert that the appellant Rakesh was one of the culprits identified by the police personnel (P.W-3) on convoy duty. Apart from the discussion above, we may further note that the result of the test identification parade was not corroborated with the evidence of implication of the

appellant Rakesh in the Court. The statements of three witnesses of fact namely P.W-1, P.W-2 and P.W-3 were recorded on 24.11.1983 though the statement of P.W-3 could not be completed on that day.

63. P.W-1, the first informant, was driver of the looted truck, in cross examination, on behalf of the appellant Rakesh denied having seen the miscreants as it was a dark night and lights of the truck were put off and the trucks behind him were parked with dim lights.

64. P.W-2, Ramdeo Pandey, one of the police personnel on convoy duty did not identify the appellant Rakesh either in the identification parade or in the Court though he had identified two accused persons who had ultimately been acquitted by the trial court. Only witness who allegedly had identified appellant Rakesh in the test identification parade also identified him in the Court but we cannot loose sight of the fact that this identification was only by the police personnel posted in the convoy duty on the fateful night and not by any other witness. As it is settled that the test identification report do not constitute substantive evidence and its corroboration from the surrounding circumstance is required. In the instant case, the circumstances discussed above, do no corroborate the result of the test identification parade, hence, we are afraid to convict the appellant solely based on the result of the test identification parade, as has been done by the trial court. The prosecution has not been able to prove by leading cogent evidence that there was no possibility of the identifying witnesses (P.W-3) to see the appellant from the time of his admission into the jail till the date of his identification. The circumstances noted above such as non identification by independent witnesses in the Court and vulnerability of the witnesses having been seen prior to the identification parade, create a reasonable doubt in the mind of the Court as to the fairness of the identification proceedings. The evidence of identification of the accused appellant is not such which would exclude with reasonable certainty the possibility of an innocent person being implicated.

65. The trial court has completely erred in returning the finding that since the accused appellant had surrendered on 22.11.1982 in the Court of Magistrate, he was sent to jail on the same day and as such there was no possibility of the witness P.W-3 having seen him, and by holding that the accused persons were put to test identification on 22.11.1992 and 27.12.1982. The trial court had simply drawn distinction in rejecting the plea of accused appellant that he was identified in the Court, solely on the premise that the Magistrate before whom he had surrendered knowing that the accused appellant was wanted in a crime under Section 396 IPC must have taken precautions of sending him jail in veil, particularly when he was not named in the FIR.

66. Only evidence against the accused appellant being his identification by P.W-3 in the test identification parade held on 27.12.1982, reported in Exhibit Ka-22 which itself is under cloud, the inevitable conclusion that can be drawn in the facts of the instant case that the prosecution has failed to prove its case beyond all reasonable doubt for implication of the accused appellant Rakesh in the commission of the offence punishable under Section 396 IPC. The accused

appellant Rakesh herein is entitled to be given benefit of doubt and is to be acquitted for the offence punishable under Section 396 IPC.

67. In view of the above discussion, the judgment and order dated 06.02.1984 passed by the Second Additional Sessions Judge, Fatehpur in Sessions Trial no.145 of 1993 arising out of Case Crime no.139 of 1982 under Section 396 IPC, P.S- Malwan, District-Fatehpur for the offence punishable under Section 396 IPC and sentence for life imprisonment is hereby set aside.

68. The appeal is, accordingly, **allowed**.

69. The appellant is in jail.

70. The appellant shall be released from jail forthwith, unless he is wanted in any other case.

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

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

(2022)06ILR A459
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.05.2022

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Criminal Appeal No.888 of 2016
With
Criminal Appeal No.639 of 2016

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

Counsel for the Appellant:
Sri Mukhtar Alam, Sri Saquib Mukhtar, Sri Deepak Kumar, Sri Mahipal Singh, Sri Sangam Lal Kesarwani, Sri Veer Singh

Counsel for the Respondent:
Sri A.N. Mulla, Sri S.N. Mishra

Criminal Law- Indian Evidence Act, 1872- Section 3- It is established that P.W.-1 is changing his stand with respect to place of incident - These are material contradiction in the statement of P.W.-1 and has not been explained by prosecution, as such, evidence of P.W.-1 cannot be relied upon- Statement of P.W.2 is not consistent with respect to place of incident as well as evidence of P.W.2 is not corroborated by evidence of P.W.1, thus, evidence of P.W.2 is also not reliable and trustworthy-P.W.-3 is not eye-witness of the incident and his evidence is also not reliable and trustworthy.

Settled law that material contradictions in the testimonies of the prosecution witnesses, that go to the root of the matter and are uncorroborated, render the case of the prosecution doubtful.

Indian Evidence Act, 1872- Section 3- Ocular evidence has greater evidentiary value vis-a-vis medical evidence. In the present matter, we also find that there is inconsistency of the prosecution witnesses of fact and after close scrutiny of the medical evidence, we find that ocular evidence may be discarded-These three witnesses claim themselves to be the eye witness of the occurrence but their description seven steps and considering the statement of PW-4- Dr. R.S. Rabidas that the gun shot fired from very close range (few inches) are such circumstances which remain unexplained.

Although the ocular evidence will prevail over the medical evidence in case of contradiction between the two, but where the contradiction between the ocular version and medical evidence is too much then the ocular version may not be believed by the court.

Code of Criminal Procedure, 1973- Section 154- First Information Report- Section 157- Special Report-U.P Police Regulations- Section 101- Non-Compliance- Ante- Timed F.I.R- Constable Clerk Tarachand Special Report Messenger has not been produced by prosecution which also makes the prosecution case doubtful and strengthen the argument of learned counsel for the appellants on defective investigation-Special report of the case has not been sent according to rule and regulation which is proved from the statement of P.W.10 Mahak Singh Head Constable. The statement of P.W.1, PW.5 and P.W.11 further reveals that FIR in this case is ante-timed.

Where the prosecution has failed to comply with the mandate of Section 157 of the Cr.Pc and has deliberately withheld the police officer responsible for sending the same, the investigation is apparently defective and it is demonstrated from the evidence of the prosecution witnesses that the first information report is ante-timed, then the same makes the story of the prosecution doubtful. (Para 26, 28, 30, 31, 32, 36, 37, 40, 44)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon/cited:-

1. Raj Kumar Prasad Tamarkar Vs St. of Bih. & Ors, 2007(57) ACC 1099

2. Thaman Kumar Vs St. of U.T of Chandi., (2003) 6 SCC 380

3. Punjab Singh Vs St. of Har., 1984 Supp SCC 233

4. Anil Rai Vs St. of Bih., (2001) 7 SCC 318

5. Abdul Sayeed Vs St. of M.P, (2010) 10 SCC 259

6. Jagdish Murav Vs St. of U.P. & Ors, 2006 (3) ACR 2726 (SC)

7. Crl. Appeal No.3019/1986 (Bachhi Lal and Others Vs State of U.P.) dt. 24.4.2019

8. Mani Ram Vs St. of U.P. 1994 (Supp 2) SCC 289

9. Sudhakar @ Sudharasan Vs St., (2018) SCC 435

10. Jafel Biswas and others Vs St. of W.B, AIR 2019 SC 519 (cited)

11. Hema Vs St. thru Insp. of Police, Madras, (2013) 10 SCC 192 (cited)

12. C. Muniappan & ors. Vs St. of T.N., AIR 2010 SC 3718 (cited)

13. Pala Singh & anr. Vs St. of Punj., 1972 (2) SCC 640 (cited)

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

1. The present Criminal Appeals have been filed against the Judgment and Order dated 14.1.2016 passed by the Special Judge / Additional Sessions Judge, Bijnor in Session Trial No.485-A of 2011 (State vs. Alam); Session Trial No.485 of 2011 (State vs. Noor Mohammad and Others), arising out of Case Crime No.52 of 2011, under Sections 302/34, 323/34 IPC, P.S. Mandawar, District Bijnor, whereby appellants were convicted for life imprisonment under Sections 302/34 IPC and fine of Rs.20,000/- each, in default of payment of fine, six months additional R.I. and under Section 323/34 IPC, 3 months R.I. and fine of Rs.500/- each, in default of payment of fine, one month additional R.

2. Being aggrieved therefrom, accused Alam preferred Criminal Appeal

No.888 of 2016 and accused Noor Mohammad, Deen Mohammad preferred Criminal Appeal no.639 of 2016 for setting aside their conviction and passing an order of acquittal.

3. Since common issues are involved in both the appeals, both are being disposed of by a common order. The facts stated in Criminal Appeal No.888 of 2016 shall be treated as the leading appeal.

4. The brief facts relating to case are that Salamat (son of deceased) submitted a written report at Police Station with the averment that he is resident of village Khirani, P.S. Mandawar, District Bijnor. His father purchased about 18 bigha land 2 years before from Hamid, son of Jamaluddin that is why Noor Mohammad, Deen Mohammad, Alam were on enemical terms to his father. On 19.3.2011 at 7.15 PM (evening), his younger brothers Riyasat and Faizan went to purchase items from the grocery shop of Habib, at that moment , Noor Mohammad, Deen Mohammad and Alam armed with countrymade pistol, came there, abused them and started altercation with Riyasat. Faizan came back from shop and told about the incident to his father, then he and his father Aslam reached at the shop of Habib and tried to protect Riyasat, at that time, Alam fired shot from his countrymade pistol on the head of his father, who died on spot. He and Riyasat tried to catch Alam, then Noor Mohammad and Deen Mohammad with an intention to kill, fired shot from their countrymade pistol but he and Riyasat were escaped narrowly. The prayer was made to register the report and legal action be taken. Rafeeq son of Imam Shah and Others were mentioned as witness of the incident.

5. On the basis of written report, Case Crime No. 52/2011, under Sections 302/323/307/34 IPC was registered against accused Alam, Noor Mohammad, Deen Mohammad on 19.3.2011 at 8.30 PM and investigation of the case was handed over to Station Officer Sunil Kumar Sharma who went to the place of incident where S.I. Veer Singh conducted Panchayatnama of the dead body and after completing the formalities, dead body was sent for postmortem. The spot map of the place of incident was prepared, two empty cartridges were recovered by the police from the roof of the accused, the memo was accordingly prepared. During investigation, on 22.3.2011 accused were arrested and on the pointing out of Alam, countrymade pistol 315 bore, 2 live cartridges, one empty cartridge 315 bore inside the barrel and on the pointing out of Noor Mohammad, countrymade pistol 12 bore and 2 live cartridges were recovered, the memo were accordingly prepared. FIR was lodged against Alam and Noor Mohammad under Section 25 of the Arms Act on 22.3.2011 at 12.30, the investigation of the case under the Arms Act was handed over to H.C.P. Prem Singh. Respective Investigating Officer submitted charge-sheet against accused Alam, Noor Mohammad and Deen Mohammad under Sections 302/34, 307/34, 323 IPC and against accused Alam and Noor Mohammad under Section 25 of the Arms Act. Charges were framed against Alam, Noor Mohammad, Deen Mohammad under Sections 302/34, 307/34, 323 IPC and against accused Alam and Noor Mohammad under Section 25 of the Arms Act to which they denied and claimed trial.

6. The prosecution in order to prove its case, produced as many as 12 witnesses whose particulars are as follows:

P.W.1 Salamat son of Aslam (First informant and alleged eye-witness)

P.W.2 Faizan son of Aslam (alleged eye-witness)

P.W.3 Rafeeq son of Imaam Shah (alleged eye witness as well as independent witness)

P.W.4 Dr. R.S. Ravidas

P.W.5 S.I. Veer Singh

P.W.6 Constable Jaiveer Singh (witness of the inquest)

P.W.7 Constable Narendra Sharma (FIR scribe of Case Crime No. 53 of 2011 and 54 of 2011)

P.W. 8 HCP Prem Singh (IO of Case Crime No.53 of 2014 and 54 of 2011)

P.W.9 Sub-Inspector Shishpal Singh

P.W.10 HC 139 Mahak Singh Sharma (Scribe of Case Crime No.52 of 2011)

P.W.11 Sunil Sharma (IO of Case Crime No.52 of 2011)

P.W.12 Shailendra Pratap (Subsequent IO of Case Crime No.52 of 2011)

7. In support of the occular testimony of the witnesses, prosecution filed following documentary evidence:

1. FIR dated 19.3.2011 (Ext. Ka 19)

2. FIR dated 22.3.2011 (Ext. Ka12)

3. Written report dated 19.3.2011 (Ext. Ka1)

4. Panchayatnama dated 19.3.2011 (Ext. Ka 3)

5. Postmortem report dated 20.3.2011 (Ext. Ka 9)

6. Site plan dated 19.3.2011 (Ext. Ka 21)

7. Site plan dated 23.3.2011 (Ext. Ka 14)

8. Site plan dated 23.3.2011 (Ext. Ka 15)

9. Charge-sheet dated 15.4.2011 (Ext. Ka 23)

10. Charge-sheet dated 23.3.2011 (Ext. Ka16)

11. Charge-sheet dated 23.3.2011 (Ext. Ka 17)

8. The accused appellants in their statements recorded under Section 313 Cr.P.C. denied the prosecution case and disputed the veracity of the evidence adduced by the prosecution.

9. P.W.1 Salamat son of deceased Aslam as well as first informant in his examination-in-chief stated that he knows accused Noor Mohammad, Deen Mohammad and Alam, they belong to his village. His father purchased about 18 bigha land 2 years before from Hamid, son of Jamaluddin that is why Noor Mohammad, Deen Mohammad, Alam were on enemical terms to his father. On 19.3.2011 at 7.15 PM (evening), his younger brothers Riyasat and Faizan went

to purchase items from the shop of Habib, at that moment, Noor Mohammad, Deen Mohammad and Alam armed with countrymade pistol, came there, abusing them and started altercation with Riyasat. Faizan came back from shop and told about the incident from him and his father, then he and his father Aslam reached at the shop of Habib and tried to protect Riyasat, at that time, Alam fired shot from his countrymade pistol on the head of his father, who died on spot. He and Riyasat tried to catch Alam, then Noor Mohammad and Deen Mohammad with intention to kill, fired shot from their countrymade pistol but he and Riyasat were escaped narrowly. Accused Noor Mohammad, Deen Mohammad, Alam, sons of Bundu ran away towards their house after fire shot. In cross-examination, he stated that he reached to police station at 8.30 PM by tractor. Rafeeq, Shafeeq, Anwar and Abid also accompanied him, they did not bring any written report with them and told incident to police so police came to the spot along with him. Police made necessary inquiry and told him to give written complaint / report, accordingly, he gave written report to police at the village after being written by Mahaboob Alam on his instruction at about 9.00 PM and the dead body of his father was sealed by the police, the same was kept on tractor trolley and he was also sitting on the tractor. He stated that altercation took place before the shop of Bundu. He further stated that his father received fire-shot in front of primary school. He stated that the person who fired was 7 step away from his father. He further stated that Noor Mohammad and Deen Mohammad fired from their roof, both of them were on their roof and remained there. Two fires were made from the roof and his father was standing when the fire was made.

10. P.W. 2 Faizan aged about 15 years, alleged eye-witness, in his examination-in-chief stated that incident is of about 10 months before at about 7.15 PM. He and his brother Riyasat went to shop of Habib for purchasing, at that moment, Noor Mohammad, Deen Mohammad and Alam armed with countrymade pistol, came there, abusing them and started altercation with him and his elder brother Riyasat. He ran away to his home and told about the altercation to his father Aslam and brother Salamat. Having heard the same, his father and brother came to the shop and tried to protect Riyasat, at that time, Alam fired shot on the head of his father Aslam and he died on spot. His brother Salamat and Riyasat tried to catch Alam, then Noor Mohammad and Deen Mohammad fired shot with intention to kill Riyasat and Salamat but they were escaped narrowly. All the three accused run away to their home. About 2 years before his father Aslam purchased about 18 bigha land from Hamid due to which Bundu and his sons Noor Mohammad, Deen Mohammad and Alam were on enemeical terms to his father. In the cross-examination, he stated that his father did not receive fire-shot at the place where Riyasat was caught rather he received fire-shot at Chauraha.

11. P.W.3 Rafeeq alleged eye-witness, in his examination-in-chief stated that incident is of 10-11 months before, it was Holi festival and time was about 7 PM (evening). He was sitting with Aslam then Faizan son of Aslam came and told that Noor Mohammad, Deen Mohammad, Alam are beating him and his brother. He and Aslam went there along with Faizan, Aslam was on front side and he was on back side. They reached to the shop, Aslam tried to protect his son from accused then all the

three accused persons started altercation with Aslam and after that Alam fired shot from his countrymade pistol on the head of Aslam who died on spot. He did not interfere and went to his house. Deen Mohammad and Noor Mohammad fired two shots on Aslam but did not fire on Salamat and Riyasat. In his cross-examination, he stated that when he reached at the place of occurrence, Aslam was dead and Noor Mohammad, Deen Mohammad, Alam were not present at that time. He further stated that he did not go to the house of Aslam on that day. He stated that when fire shot took place, he was present in his house. He further stated that he did not see anybody who fired shot on Aslam.

12. P.W.4 Dr. R.S. Ravidas, Community Health Centre, Laharpur, District Sitapur conducted the postmortem of the dead body of Aslam on 20.3.2011 at 2.00 PM. He has proved the postmortem report as Ext. Ka 9 and has stated that following injuries were found on the body of the deceased:

1. Fire arm wound of entry 2cm x 2cm. Cavity deep on middle forehead upto root of the nose. Blackening present in some extant. On dissection one metallic piece recovered from the right side of occipital region of brain and handed over to police. Fracture of nasal bone and forehead bone, fracture of right occipital bone, brain membrane lacerated

13. P.W.-5, S.I. Veer Singh in his examination-in-chief stated that on 19.3.2011 he was posted on the post of Sub-Inspector at Police Station- Mandawar. He prepared the Panchayatnama of the dead body of deceased Aslam and handed over the deadbody after necessary formalities for postmortem, the other documents relating to panchayatnama were prepared. Panchayatnama (Ex-Ka-3), letter to R.I. (Ka-4), Chalan Lash (Ka-6), Photo Lash (Ka-7), letter to C.M.O. (Ka-5) were prepared by him on the spot. Ex-Ka-9 is memo of recovery of plain earth and stained earth was prepared by him.

14. PW.-6, Constable Jaiveer Singh in his examination-in-chief stated that on 19.3.2011, he was posted at Police Station-Mandawar on the same post and place. On the information of murder of deceased Aslam he reached along with force to place of incident situated in village- Khirani. After completion of proceeding of Panchayatnama, he received the dead body of Aslam in a sealed position at 22:00 hours from homeguard Ashraf and constable-Randhir Singh and kept the dead body in the morchary of district hospital, after postmortem, dead body was handed over to family members. In the cross-examination, he stated that dead body was given to him on 19.3.2011 at 8:00 P.M. He carried dead body from village-Khirani through tempo to hospital and 30-45 minute was taken in covering the distance from Village-Khirani to hospital.

15. P.W.-7, Constable Clerk, Narendra Sharma in his examination-in-chief stated that on 22.3.2011, he was posted as constable clerk at Police Station-Mandawar. He proved chik F.I.R. as well as Ex-Ka-12 and Ex-Ka-13. In the cross-examination, he stated that original G.D. is not on record nor he brought the same with him on that day.

16. P.W.-8, H.C.P. Prem Singh has stated in his examination-in-chief that on 22.3.2011, he was posted as H.C.P. at

Police Station- Mandawar. He received investigation of Case Crime No.53 of 2011 (Alam Vs. State) and Case Crime No.54 of 2011 (Noor Mohammad Vs State) from police station office. Necessary entry were made in the case dairy. Statement of witness, S.I., Sheeshpal Singh, Constable Tejpal Singh and Constable Sukhpal Singh were recorded in the case diary on 23.3.2011. After that on the pointing out of S.I. Shamim Haider inspected the place of incident and prepared the spot map under Section 25 of Arms Act which are Ex-Ka-14 and Ex-Ka-15, the charge-sheet was also submitted by him under Section 25 of Arms Act, which are Ex-Ka-16 and Ex-Ka-17.

17. P.W.-9, S.I., Sheeshpal Singh, has stated in his examination-in-chief that on 22.3.2011, he was posted as Sub-Inspector at Police Station- Mandawar. He arrested the accused-Noor Mohammad and Alam on 22.3.2011 at 7:45 A.M. On the pointing out of Noor Mohammad and Alam, a country made pistol as well as live and empty cartridges were recovered at 10:45 A.M. on 22.3.2011. The memo was prepared by I.O. in his presence and the same is Ex-Ka-18 which is signed by him also. In the cross-examination, he reiterated the same.

18. P.W.-10, Head Constable, Mahak Singh in his examination-in-chief stated that on 19.3.2011, he was posted on the post of Head Moharir at Police Station-Mandawar. On that day at 8:30 P.M., on the basis of report of Salamat Chik No.30/11, Case Crime No.52/11, under Sections 323/ 302/ 307/ 34 I.P.C. was registered by him against Noor Mohammad, Deen Mohammad and Alam. The same is Ex-ka-19. He mentioned about the incident on same day in G.D. through report no.39, time 8.30 PM. He brought the original G.D. with him on that day which is in his hand writing. He filed the correct and attested photo copy of the same, which is Ex-Ka-20. In the cross-examination, he stated that he sent the special report of the case through Constable, Tarachand but in G.D. time of Rawangi of Tarachand is not recorded. He sent the Tarachand on the oral instruction of station officer without recording his rawangi in the G.D. In Report No.39, there is no mention of sending special report. He further stated that there is no copy of special report on record. He further stated that he prepared seven copies of special report but nothing was kept at the police station.

19. P.W.-11, Station Officer, Sunil Sharma in his examination-in-chief stated that on 19.3.2011, he was posted as station officer at Police Station- Mandawar. He was investigating officer of Case Crime No.52/11, under Section-323, 302, 307,34 I.P.C. which was registered in his presence. He reached to place of incident along with force, statement of first informant Salamat was recorded in case diary and on the pointing out of first informant inspected place of incident and prepared site plan (Ex-Ka-21). Two empty cartridges of 12 bore were recovered from the roof of the accused and sealed in white clothes. The memo was prepared, which is Ex-Ka-22, memo was copied in case diary. On 20.3.2011 statement of Mahak Singh scribe of first information report was recorded. On 22.3.2011 accused Noor Mohammad and Alam were arrested and their statements were recorded, at their instance country made pistol and cartridges were recovered, memo was accordingly prepared which is Ex-ka-18 statement of witnesses Riyasat, Faizan and Rafeeq were recorded.

20. from 3.4.2011 to 6.6.2011, he was posted at police station- Mandawar. He

was handed over investigation of Case Crime No.52/11, under Sections 302, 307, 323, 34 I.P.C. of witnesses which was being investigated by earlier investigating officer. He started investigation on 5.4.2011 statement of witnesses of recovery, postmortem, panchayatnama were recorded on 15.4.2011, charge-sheet no.53/11 was submitted in Court which is Ex-ka-23.

21. The learned Sessions Judge, Bijnor after hearing the parties and perusal of the record, acquitted the accused-Noor Mohammad, Deen Mohammad and Alam under Section 307/34 IPC as well as acquitted accused Noor Mohammad and Alam under Section 25 of the Arms Act but convicted accused Noor Mohammad, Deen Mohammad and Alam under Section 302/34, 323/34 IPC, hence this appeal.

22. Heard Mr. Mukhtar Alam & Mr. Saquib Mukhtar, learned counsel for the appellants, Mr. A.N. Mulla, learned A.G.A. for the State and perused the record.

23. Learned counsel for the appellant submitted that following points for determination are involved in the present appeal:-

1. Whether the occurrence was occurred in presence of alleged eye-witnesses i.e. P.W.1, P.W.2 & P.W.3 and there evidence is reliable?

2. Whether prosecution has not produced the best evidence to prove its case and deliberately withheld the material witnesses and evidence without any justification?

3. Whether the postmortem report does not support the prosecution case and as per autopsy, single fire-arm has been used for the commission of an offence and the shot was fired at a close range.

4. Whether the FIR is ante-timed and absolutely there was no proper and fair investigation and the investigation of the case is defective.

5. Whether trial court has completely misread the evidence and passed the impugned judgment and order without appreciating the evidence available on record in its right perspective and the same is not sustainable in the eyes of law?

24. Learned counsel for the appellants on the points for determination no.1 submitted as follows:-

P.W.-1, P.W.-2 and P.W.-3 alleged eye witnesses are unreliable witnesses as all the three were not present nor they have seen the incident.

The relevant portion of examination-in-chief of P.W.-1 is as follows:-

दिनांक 19.3.2011 को समय करीब शाम के सवा सात बजे मेरे छोटे भाई रियासत व फैजान हबीब की दुकान पर सामान लेने गये थे। तभी नूर मोहम्मद, दीन मोहम्मद व आलम अपने हाथों में तमंचे लिये हुये गाली देते हुये आये और रियासत को पकड़कर मारपीट करने लगे तभी फैजान जो मेरा छोटा भाई है दुकान से भागकर आया और घटना के बारे में मुझे व मेरे पिता असलम को बताया मै तथा मेरे अब्बा असलम, हबीब की दुकान पर पहुंचे और रियासत को बचाने लगे तभी आलम ने अपने

हाथ में लिये तमंचे से मेरे अब्बा के माथे पर गोली मार दी, जिससे उनकी मौके पर मृत्यु हो गयी थी। मैने व मेरे छोटे भाई रियासत ने आलम को पकड़ना चाहा। तभी नूर मोहम्मद व दीन मोहम्मद ने जान से मारने की नियत से अपने हाथों में लिये तमंचे से हमारे उपर फायर किये गये जिससे हम बाल बाल बच गये। मैं अपने पिता असलम की लाश को मौके पर छोड़कर थाने आये और महमूद आलम से रिपोर्ट लिखकर थाने पर दी जो मैने बोला था वही महमूद आलम ने लिखा था मैने सुनकर तहरीर पर अपना अंगूठा लगाया था। पत्रावली पर तहरीर कागज सं० 11/2 दाखिल है जिस पर एक्ज क-1 डाला गया। मुलजिमान नूर मोहम्मद, दीन मोहम्मद व आलम पुत्रगण बुन्दू गोली मारकर व फायर करके अपने घर की ओर भाग गये थे।

25. The relevant portion of cross-examination of P.W.-1 is as follows:-

हबीब की दुकान उत्तर सामनी है। और उसके सामने पूरब पश्चिम रास्ता है। पश्चिम को हमारी तरफ को रास्ता जाता है और पूरब को गांव मे जाता है। जब मेरे वालिद को गोली लगी तो उस समय वह प्राईमरी पाठशाला के सामने थे। प्राईमरी पाठशाला के उत्तर में आटा चक्की बुन्दू है। यह प्राईमरी पाठशाला इस पूरब पश्चिम वाले रास्ते के उत्तर में है। पाठशाला की बाउण्डरी नही है खुला है। पाठशाला की पूरब पश्चिम चौडाई करीब 60 फीट है। पाठशाला का जो पश्चिम वाला कोना है उसके पास गोली लगी थी और दक्षिण से चलाई गई थी। गोली चलाने वाला करीब 7 कदम मेरे वालिद से दूर था। पाठशाला के सामने रास्ता करीब 20-22 फिट चौड़ा है।

नूर मोहम्मद व दीन मोहम्मद ने फायर अपने मकान की छत पर से किये थे ये दोनो लोग अपने मकान की छत पर थे और वहीं रहे। छत पर से दो फायर हुये थे जब फायर हुये थे मेरे पिता उस समय खडे थे। बुन्दू के मकान जिस की छत पर से फायर होना बता रहा हूँ रास्ते के दक्षिण मे है और उससे पश्चिम में राशिद की दुकान है। राशिद की दुकान से उत्तर मे मै 5 पहरे दूर था। इनकी छत 12 फिट ऊँची है।

26. From the perusal of entire statement (Chief and cross) of P.W.-1, Salamat alleged eye witness, as well as son of deceased, it is established that P.W.-1 is changing his stand with respect to place of incident. In his examination-in-chief, he stated that incident has taken place before shop of Habib, where all the three accused were present and fired but in cross examination he stated that incident has taken place before primary school and Noor Mohammad and Deen Mohammad fired from the roof of their house, who remained present on their roof. These are material contradiction in the statement of P.W.-1 and has not been explained by prosecution, as such, evidence of P.W.-1 cannot be relied upon.

27. So far as P.W.-2, Faizan is concerned, he is son of deceased and minor at the time of incident, his statement is also not consistent. In the cross-examination, he stated that hundred people were assembled at the place of incident, the place where Riyasat was caught hold his father, had not received fire-shot, rather at Chauraha his father received fire shot, the relevant portion of cross-examination of P.W.-2 is as follows:-

मुझे अपने पिता व भाई को बुलाकर लाने में पन्द्रह बीस मिनट लगी होगी। उस समय भी रियासत को मुलजिमान

मारपीट कर रहे थे। सैकडों आदमी वहां इकट्ठा हो गये थे। घटनास्थल पर वे सब आदमी रियासत को चारों ओर हो रहे थे। उन सैकडों आदमियों मे से मै किसी का नाम नही बता सकता। मुझे दिशाओ का ज्ञान नही है जब हम लौटकर आये तो रियासत हबीब की दुकान से 5 पहटे हमारे घर की तरफ को था। जहां रियासत को पकड़ रखा था। उससे बुन्द्रू का घर उत्तर की तरफ था। जहां रियासत को पकड़ रखा था। वहां मेरे पिता को गोली नही लगी थी। बल्कि चौराहे पर लगी थी।

28. From the perusal of examination-in-chief and cross-examination of P.W.-2 who was minor at the time of incident, it is established that statement of P.W.2 is not consistent with respect to place of incident as well as evidence of P.W.2 is not corroborated by evidence of P.W.1, thus, evidence of P.W.2 is also not reliable and trustworthy.

29. P.W.-3, Rafeeq alleged eye-witness as well as independent witness in his cross-examination clearly stated that he was at his home when firing took place. He further stated that he had not seen anybody who fired shot to Aslam, the relevant portion of cross-examination of P.W.-3, Rafeeq is as follows:-

जब मै पहुचा तो असलम को मैने मरी हुई हालत में देखा सैकडो आदमी इकट्ठा थे सब एक दूसरे से पूछ रहे थे कि असलम कैसे मर गया और किसने गोली मार दी उस समय नूर मौहम्मद, दीन मौहम्मद, व आलम उस समय घटना स्थल पर नही थे जब मै वहां घटना स्थल पर पहुंचा उस दिन मै सलामत के घर भी नही गया था जब गोली चली मै अपने घर पर था। सलामत अपने बाप के पास होगा।

सलामत का घर पूरब में हवीव की दुकान से है। हबीब की दुकान से पूर्व को रास्ता जा रहा है। हबीब की दुकान के पास कोई चौराहा नही है। हवीब की दुकान के पूरब मे रास्ते के बाद इस्माईल का घर है। इसके बाद पंचायत घर है। पाठशाला हवीब की दुकान से 50-60 कदम की दूरी पर है जो पूरब में है।

यह बात सही है कि असलम को गोली मारते हुऐ मैने किसी को नही देखा।

यह कहना गलत है कि पाठशाला हवीब की दुकान से 100 गज से अधिक फासले पर हो।

30. From the perusal of statement of P.W.-3, it is fully established that P.W.-3 is not eye-witness of the incident and his evidence is also not reliable and trustworthy.

31. On the point for determination no.2, learned counsel for the appellants contended that prosecution has not produced Riyasat who was alleged to be throughout present on spot and even beaten by accused but prosecution has failed to produce Riyasat which makes the prosecution case doubtful. Constable, Tarachand, special report messenger was also not produced by prosecution and copy of special report was also not on record of the case and there is no mention of sending special report of the case in report no. 39 which demonstrate that special report of the case has not been sent. Accordingly, non-production of Tarachand by prosecution makes the prosecution case doubtful.

32. On the point for determination no.3, learned counsel for the appellants contended that according to postmortem

report, blackening was present in the injuries but P.W.1 in his cross-examination stated that person who fired shot was 7 steps away from his deceased father Aslam. P.W.4 Dr. R.S. Rabidas in his cross-examination stated that deceased received fire shot from the distance of some inch.

33. On the point of blackening and charring, following judgment of the Apex Court will be relevant. Paragraph no. 12 of **2007(57) ACC 1099, Raj Kumar Prasad Tamarkar vs. State of Bihar and Others** is as follows:

12. The autopsy report shows that 'a blackening and charring' existed so far as Injury No. (i) is concerned. The blackening and charring keeping in view the nature of the firearm, which is said to have been used clearly go to show that a shot was fired from a short distance. Blackening or charring is possible when a shot is fired from a distance of about 2 feet to 3 feet. It, therefore, cannot be a case where the death might have been caused by somebody by firing a shot at the deceased from a distance of more than 6 feet. The place of injury is also important. The lacerated wound was found over grabella (middle of forehead). It goes a long way to show that the same must have been done by a person who wanted to kill the deceased from a short distance. There was, thus, a remote possibility of causation of such type of injury by any other person, who was not in the terrace. Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same.

34. Now, at this stage, we shall proceed to examine whether the medical evidence renders the ocular account completely unacceptable or improbable. In this regard, the submission of learned counsel for the appellants is that the ocular account is not acceptable because the medical evidence has ruled out possibility of the shot being fired from seven steps away from the deceased as per PW-1 in his cross-examination but the same is ruled out as per PW-4-Dr. R.S. Rabidas in his cross-examination, who stated that deceased received fire shot from the distance of some inches. There is also contradictions in the examination-in-chief and in cross examination of witnesses of fact i.e. PW-2 and PW-3 vis-a-vis in the medical evidence.

35. At this stage, we may notice few decisions of Hon'ble the Apex Court on the issue as to when a conflict between medical evidence and ocular account would render the ocular account untrustworthy and unreliable. In **Thaman Kumar v. State of Union Territory of Chandigarh, (2003) 6 SCC 380**, in paragraph 16, it was observed as follows:

"16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of

assault but they are not found on that portion of the body where they are deposed to have been caused by the eye witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category, it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

36. Hon'ble the Apex Court in **Punjab Singh v. State of Haryana, 1984 Supp SCC 233 and Anil Rai v. State of Bihar, (2001) 7 SCC 318** has considered in detail that (1) if direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence, and (2) if medical evidence when properly read shows two alternative possibilities but not any inconsistency, the one consistent with the reliable and satisfactory statements of the eye witness has to be accepted. The similar view has also been taken by Hon'ble the Apex Court in **Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259**. No doubt the legal principle, which has been pronounced by Hon'ble the Apex Court, is that ocular evidence has greater evidentiary value vis-a-vis medical evidence. In the present matter, we also find that there is inconsistency of the prosecution witnesses of fact and after close scrutiny of the medical evidence, we find that ocular evidence may be discarded.

37. To appreciate the submission urged by the learned counsel for the appellants that P.W.1, P.W.2 and P.W.3 are not credible and reliable, we have examined their testimony threadbare. We find that these three witnesses claim themselves to be the eye witness of the occurrence but their description of the manner of occurrence and the contradiction regarding the place of occurrence, the injury sustained by the deceased from a gun shot fired from approximately seven steps and considering the statement of PW-4- Dr. R.S. Rabidas that the gun shot fired from very close range (few inches) are such circumstances which remain unexplained. Thus, the ocular testimony is wholly inconsistent with the circumstantial evidence as well as the medical evidence. The case in hand is based upon direct evidence. Therefore, in order to award or uphold the conviction of an accused in a case based upon direct evidence, the Court has of necessity to hold that the prosecution story is probable. The prosecution witnesses of fact are credible and reliable and therefore their testimony is worthy of credit. In a case of direct evidence motive cannot be said to be of much value. Therefore, in such situation, it is imperative to the Court to go into the facts and circumstances of the case and find out as to what was the cause behind the occurrence, the motive behind the occurrence and whether it has any relation with the crime or not. On a careful scrutiny of the alleged motive assigned to the accused-appellants for the commission of crime, the Court finds, as enumerated above, that the same is too far stretched.

38. On the point of determination no.4, learned counsel for the appellants submitted that FIR is ante-timed and

investigation of the case is defective. Learned counsel for the appellants further submitted that special report of the case has not been sent according to law, the reliance has been placed upon paragraph-101 of the police regulation which is as follows:

"101. Special Report cases.- Whenever the occurrence of an offence of any of the following kinds is reported (1) dacoity, (2) robbery except unimportant cases such as snatching earrings, (3) torture by police, (4) escape from police custody, (5) forging of currency notes (6) manufacture of counterfeit coin, (7) serious defalcations of public money including theft of notes or hundis from letters, (8) important cases of murder, rioting, burglary and theft, breaches of the peace between different classes, communities or political groups and other cases of special interest, copies of the report will be sent immediately in red envelopes to the Superintendent, the District Magistrate, the Sub Divisional Magistrate and the Circle Inspector by post or hand whichever may be the quicker method of conveyance. The telephone or telegraph when available, and the department telegraphic code, copies of which have been supplied to all police stations near telegraph offices should also be used to give the Superintendent early news of such offences."

39. The counsel further placed cross-examination of PW.10 Head Constable Mahak Singh in order to demonstrate that procedure for sending special report of the case has not been followed at all, the relevant portion of cross-examination of P.W.10 Mahak Singh is as follows:

"मैने स्पेशल रिपोर्ट जिस जी०डी० मे मुकदमा कायम हुआ उसी जी०डी० मे भेजी मैने सी/ताराचन्द्र को एस०आर० लेकर भेजा था परन्तु जी०डी० मे ताराचन्द्र की कोई रवानगी दर्ज नही है। तारा चन्द्र नक्शा नजरी के अनुसार सुबह 6.05 मिनट पर थाने पर मौजूद था फिर 8.50 मिनट पर जी०डी० संख्या 18 पर ये उसकी रवानगी सदर विजनौर के लिए हुई। फिर ताराचन्द्र की वापसी 17.40 पर थाने पर हुई। उसके पश्चात ताराचन्द्र की रवानगी मे दर्ज नही है। उसे मैने बिना रवानगी दर्ज करे ही भेज दिया था एस०ओ० साहब के जुवानी आदेश मे भेजा था। मुझे नही पता कि तारा चन्द्र का उस दिन का एस०आर० लेकर जाने का टी०ए०डी०ए० भरा गया या नही यह सही है कि रपट नम्बर 39 मे एस०आर० भेजे जाने का तस्करा नही है। रपट नम्बर 39 मे यह लिखा है कि एस०आर० बाद करने तैयार रवाना की जायेगी। यह सही है मेरे पास उस एस०आर० की कोई कापी है। ना ही पत्रावली मे उस एस०आर० की कोई नकल है। उस एस०आर० पर जो भेजी थी उस पर एस०एच०ओ० के हस्ताक्षर कराये थे। ताराचन्द्र की कायमी थाने पर कब हुई मै नही बता सकता। ताराचन्द्र आज कल थाना नजीमाबाद मे तैनात है। यह कहना गलत है कि रपट नम्बर 39 पर ओवर राइटिंग की गई हो। एस०एच०ओ० मुकदमा कायमी के समय मौजूद नही थे मुकदमा कायमी से पूर्व रपट नम्बर 34 16.00 बजे रवानगी हो चुकी थी एस०एच०ओ० की वापसी दिनांक 19.3.11 को थाने पर नही हुई अगले दिन हुई होगी।

यह कहना गलत है कि मैने कोई एस०आर० रवाना ना की हो और यह बात मुकदमे को बल देने के लिए झूंठ बोल रहा हूँ मैने जी०डी० रपट नम्बर 39 मे यह दर्ज किया है कि घटना की सूचना जरिये टेलीफोन क्षेत्र

मे मामूर रवाना स्थल बता दिया था नकल चिक व नकल रपट उन्हे क्षेत्र मे भिजवायी थी वह कहाँ थे नही पता यह सूचना मैने एस०आई० वीर सिंह को थाने पर बुलाकर उनसे भिजवायी थी। वीर सिंह इस मुकमदे के विवेचक नही थे। एस०आर० पर क्रम संख्या, अपराध संख्या, धारा दिनांक घटना समय, दिनांक सूचना समय दिनांक घटना स्थल वादी प्रतिवादी नाम मृतक, विवेचक व अन्य विवरण लिखा जाता है। यह एस०आर० डी०आई०जी० महोदय, पुलिस अधीक्षक एडि० एस०पी०, डी०एम० व एस०डी०एम०, सी०ओ० और बी०सी०आर०पी० को भेजी जाती है। मैने एस०आर० की सात प्रति कार्बन लगाकर तैयार की थी परन्तु थाने पर उनमे से एक भी नही रखी थी। ना ही न्यायालय मे भेजने हेतु कोई रखी। क्योंकि न्यायालय मे मूल एफ०आई०आर० आती है। इसलिए हम न्यायालय को एस०आर० की कापी नही भेजते।

यह कहना गलत है कि मै सही ब्यान ना दे रहा हूँ। और एफ०आई०आर० एन्टी टाईम लिखी गई हो बाद मे लिखकर पहले दिखा दी गई हो।"

कोर्ट सर्टि०
सुनकर तसदीक किया

ह०अपठनीय
ह०अपठनीय

स्पेशल जज विजनौर
स्पेशल जज विजनौर
8.10.13
8.10.13

ह० अपठनीय
एच०सी० महक सिंह

40. It is relevant to mention here that Constable Clerk Tarachand Special Report Messenger has not been produced by prosecution which also makes the prosecution case doubtful and strengthen the argument of learned counsel for the appellants on defective investigation.

41. The learned counsel for the appellant further placed statement of P.W.1 Salamat and P.W.5 Veer Singh in order to demonstrate that FIR is ante-timed, the relevant portion of cross-examination of P.W.1 is as follows:

"थाने मै शाम को साढे आठ बजे पहुंचा था। महमूद, आलम पुत्र अमीर हसन निवासी नारायण पुर मेरे खालू लगते है। नारायण पुर गांव हमारे गांव से 22 किलोमीटर है। थाने हम कोई तहरीर लेकर नही गये थे। हम लोग ट्रैक्टर से गये थे। मेरे साथ रफीक, शफीक, अनवार, आबिद गये थे। मैने थाने जाकर दिवान जी को घटना बताई। मेरे बताने पर पुलिस वाले मेरे साथ मौके पर आये थे दरोगा जी भी आये थे। वहां उन्होने लोगों से तहकीकात की लोगों से पूछताछ की तब मुझसे कहा था कि जैसा हुआ है लिख कर दो तब मैने महमूद आलम से तहरीर लिखवाकर दरोगा जी को गांव में ही दे दी थी। यह बात करीब 9 बजे की रही होगी तभी पुलिस वालों ने मेरे पिता जी की लाश वही सील की थी। तभी 9 बजे जब मैने तहरीर दी थी। पुलिस वालों ने मेरे पिता की लाश ट्रैक्टर ट्राली मे रख ली और मुझे भी बैठा लिया था। फिर लाश को लेकर थाने गये। थाने पर लाश ट्रैक्टर ट्राली मे ही रखी रही थी। वहां पुलिस वालों ने लिखत पढ़त की। वहां मेरे कोरे कागजो पर अंगूठे लगवाये। थाने पर हम लोग एक घण्टा रुके थे। यह एक घण्टा थाने पर लाश की लिखा पढी के लिये रुके थे। मेरे पिता की लाश सील

घर से करके ले गये थे। लिखा पढ़ी थाने पर की थी। मुझे नही पता कि पुलिस ने जिन कोरे कागजों पर मेरे अंगूठे लगवाये थे उन पर क्या लिखा था मुझे नही पता कि उन कागजों का क्या हुआ जब लाश लेकर आये थे तो महमूद आलम गांव मे ही रुक गये थे। ट्रैक्टर ट्राली से हमारे गांव से थाने आने मे करीब 40 मिनट लगती है। मेरे खालू महमूद आलम मेरे गांव मे ही थे रिस्तेदारी के नाते आये हुये थे।

थाने हैड मोहर्रिर की सूचना पर मौके पर गया था। ये सूचना लगभग 7 -1/2 बजे मिली थी। सूचना के बाद थाने आया था उस समय एस.ओ. थाने पर नही थे। कागजात लेने का इन्द्राज नही कराया था। घटना स्थल पर 20.30 बजे हुआ था। उस समय एस.ओ. थे। उनके पास पंचायतनामा जिल्द वगैरा नही थी मृतक की आयु अनुमान पर लिखी गई थी थाने पर रात मे 11 बजे वापसी हुई पंचायतनामे मे एक नाम बाद मे बढ़ाया गया है शेष कानि० पहले से मौके पर मौजूद थे। मुझे लाश हवीव की दुकान के सामने मिली थी।

यह कहना गलत है कि थाने पर बैठकर सारे कागजात पूरे किए हो।"

42. Learned counsel for the appellants placed reliance upon the case law reported in **2006 (3) ACR 2726 (SC), Jagdish Murav vs. State of U.P. and Others,** the Apex Court in para no. 12 observed as hereunder:

".....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 extremal 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"

43. Further reliance was placed upon the judgment of this Court delivered in Criminal Appeal No.3019/1986 (Bachhi Lal and Others vs. State of U.P.) dated 24.4.2019, this Court in paragraph no. 31 observed as hereunder:

"Testing the evidence on record on the touchstone of the principles enunciated hereinabove for ascertaining whether FAR. in this case is ante-timed, we find that neither the special report was sent by the Investigating Officer or the constable moharir promptly to the C.O. nor the original F.l.R. accompanied the dead body when it was dispatched for post mortem examination. The deposition made by PW6 that the special report was sent on 20.03.1985 and received back on 23.03.1985 but both the entries regarding the dispatch of the special report and its receipt were made on the same day i.e. on 23.03.1985 creates a doubt about the credibility of the prosecution claim that special report was sent on 20.03.1985. The total inability of the prosecution to furnish any plausible explanation for the inordinate delay of 24 hours in delivering the body of the deceased by PW-6, constable Raspal to PW4, Dr. Keshav Gupta which was given to him by the Investigating Officer on 19.03.1985 at 11:00 a.m. for post-mortem examination gives rise to only inference that is the F.I.R. had not come into existence either at the time of the inquest or till the morning of 20.03.1985. Hence, we hold that the F.I.R. in this is ante-timed. "

44. Thus, upon complete analysis of record, we find that special report of the case has not been sent according to rule and regulation which is proved from the statement of P.W.10 Mahak Singh Head Constable. The statement of P.W.1, PW.5 and P.W.11 further reveals that FIR in this case is ante-timed.

45. On the point for determination no.5, learned counsel for the appellants submitted that learned trial Judge misread the evidence of P.W.1, PW.2 and P.W.3 to the effect that they are not eye-witnesses of the incident. He further failed to notice that what will be result of non-production of material witness (Riyasat and Tarachand) by the prosecution, the trial court only say that it is not necessary that prosecution must produce every witness. It is also material that learned trial court while acquitting the accused under Section 307 IPC and Section 25 of the Arms Act recorded that accused Noor Mohammad and Deen Mohammad were present on the roof of their house from where they fired which is 400-500 yard away from the place of incident and there are no independent witness of the recovery, as such Section 25 of the Arms Act is also not made out but convicted the accused-appellants under Section 302/34 & 323/34 IPC.

46. On the point of eye-witness account as well as on interested and related witness, the learned counsel for the appellants placed reliance upon the case law reported in 1994 **(Supp 2) SCC 289**

Mani Ram vs. State of U.P. and (2018) SCC 435 Sudhakar @ Sudharasan vs. State. In the aforementioned cases, the Apex Court acquitted the accused on the ground that there exists reasonable doubt in the case as the case of prosecution is unsupported by independent witnesses and filled with suspicious circumstances.

47. Learned A.G.A., Mr. A.N. Mulla and Mr. S.N. Mishra on the other hand, supported the impugned judgment of conviction and sentence dated 14.1.2016 contending that FIR is not ante-timed and on the ground of latches in the investigation, prosecution case cannot be doubted. Prosecution case is fully proved from the statement of PW.1, PW.2 and PW.3. The appeals filed by accused-appellants have no merit and are liable to be dismissed. On the point of defective investigation, learned AGA has cited following case laws:

(i) **AIR 2019 SC 519, Jafel Biswas and others vs. State of West Bengal** (Relevant paras are paragraph nos. 20 to 23)

(ii) **(2013) 10 SCC 192, Hema vs. State through Inspector of Police, Madras** (Relevant paras are paragraph nos. 10 to 18)

(iii) **AIR 2010 SC 3718, C. Muniappan and others vs. State of Tamilnadu** (Relevant para is paragraph no. 44)

(iv) **1972 (2) SCC 640, Pala Singh and another vs. State of Punjab** (Relevant paras are paragraph nos. 3 & 7).

48. This Court has considered the entire evidence on record i.e. eye-witness account, non-production of material evidence medical evidence as well as defective investigation while deciding the point for determination nos. 1 to 5 and the defective investigation.

49. In view of the above facts and circumstances of the case, it is borne out from the records that point for determination no.1 is answered in negative to the effect that P.W.-1, P.W.-2 and P.W.-3 were not eye-witness of the incident and their evidence are not reliable. Further, point for determination no.2 is answered in affirmative to the effect that prosecution has not produced the best evidence to prove its case and deliberately withheld the material witnesses without any justification. Point for determination no. 3 is also answered in affirmative to the effect that postmortem report does not support the prosecution case as P.W. 1 in his cross-examination stated that person who fired shot was 7 steps away from deceased father Aslam while in the postmortem report blackening was found in the injury. Point for determination no. 4 is answered in affirmative to the effect that FIR is ante-timed and investigation of the case is defective. The point for determination no.5 is also answered in affirmative.

50. In view of above, we find that the evidence of alleged eye witnesses produced by prosecution does not inspire confidence. There exists a doubt whether they are eye-witnesses of the incident or not, the place of incident is also doubtful. Oral evidence is also not consistent with the medical evidence, FIR is ante-timed and there are no independent witness of the incident. Prosecution has failed to prove the charges against the accused-appellants beyond reasonable doubt.

51. Accordingly, the Appeals are allowed. The impugned judgment / order of

conviction and sentence dated 14.1.2016 are set aside. Appellants are acquitted of the charges framed against them. The accused appellant Alam in Criminal Appeal No.888/2016 is in jail. He shall be released from jail forthwith. Accused-appellants Noor Mohammad and Deen Mohammad in Criminal Appeal No.639/2016 are on bail. Their bail bonds and sureties are discharged.

Let a copy of the judgment along with the original record be sent to the court below for compliance.

(2022)06ILR A476
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No.917 of 2006

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

Counsel for the Appellant:
Sri Satish Chandra Mishra, Sri Dileep Kumar, Sri Pramod Kumar Pandey, Sri R.B. Chaudhary, Sri R. Bhargava, Sri Rajrshi Gupta, Sri Shesh Narain Mishra

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code, 1860- Section 304B- Unnatural death within Seven years of marriage- All the four witnesses of fact are consistent in proving the marriage of the deceased Islawati with accused Sanjay Kumar approximately 5 years ago from the date of the incident. The prosecution, thus, became successful in proving the incident of bride burning as informed by the first informant, PW-1, occurring within a period of five years' of matrimonial life of the deceased Islawati with accused Sanjay Kumar. By oral evidence, the witnesses PW-1, PW-2, PW-3 and PW-4 had proved the demand of motorcycle in dowry and also torture and beating of the deceased in connection with the said demand.

In a case under Section 304 B of the IPC, the prosecution has to prove that the death of the woman was under unnatural circumstances within seven years of her marriage and she was subjected to cruelty and harassment by her husband or any of his relatives for demand of dowry.

Indian Evidence Act, 1872- Section 8 - Subsequent Conduct- Neither the accused informed the unnatural death of the deceased nor they took her to the hospital to get her all possible treatment. This conduct is also a relevant fact which lead to an inference that the unnatural death was caused due to burn injuries caused by her in-laws and the motive was unfulfilled demand of motorcycle in dowry.

The subsequent conduct of the accused persons in neither giving any information about the unnatural death and nor providing the deceased with any medical help will lead the court to take an adverse inference against the accused.

Indian Evidence Act, 1872- Section 106- Burden of Proof- What happened in the matrimonial house with the deceased and how the wounds and injuries were sustained on the person of the deceased as ante-mortem injuries are the facts, particularly within the knowledge of the accused-Sanjay as there is absolutely no evidence on record nor it was alleged that he was not present in the house on the fateful day when the deceased was alive just prior to the incident, no explanation at all had been offered by the accused despite opportunity given to him. The presence of accused with the deceased when she was alive is proved beyond doubt. Resultantly, under Section 106 of Evidence Act, 1872, there is a

corresponding burden on the accused-husband to give cogent explanation as to how the crime was committed. The appellant cannot get away by keeping mum.

Where the wife has died an unnatural death inside the home, the presence of the husband stands established by the prosecution during the relevant period then the burden of proof of explaining the circumstances under which the deceased met her death, will lie upon the accused husband.

Proportionate Punishment- Quantum of Punishment- The judgment can not be interfered on the argument as to the disproportionate quantum of punishment. The dowry death being a long standing social event and the dowry death of the deceased in the instant case being pestiferous committed in a scheme of the most brutal manner and cruelty by the covetous husband, the punishment of life imprisonment, in our considered opinion, is the proportionate punishment.

Where the deceased has been done to death in a brutal manner by a greedy husband, no interference is required in the quantum of punishment awarded by the trial court. (Para 28, 34, 46, 47, 51)

Criminal Appeal rejected. (E-3)

Judgements/ Case laws relied upon:-

1. Bansi Lal Vs. St. of Har. (2011) 11 SCC 359

2. Maya Devi & anr. Vs. St. of Har. (2015) 17 SCC 405

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

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The instant Criminal Appeal has been preferred against the judgment of conviction and order of sentence dated 24.01.2006 passed by the learned Additional Sessions Judge, Court no. 6, Basti in Sessions Trial No. 276 of 2000, under Sections 498-A, 304-B of Indian Penal Code, 1860 read with Section ¾ of Dowry Prohibition Act.

2. On behalf of accused-appellant, learned Amicus Curiae Sri Pramod Kumar Pandey argued the case whereas the State-respondent is represented by the learned Additional Government Advocate Ms. Arti Agarwal.

3. Vide impugned judgment of conviction and order of sentence, dated 24.01.2006, the appellant is convicted under Sections 498-A, 304-B IPC read with Section ¾ of Dowry Prohibition Act, Police Station Lalganj, District Basti and sentenced with life imprisonment under Section 304-B IPC. Under Section 498-A IPC two years rigorous imprisonment and fine of Rs. 2000/-; in default of payment of fine six months additional rigorous imprisonment. Under Section ¾ of the Dowry Prohibition Act one year rigorous imprisonment. All the sentences are to run concurrently.

FACTUAL MATRIX OF THE CASE

4. Briefly stating the prosecution case as emerges from the written information dated 27.08.2000 submitted in the Police Station Lalganj, District Basti by the brother of the deceased, is that the informant's sister was married with the accused-appellant Sanjay Kumar, resident of village Dei Saar, Police Station Lalganj, District Basti, approximately 5 years ago (27.08.2000). It is complained that Sanjay Kumar and his father Daya Shanker and mother Dhanpati @ Kanchan were not

satisfied with the gifts and dowry given to them at the time of marriage, therefore demanded "Rajdoot' motorcycle in dowry repeatedly. The father of the informant had already died and the family of the informant was not sound financially, therefore, they could not fulfil the demand of motorcycle in dowry. Due to this, the accused persons, Sanjay Kumar and his parents were harassing his sister, the deceased Islawati Devi. On the complaint made by the informant's sister, the informant met her in-laws with folded hands and told that he was not in a position to gift motorcycle in dowry. Being annoyed by the denial, the accused persons, on 27.08.2000, caused death of Islawati, informant's sister by burning her. After getting information of the incident when the informant, Mani Ram Chaudhary reached at the matrimonial house of his sister and asked the accused Daya Shanker, he told that she had died.

5. The First Information Report was lodged on the said information registering the criminal Case No. 98 of 2000 on 27.08.2000 at about 9:35 p.m. against Sanjay Kumar (the present appellant), Daya Shanker and Dhanpati Devi (the parents of the appellant Sanjay Kumar). On 29.08.2000, the informant Mani Ram Chaudhary applied to add the name of Ram Singh S/o Daya Shanker, brother of the accused-appellant Sanjay Kumar as an accused making harassment and cruelty committed on the deceased Islawati Devi in connection with the demand of dowry.

6. After registering the First Information report, the Investigating Officer reached at the spot of the incident, collected the plain and blood stained soil, other material and articles found near the dead body including one plastic container of kerosene oil of half a litre, the ash of the spot and prepared the relevant memos on 08.08.2000.

7. The inquest proceeding was conducted on 28.08.2000 and concluded on the same day at about 1:00 p.m. The Investigating Officer formed an opinion that the death was caused by burning and sent it for post-mortem with constables Ram Narain Singh and Sriram Pandey on the same day.

8. The plea of alibi is taken by learned the Amicus Curiae on behalf of the accused-appellant Sanjay Kumar.

9. The post-mortem was conducted on 29.08.2000 at about 4:00 p.m. The age of the deceased was mentioned about 26 years. The doctor opined that the death occurred 2-3 days ago. Following ante-mortem injuries were reported:

"1. Contusion on left side of face 6cm x 4cm just interior to left ear.

2. Contusion on the back of head 5cm x 4cm.

3. Contusion upper part of chest 22cm x 15cm.

4. Contusion 6cm x 4cm front of upper left arm found above left elbow."

10. After collecting incriminating material from the spot of the incident, recording evidence of witnesses, the Investigating Officer concluded the investigation and submitted the chargesheet, whereupon after hearing the parties, charges against three accused persons, namely Sanjay Kumar, Daya Shanker and Dhanpati Devi @ Kanchan

were framed on 22.02.2001 and subsequently in a separate Sessions Trial against Ram Singh bearing Sessions Trial No. 247 of 2001 also charges were framed on 23.10.2001 under Sections 498-A, 304-B IPC read with Section ¾ of Dowry Prohibition Act.

11. The prosecution produced the following oral and documentary evidences before the trial Judge:

P.W.-1, the informant, Mani Ram Chaudhary (brother of the deceased)	Proved the written complaint (Ex. Ka.1) Proved the Application (Ex. Ka.2)
P.W.-2, Ram Karan (brother of the deceased)	
P.W.-3, S.K. Chaudhary	
P.W.-4, Malti Devi (Mother of the deceased)	
P.W.-5, Radhey Shyam	Proved Panchayatnama as Ex. Ka.
P.W.-6, Ram Narain Singh	
P.W.-7, Dr. P.N. Singh	Proved Post mortem report Ex. Ka-6.
P.W.-8, Diwakar Kumar, Sub Inspector	1. Proved the recovery memo of blood stained and plain earth. (Ex. Ka.-4) 2. Proved the recovery memo of Ash and Earth (Ex. Ka.-5)
P.W.-9, Chedhi Prasad Yadav, Station HouseOfficer P.W.-10, Vidya Sagar Sharma, Head Moharrir P.W.-11, Sri Ram Pandey, Constable	
One witness in defence	
Arjun as D.W.-1	

12. After the prosecution witnesses, the accused persons were examined under Section 313 Cr.P.C. and ultimately the trial judge convicted the present accused-appellant Sanjay Kumar for the offence under Sections 498-A, 304-B IPC read with Section ¾ Dowry Prohibition Act. The accused Daya Shanker and Dhanpati Devi @ Kanchan in Sessions Trial No. 276 of 2000 and Ram Singh in Sessions Trial No. 247 of 2001 were acquitted for all the charges levelled against them under Sections 498-A, 304-B IPC read with Section ¾ of Dowry Prohibition Act. As such, the present accused-appellant Sanjay Kumar is the sole accused before this court.

ARGUMENTS OF THE LEARNED COUNSELS

13. Learned Amicus Curiae on behalf of the accused-appellant argued that the factum of demand of dowry is not proved as the evidence with regard to the demand of dowry is lacking. There is no complaint either in the police station or any other Forum like village Panchayat or before the respected elders of the family of cruelty in connection with the demand of dowry either by the deceased Islawati or by her brother. For the first time after death of the deceased the allegations of demand of

dowry came in the written information given by the brother of the deceased.

14. He further urged that even the inquest witnesses had not stated any sign of cruelty on the person of deceased just before her death. The deceased was reported to have been treated with cruelty and harassment by the informant on his own by reason of her death due to burning.

15. Learned Amicus Curiae further argued that no specific role of demand of dowry and committing cruelty in connection therewith to can be assigned to the accused-appellant. The informant, PW-1 and other witnesses of the fact have stated that the demand of dowry and cruelty committed in connection therewith was made by all the accused persons including the present accused-appellant, though there is no evidence exclusively against the present accused-applicant. Once on the same evidence when other accused persons were acquitted, the learned trial judge had committed an error in recording the conviction of the present accused-appellant Sanjay Kumar only. The learned trial judge thus has passed the impugned judgment of conviction and order of sentence dated 24.01.2006 without considering the material on record. The sentence is too severe being the maximum as provided under Section 304-B IPC which is disproportionate to the guilt, if any. The prosecution had been unsuccessful in proving it's case beyond all reasonable doubt. No specific motive against the appellant is proved. On the basis of the contentions made by him, learned Amicus Curiae prays to set aside the judgment of conviction and order of sentence and to allow the appeal.

16. Learned Additional Government Advocate Ms. Arti Agarwal replying the arguments made by learned Amicus Curiae on behalf of the accused-appellant argued that the prosecution has successfully proved all the ingredients to constitute the presumptive offence under Section 304-B IPC with regard to dowry death, namely:

(I) unnatural death of the wife ;

(ii) death within 7 years of marriage ;

(iii) demand of dowry and ;

(iv) cruelty done with the deceased in connection with demand of dowry soon before her death.

17. Learned AGA contended that on the date of the incident, the deceased, "Islawati" was a young lady of 26 years of age. Undoubtedly, her death was unnatural as is evident from the post-mortem report. The injuries apart from burn injuries found in the arm of the person of the deceased show that the deceased was subjected to brutality and cruelty soon before her death. Learned AGA has further contended that the post-mortem report reveals that the deceased was strangulated before her death as hyoid bone was broken. She further contended that the dead body was found in the matrimonial house of the deceased Islawati of which the accused appellant was a normal resident. No plausible explanation could be given by him. He rebut the presumption against him. The material circumstances were enough to presume it is a case of dowry death against the accused-appellant. The defence has remained unsuccessful in eliciting any fact during cross-examination of the prosecution

witnesses which may be considered as the fact sufficient to rebut the presumption.

18. The plea taken in defence of alibi had not been proved by the defence during trial. The prosecution had established it's case beyond all reasonable doubt against the appellant, therefore there may not be any interference with the judgment of conviction and order of sentence. The appeal deserves to be dismissed.

[DISCUSSIONS]

LAW RELATING TO DOWRY DEATH

19. From the facts, circumstances of the case and evidences on record, the case against the present accused-appellant is of dowry death which is a presumptive offence under Section 304-B IPC. For the purpose of easy reference in discussions, Section 304-B IPC be quoted hereunder:

***[304-B. Dowry death**.--"(1)Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation. For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*

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

20. As can be seen from the aforesaid provision, for convicting the accused for an offence punishable under Section 304B IPC, the following pre-requisites are required to be met:

(i) that the death of a woman must have been caused by burns or bodily injury or occurred otherwise than under normal circumstance;

(ii) that such a death must have occurred within a period of seven years of her marriage;

(iii) that the woman must have been subjected to cruelty or harassment at the hands of her husband soon before her death and ;

(iv) that such a cruelty or harassment must have been for or related to any demand for dowry.

21. The explanation appended to Section 304B IPC states that the word "dowry" shall have the same meaning as provided in Section 2 of the Dowry Prohibition Act, 1961 which reads as follows:

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

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

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

at or before or any time after the marriage in connection with the marriage

of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal law (Shariat) applies."

22. The presumption of dowry death arises when the death caused is unnatural within 7 years of the marriage in the matrimonial home and soon before the unnatural death of the wife, there is evidence of cruelty committed on her before her death in connection with the demand of dowry. It would also be pertinent to reproduce Section 498-A IPC as under:

"Section 498A in The Indian Penal Code

498A. Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative 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. Explanation.--For the purpose of this section, "cruelty" means--

(a) any wilful 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 to coercing her or any person related to her to 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."

23. In this connection to appreciate the nature of presumption, we find it relevant to note Section 113-B of Indian Evidence Act, 1972 as under:

"Section 113B in The Indian Evidence Act, 1872

[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).]"

WHETHER DEATH CAUSED WITHIN 7 YEARS OF MARRIAGE

24. According to the case of the prosecution, the marriage of deceased Islawati with appellant Sanjay Kumar was solemnized 5 years prior to the incident dated 27.08.2000. The written information of the incident has proved by the brother of the deceased Mani Ram Chaudhary (PW-1) and marked as Exhibit Ka-1. PW-1 categorically stated in the examination in chief that the marriage of his sister, the deceased, was solemnized 5 years ago and denied the suggestion that he gave statement to the Investigating Officer that the deceased got married in the year 1988.

25. PW-2, Ramkaran, another brother of deceased Islawati also stated that the marriage was solemnized approximately 5 years ago from the date of incident. In the course of cross examination, it was

suggested that this witness in his previous statement to the Investigating Officer stated that the marriage of his sister Islawati was solemnized in the year, 1988 and the ritual of "Gauna" was performed in the year, 1995. PW-2 denied that no such statement was given to the Investigating Officer. Apart from this suggestion, nothing could be elicited by the learned defence counsel to establish the marriage of the deceased Islawati with the accused Sanjay in the year, 1988.

26. PW-3 Shyam Karan Chaudhary, brother of the deceased Islawati in his cross examination has specifically stated with the marriage of deceased Islawati was solemnized with accused Sanjay in the year, 1995. This witness also stood firmly in the cross examination with regard to the period of marriage.

27. PW-4 Malti Devi W/o Shyam Karan (PW-3) who sister-in-law of deceased Islawati also stated she got married before the marriage of deceased Islawati and that she came to her in-laws house before the marriage of the deceased. She was examined before the trial court on 17.05.1995 and stated that the marriage of deceased was solemnized approximately 9 years ago from the date she was examined. PW-4 also stated that she had witnessed the marriage of the deceased. Nothing could be carved out by the learned counsel for the defence in contradiction to the statement of other witnesses with regard to the period of marriage of deceased Islawati with accused Sanjay Kumar.

28. All the four witnesses of fact are consistent in proving the marriage of the deceased Islawati with accused Sanjay Kumar approximately 5 years ago from the date of the incident. The prosecution, thus, became successful in proving the incident of bride burning as informed by the first informant, PW-1, occurring within a period of five years' of matrimonial life of the deceased Islawati with accused Sanjay Kumar.

DEMAND OF DOWRY

29. The fact of demand of dowry can be disclosed most probably and very naturally by the sufferer i.e. the wife (In the present case decesed Islawati) herself and the inmates of her paternal house like her mother, brother or other near relatives with whom she might have shared the fact of demand having been made to her. In the case before us, PW-1, PW-2, PW-3 are the brothers of the deceased and PW-4 is her sister-in-law (wife of the brother of the deceased, namely, Shyam Karan). Narrating their conversation with the deceased during her life time the witnesses have stated before the court with regard to demand of motorcycle in dowry. PW-1 stated that their father had died before the marriage of Islawati and according to their financial capacity, they had given sufficient dowry in the marriage but the accused Sanjay Kumar, his parents and one real uncle Ram Singh were pressing the demand for motorcycle in the dowry. PW-1, the elder brother of the deceased with folded hands met the in-laws of his deceased sister and begged pardon for not fulfilling their demand of motorcycle in dowry and requested not to torture his sister in connection with their unfulfilled demand but they continued torturing and treating the deceased Islawati with cruelty in connection with their unfulfilled demand and ultimately P.W.-1 got the information of his sister's death by burning in her in-laws house. When he reached to the matrimonial house of the deceased, her

father-in-law Daya Shanker met and told his sister had died. He immediately moved to the police station, gave the written information of the incident to lodge the First Information Report. This witness when confronted stated that before the marriage, no terms of dowry were settled but when his sister came from her matrimonial house to her paternal home, she told about the demand of motorcycle in dowry. P.W.-1 was further confronted as to when the said demand was made, he replied that the demand was made in the very year in which the marriage of Islawati was solemnized. This witness in the cross examination, thus, had proved that the demand of motorcycle in dowry was made to the deceased Islawati soon after her marriage.

30. Contrary to this proved fact when the accused persons were confronted with the same, they simply stated that marriage of Islawati with accused Sanjay Kumar was solemnized 8 years ago from the date of alleged incident. Except this bare statement under Section 313 Cr.P.C., neither any inconsistency could be carved out in the cross examination of prosecution witness that the solemnization of marriage 8 years prior to the date of the incident nor the accused had adduced any evidence to prove their version.

31. In the cross examination of P.W.-1, it has come that the deceased Islawati was educated up to 10th standard, a query was then made to PW-1 whether any letter was written by her in relation to the demand of dowry which he denied. But P.W.-2 also denied the suggestion that letter was not written as there was no such demand nor any cruel treatment in connection with demand of dowry was ever made to her.

32. So far as the threat of life if the demand of motorcycle as dowry is concerned, PW-4, the sister-in-law of the deceased stated that deceased Islawati when visited her house, shared the trouble she was facing relating to the demand of dowry and cruel treatment by her in-laws in connection with the said demand. P.W.-4 stated that the deceased also shared the threat given to her that if the demand of motorcycle was not fulfilled, she (Islawati, the deceased) would be killed and second marriage would be performed. In the cross examination also P.W.-4 stood uncontradicted and consistent with her statement as to the threat of life to deceased Islawati. The other witnesses of fact PW-2 and PW-3 also stated that the deceased had shared threat to her life given by the accused persons in case the demand of motorcycle in dowry was not fulfilled. PW-2 and PW-3 Shyam Karan stated that their younger brother Mani Ram (PW-1) used to visit their sister in her matrimonial house frequently and he then became conversant with the fact of demand of dowry and subsequently killing of deceased. By oral evidence, the witnesses PW-1, PW-2, PW-3 and PW-4 had proved the demand of motorcycle in dowry and also torture and beating of the deceased in connection with the said demand.

33. Anything contrary to the said proved facts could not be carved out. Even no evidence had been adduced in defence.

UNNATURAL DEATH AND MEDICAL EVIDENCE

34. The witnesses of fact, namely, PW-1 to PW-4 proved that they came to know that her sister was burnt and killed by her in-laws when PW-1 rushed to know about the well being of her sister and

reached her matrimonial house, her father-in-law informed that she had died. Neither the accused informed the unnatural death of the deceased nor they took her to the hospital to get her all possible treatment. This conduct is also a relevant fact which lead to an inference that the unnatural death was caused due to burn injuries caused by her in-laws and the motive was unfulfilled demand of motorcycle in dowry.

35. The inquest of the dead body after registration of the First Information Report on 27.08.2000 was done on 28.08.2000. The informant of the incident was Mani Ram Chaudhary PW-1 and no in male from the matrimonial house of the deceased. The spot of the incident of burning and death of the deceased, as described in the inquest report, is the matrimonial house of the deceased. The prima facie reason of unnatural death is assigned in the inquest report to the accused that they caused death by burning. The inquest proceeding is proved by the witness of the inquest, namely, Radhey Shyam as PW-5. He proved his signature on the inquest proceeding marked as Exhibit Ka-3. This witness also proved the collection of blood stained soil from the spot of the incident and plain earth soil therefrom by the Investigating Officer. The memo of the aforesaid is proved by him as Exhibit 3Ka/5. This witness has further stated that on the spot, at the time of the inquest, a container of kerosene oil was also found and the recovery memo was prepared by the Investigating Officer and he witnessed the recovery by making the signature on memo marked as Exhibit 3K/6. Apparently, according to this witness, no apparent injury was found on the burnt body but in view of the fact, collecting blood stained soil from the spot, the aforesaid portion of the statement suffers from obscurity. The body was, however, sent for the post-mortem.

36. The post-mortem examination was done on 29.08.2000 about 4:00 p.m. The doctor PW-7 observed that the dead body was 2 to 3 days old and the deceased was about 26 years of age. He observed the condition of the body as follows:

"Body swolen, both eyes, skin pealed off at places bulges out conjunctiva congested. Tongue protruded out of mouth 4cm in length. Abdomen burst open, intestine coming out. Protruded tongue is blackened due to partial burn. Tip of the tongue lacerated. Indentation of teeth present in lower surface of tongue."

37. The ante-mortem injuries found on the body are:

(I) contusion on the left side of the face of 6cmx4cm just interior to left ear

(ii) contusion on the back of head 5cmx4cm

(iii) contusion upper part of chest 22cmx15cm

(iv) contusion 6cmx4cm front of the upper left arm from above left elbow.

38. The doctor had opined that post-mortem burn was present all over the body. Scorching of hair present on the head scalp, most of hair were completely burnt. The smell of kerosene oil present on scalp hair and remaining part of cloth. The right cornua of hyoid bone was fractured. Extravascular of blood muscles present. On the internal examination of the dead body, the doctor found a wound on the head, the liquification of the brain started. No smoky

particles were present in the Bronchi. Lungs were congested, pericardium congested, heart both chambers empty, the abdominal was ruptured and intestines were coming out. Stomach empty, saces and pulpy matter present in small intestine gas faecal matter present. Putrifacation of liver started. The doctor had opined that the death of the deceased was caused by result of asphyxia due to strangulation of neck. This report was proved by doctor as Exhibit K-6

39. In the cross examination, PW-7 had denied any ligature mark on the neck of the deceased and no mark of fingers or thumb were also found.

40. The burn injuries and scars on the dead body were opined by PW-7, the doctor as post-mortem injuries i.e. subsequent to the killing of the deceased. On a suggestion, the doctor stated that if after death clothes of the deceased caught fire, post mortem burn could occur. It is also apparent from the internal examination that there were no smoke particles in the bronchea. This clearly shows that when the body was being burnt, the victim was not in a vital condition or alive so as to inhale the smoke particles. Likewise, the autopsy fining post-mortem burn all over body. Ante-mortem injuries found on the person of the deceased is attributable to the violent death. The presence of acclerants used and violent sings are factors indicating "post mortem burning' following homicidal death. The above fact reflecting from the post-mortem examination and the opinion of doctor clearly proved the homicidal death of the deceased and, thereafter, burning of the dead body by the accused.

41. On going through the report of the inquest coupled with the post-mortem examination, it is established that the deceased was first beaten brutally then she was strangulated and finally when she died, her body was tried to emulate in fires pouring kerosene oil on it. The ante-mortem injuries mentioned in the post-mortem report, collection of blood stained soil reported in the inquest by the Investigating Officer are sufficient to establish the offence of torturing, beating and cruelly committed on the deceased soon before her death by the accused. The ante-mortem injuries reveal that the deceased was subjected to extreme cruelty soon before her death, particularly in proximity to the death caused by the accused.

42. The Import of the provisions of Section 498A, 304-B IPC and Section 113-B of the Indian Evidence Act has been explained in several decisions of the Apex Court. In **Bansi Lal Vs. State of Haryana [(2011) 11 SCC 359]**, it has been held that:

"17. While considering the case under Section 498-A (Sic. Section 304-B), cruelty has to be proved during the close proximity of time of death and it should be continuous and such continuous harassment, physical or mental, by the accused should make life of the deceased miserable which may force her to commit suicide."

43. In **Maya Devi and Anr. Vs. State of Haryana [(2015) 17 SCC 405],** it was held that:

"23. To attract the provisions of Section 304-B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty or harassment "for, or in connection with the demand for

dowry". The expression "soon before her death" used in Section 304-IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. In fact, the learned Senior Counsel appearing for the appellants submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to while considering the evidence led in by the prosecution. Though the language used is "soon before her death", no definite period has been enacted and the expression "soon before her death" has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the women concerned, it would be of no consequence."

44. On the basis of the evidence led by the prosecution, we find that there is sufficient linking of the chain of circumstances which produce the following picture of the entire incident from the very inception till the end, namely:-

(I) The deceased "Islawati" was married with accused Sanjay S/o Daya Shanker and Dhanpati 5 years prior to the date of the incident occurred on 28.07.2000;

(ii) The body of the deceased was found in the matrimonial house of the deceased in the burnt state and there are consistent evidence that the death was caused otherwise than under normal circumstances;

(iii) The deceased was at her matrimonial house prior and at the time of her death;

(iv) The information of the death of the deceased was not given to her brother;

(v) The deceased was subjected to assault and cruel treatment by the accused person who is her husband;

(vi) The act of cruelty and harassment was in connection with the demand of dowry and was made soon before her death.

NO EXPLANATION BY THE ACCUSED

45. All the incriminating circumstances were put to the accused-appellant Sanjay who while denying them being false offered an explanation that he was falsely implicated due to enmity. To the question as to whether he wanted to produce any defence, the answer was "yes'. However, no defence was produced by accused Sanjay. The defence witness D.W.-1 was produced to support of plea of alibi of co-accused Ram Singh who is not before us. Absolutely no explanation was offered by the appellant Sanjay as to what had happened in the house on the fateful day, admittedly wherein he was present.

46. It is proved that the deceased was normally living in her matrimonial house with her husband accused Sanjay Kumar prior to the incident in question, her dead

body was found with several wounds, injuries and signs of torture and beating on it including the evidence of strangulation and the death was caused by asphyxia which is proved. In such circumstances what happened in the matrimonial house with the deceased and how the wounds and injuries were sustained on the person of the deceased as ante-mortem injuries are the facts, particularly within the knowledge of the accused-Sanjay as there is absolutely no evidence on record nor it was alleged that he was not present in the house on the fateful day when the deceased was alive just prior to the incident, no explanation at all had been offered by the accused despite opportunity given to him.

47. The prosecution has discharged its initial burden beyond all reasonable doubt that the murder of deceased Islawati was committed in the secrecy of her matrimonial house wherein accused Sanjay was normally residing with her. The dead body was found with signs of beating and cause of death reported is asphyxia by strangulation. The presence of accused with the deceased when she was alive is proved beyond doubt. Resultantly, under Section 106 of Evidence Act, 1872, there is a corresponding burden on the accused-husband to give cogent explanation as to how the crime was committed. The appellant cannot get away by keeping mum.

48. In the Case of **Trimukh Maroti Kirkan Vs. State of Maharashtra [(2006) 10 SCC 681]**, the Apex Court in para 14 and 15 has held as under:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

"15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of

Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

49. In view of the above discussions based on the proved circumstances from documentary and oral evidences, we are of the opinion that in the present case, all the ingredients of Section 304-B read with Section 498-A IPC and Section 113-B of the Indian Evidence Act are satisfied and there are sufficient evidence and material for presumption of dowry death of deceased Islawati at the hands of accused Sanjay, her husband.

GENUNITY OF INVESTIGATION

50. Since the learned counsel for the appellant vehemently argued stating that the investigation conducted by the I.O. in-genuine, we think the same to be evaluated in the light of oral and documentary evidences on record. The written information of the incident was given by reasonable promptness to the police station Lalganj, District Basti, the submission of written information is proved by Maniram, the first informant as P.W.-1. The G.D. entry of police station of F.I.R. is also at serial no.32 on 27.08.2000 at about 21:35 P.M. The chik F.I.R. was prepared and copy of the same was provided to the informant is also proved whereupon Ex. 3 Ka-17 was endorsed. After registering the F.I.R. bearing Case Crime No.288 of 2000, under Sections 498-A, 304-B of Indian Penal Code, 1860 read with Section ¾ of Dowry Prohibition Act against the present accused-applicant and another accused, the family members, the Circle Officer started investigation on the same day. Inquest proceeding was conducted, the body of the deceased Islawati was sent for post mortem by S.D.M. Vinay Shanker Choubey. The relevant papers were filled up by the S.I. Narain Singh, who is examined as P.W.-9. He has proved the said document as Ex. 3Ka. The collection of blood stained soil, plain soil in the presence of witnesses under their signatures proved in the Court by the witness P.W.-9 as Ex. 3 Ka-5. The container of kerosene oil bearing half liter kerosene oil was also collected before the witness and memo was prepared in the Court. This is proved as Ex. 4 Ka-6. As such, lodging of the first information report and investigation was started promptly without any unreasonable delay. Inquest proceeding and report is also proved by Constable Sri Ram Pandey who reproduced into writing the contents of report on the dictation of SDM, Vinay Shanker Chaubey.

51. On the basis of above discussions, we do not find any force in the appeal. The same deserves to be dismissed. The judgment can not be interfered on the argument as to the disproportionate quantum of punishment. The dowry death being a long standing social event and the dowry death of the deceased in the instant case being pestiferous committed in a scheme of the most brutal manner and cruelty by the covetous husband, the punishment of life imprisonment, in our considered opinion, is the proportionate punishment.

52. We find no substance in the submissions of the learned Amicus so as to interfere in the judgment of conviction and

order of sentence dated 24.01.2006 passed by the trial court.

OPERATIVE

53. On the discussions made hereinabove, we do not find any force in the appeal of "Sanjay Kumar" filed against the judgment of conviction and order of sentence dated 24.01.2006 passed by the learned Additional Sessions Judge, Court no. 6, Basti in Sessions Trial No. 276 of 2000, under Sections 498-A, 304-B of Indian Penal Code, 1860 read with Section ¾ of Dowry Prohibition Act. The appeal accordingly, deserves to be dismissed and is hereby **dismissed.**

54. The appellant Sanjay Kumar is in jail. Certified copy of the judgment be sent to the court below for necessary action and forwarding to the concerned Jail Superintendent where the accused appellant, Sanjay Kumar is detained.

55. Lower court record be sent back to the District Judgeship, Basti, immediately.

56. Before parting with the matter we would like to appreciate the sincerity, commitment and enthusiasm of Sri Pramod Kumar Pandey, learned Amicus Curiae for the accused-appellant who with all reasonable promptness has prepared the case and argued vehemently on all the relevant issues. In our judgment, we recommend to pay Rs.12,000/- as remuneration to him. The payment be made by the registry at the earliest.

(2022)06ILR A490
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.06.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No.998 of 2008

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

Counsel for the Appellant:
Sri Maneesh Kumar Singh

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act 1872- Section 3 - Corroboration of Oral evidence by Medical Evidence- Perusal of the evidence of this medical witness shows that the injuries found on the body of the deceased are in consonance with the ocular account given by the complainant P.W.1

Where the medical evidence corroborates the oral testimony of the eye witnesses then the said oral testimony cannot be doubted.

Indian Evidence Act 1872- Section 3- Related Witnesses- Well settled law that the evidence of a witness cannot be doubted only for the reason that he is a related witness.

The testimony of natural witnesses , which is also corroborated by other evidence, cannot be discarded or doubted merely on the ground that the said witnesses are related to the deceased.

Indian Evidence Act 1872- Section 3- The Investigating Officer has stated that he did not find any blood on the spot, but for this reason only the direct ocular evidence cannot be doubted.

Where the oral testimony is corroborated by the medical evidence, then the defence cannot gain any advantage from the mere fact that the investigating officer did not find blood stains at the place of the occurrence as the same is only

a lapse of the investigating officer. (Para 9, 12, 15)

Criminal Appeal rejected. (E-3)

Judgements/ Case law relied upon:-

1. Kartik Malhar Vs St. of Bih.: (1996) 1 SCC 614

2. Mohd. Rojali Vs St. of Assam: (2019) 19 SCC 567

3. St. of Raj. Vs Satya Narain (1998) 8 SCC 404

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Appeal has been filed by the convict/appellant Anil Yadav, against the judgment and order dated 23.12.2007 passed by Additional Sessions Judge/FTC IV, (Room No.13), Sultanpur in Sessions Trial No.284 of 2005, whereby the convict/appellant was held guilty for the offence punishable under Section 302/34 of Indian Penal Code, 1860 (in short I.P.C.) and sentenced to rigorous imprisonment for life coupled with a fine of Rs.5,000/- and in default of payment of fine to further imprisonment of six months. The convict/appellant was also held guilty and sentenced under Section 25 of the Arms Act in Sessions Trial No. 285 of 2005 whereby he was sentenced to rigorous imprisonment of two years coupled with fine of Rs.1,000/- and in default of payment of fine to further imprisonment of three months.

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. 308 of 2005, under Section 302 of I.P.C. at Police Station Jaisingh pur, District Sultanpur, on the basis of written report presented by the complainant Vinod Yadav. It was described in the written report that on 13.06.2005 his father Asha Ram was coming back after leaving Ram Jagpal at his house and he (complainant) was coming to his home after visiting his sugarcane field. Anil and Sanjay, resident of the same village were sitting on culvert with sticks in their hands. At about 7-7:15 PM when his father reached near the culvert Anil assaulted his father on his hand, due to which his father fell down, then Anil and Sanjay both fired upon his father with country made pistols (tamanchas). He raised a loud cry then many persons of village came there then Anil and Sanjay ran away from the spot. His father sustained fire arm injury in his chest. He was carried to hospital where doctors declared him brought dead. The dead body was kept in the hospital.

(ii) On the FIR lodged, the police of concerned police station came into action and investigation started. Inquest report of the dead body was prepared, and the dead body was sent for postmortem along with necessary police papers. During investigation both the accused persons surrendered in the Court on 24.06.2005. The Investigating Officer recorded the statements of the accused persons in jail after taking permission of the Court, wherein the accused persons stated that they might get the weapons recovered, used for committing the crime. The Investigating Officer applied for the police custody remand which was allowed. The accused persons were remanded in police custody on 30.06.2005 for 24 hours. During police custody remand the weapons of offence were recovered at the pointing out of the accused persons alongwith live and empty cartridges. The case was registered against the accused persons under Section 25 of the

Arms Act, at Case Crime No.339 of 2005 against accused Anil Yadav and at Case Crime No.340 of 2005 against Sanjay Yadav, under Section 25 of the Arms Act.

(iii) After investigation chargesheet No.47 of 2005 in Case Crime No.308 of 2005 of I.P.C. (Exhibit Ka-27) was submitted in the Court. The Chargesheet No.48 of 2005 in Case Crime No.339 of 2005 under Section 25 of the Arms Act against accused Anil Yadav (Exhibit Ka-31) was also submitted before the Magistrate concerned. After taking cognizance on the chargesheets submitted the Magistrate concerned committed the case to the Court of Sessions for trial. The Sessions Court framed charge under Section 302 read with Section 34 of I.P.C. The accused persons denied the crime and claimed to be tried. The charge under Section 25 of the Arms Act was also framed against both the accused persons. Both the accused denied the charge framed under Section 25 of the Arms Act also and claimed to be tried.

(iv) The prosecution in order to prove its case examined nine witnesses in toto, which are as under:-

1. P.W. 1 Vinod Kumar Yadav, the complainant.

2. P.W. 2 Om Prakash, the witness of Panchayatnama.

3. P.W.3 Ram Jagpal, the witness of the recovery of weapon of offence at the pointing out of the accused persons.

Hospital, Sultanpur, who conducted autopsy of the dead body of Asha Ram.

5. P.W. 5 Syed Alamdar Hussain Rizvi, Police Inspector, who prepared Panchayatnama of the dead body of Asha Ram and sent the same for postmortem alongwith necessary papers.

6. P.W.6 Head Constable Police, Durga Prasad, who wrote the chick FIR and prepared the concerned G.D.

7. P.W. 7 Mr. S.K. Ram, Investigating Officer of Case Crime No.308 of 2005.

8. P.W. 8 Sub Inspector Hari Shankar Prajapati, who accompanied with Station Officer S.K. Ram when the weapon of offence were recovered at the pointing out of the accused persons.

9. P.W 9 Sub Inspector Shambu Sharavan Singh, Investigating Officer of Case Crime No.399 of 2005 and Case Crime No.340 of 2005 both under Section 25 of the Arms Act.

(v) Apart from above witnesses the prosecution also proved the necessary documents which are as under:-

1. Exhibit Ka-1 written report.

2. Exhibit Ka-2 Panchayatnama.

3. Exhibit Ka-3 recovery memo of recovery of weapons of offence.

4. Exhibit Ka-4 postmortem report.

5. Exhibit Ka-5 information sent to police station from hospital about the dead body.

6. Exhibit Ka-6 specimen seal.

7. Exhibit Ka-7 letter to Reserve Inspector.

8. Exhibit Ka-8 letter to C.M.O.

9. Exhibit Ka-9 Photonash (Police Form No.379)

10.Exhibit Ka-10 details of sending the dead body for postmortem.

11.Exhibit Ka-11 carbon copy of concerned G.D. dated 13.06.2005.

12. Exhibit Ka-12 Chick FIR.

13. Exhibit Ka-13 carbon copy of Kayami GD.

14. Exhibit Ka-14 Chick FIR of Case Crime No.339 of 2005 and Case Crime No.340 of 2005.

15. Exhibit Ka-15 Site plan of the place of occurrence.

16. Exhibit Ka-16 carbon copy of recovery memo.

17. Exhibit Ka-17 to 24 photographs relating to recovery of weapons of offence.

18. Exhibit Ka-25 'Nakal Rapat' No.24 at 15:10 hours dated 30.06.2005.

19. Exhibit Ka-26 Site plan of the place of recovery of weapon of offence prepared at the time of recovery.

20. Exhibit Ka-27 chargesheet of Case Crime No.308 of 2005.

21. Exhibit Ka-28 letter to Forensic Science Laboratory.

22. Exhibit Ka-29 Site plan of the place of recovery of weapon of offence prepared by the Investigating Officer.

23. Exhibit Ka-30 prosecution sanction for prosecution of the accused persons under Section 25 of the Arms Act.

24. Exhibit Ka-31 chargesheet of Case Crime No.339 of 2005, under Section 25 of the Arms Act.

25. Exhibit Ka-32 report of Forensic Science Laboratory.

26. Exhibit Ka-33 report of Forensic Science Laboratory.

(vi) After recording of evidence learned trial Court declared accused Sanjay Juvenile and sent his case before the Juvenile Justice Board for trial. Thereafter the statement of concivt/appellant Anil was recorded under Section 313 of the Code of Criminal Procedure (in short Cr.P.C.), wherein he denied the crime and also the recovery of weapon of offence. He further stated that witnesses have deposed falsely and the case has been registered against him due to enmity. He has further stated that the deceased was killed somewhere else by someone else in the dark of the night and he has been implicated due to enmity of parcenery (pattidari). One witness Suresh was also examined by the convict/appellant in his defence.

(vii) After completion of evidence, hearing the arguments of both the sides and analysing the evidence available on record the learned trial court found the evidence of eye witness P.W.1 trustworthy and the ocular evidence consistent with the medical evidence. Learned trial court also found proved that weapon of offence was

recovered at the pointing out of the convict/appellant and all the necessary facts and circumstances were proved by the prosecution beyond reasonable doubt and found the convict/appellant guilty for the offence punishable under Section 302/34 of I.P.C. and sentenced to life imprisonment coupled with fine noted herein above. (para 2(iii))

(viii) Learned trial court also found proved the offence under Section 25 of the Arms Act and sentenced the convict/appellant for the offence.

(ix) Being aggrieved of this conviction and sentence the present appeal has been preferred by the convict/appellant.

(3) Heard Shri Manish Kumar Singh, learned counsel for the appellant and Ms. Smiti Sahai, learned A.G.A. for the respondent State.

(4) Learned counsel for the convict/appellant argued that the learned trial court has committed grave error in holding guilty and sentencing the convict/appellant because the FIR is anti time and fabricated. The alleged eye witness was not present at the place of occurrence. He has deposed falsely. No blood was found at the place of occurrence. The memo of motorcycle of the deceased was not prepared. The medical evidence does not support the ocular testimony. No independent witness has been examined by the prosecution. P.W.1 is the son of the deceased, he has deposed falsely and has tried to improve his version during recording of his statement in trial court in order to make it consistent with the medical testimony. The Forensic Science Laboratory report cannot be read in evidence. The recovery of alleged weapon of offence is highly doubtful and no independent witness of the incident has been produced by the prosecution. The crime number has not been mentioned in the inquest report. The prosecution remained unable to prove the guilt of the convict/appellant beyond reasonable doubt. Therefore, the impugned judgment and order should be set-aside.

5. Contrary to it, learned A.G.A. argued that the evidence of P.W.1, the complainant and the son of deceased is true as no major contradiction could be brought by the defence during the cross-examination. The weapon of offence was recovered at the pointing out of the convict/appellant. The medical evidence as well as ocular evidence is consistent with each other. According to Forensic Science Laboratory report the empty cartridges recovered at the spot were found fired by the weapon recovered at the pointing out of the convict/appellant Anil. In the opinion of autopsy surgeon the cause of death was shock and hemorrhage due to ante-mortem injuries. FIR was lodged promptly without any unreasonable delay. For non mentioning of the crime number in the inquest report, the registration of the FIR cannot be doubted. The motive of the crime has been alleged and proved. As far as the place of occurrence is concerned, it is very well proved and even the defence witness has supported the place of occurrence mentioned in the FIR. Thus there is no error or discrepancy in the impugned judgment. Therefore, the appeal should be dismissed.

6. Considered the rival submissions and perused the original record of trial court as well as of appeal. The perusal of the record as well as the impugned judgment and order shows that the

conviction rests mainly on the evidence of P.W. 1 Vinod Kumar, complainant of the case. This witness has stated before the trial court that accused Anil Yadav and Sanjay Yadav are the residents of his village. Where the incident took place, a metalled road goes from Sameri to Mahorua Ambedkar Nagar and from that metalled road one paved road (kharanja) on the north side goes to Madhavpur and at the place where paved road emerges one culvert is there. Prior to this incident Anil Yadav used to drive his tractor. He stopped to drive tractor, prior to one and a half or two years of the incident. Some altercations took place on it, and for this reason the accused persons became inimical. He further stated that both the accused are present in the Court. After leaving the job of driving the tractor of the complainant the accused persons went to Indore. The incident occurred on 13.06.2005 at about 7:15 PM. On that day his father asked him to visit the sugarcane field, for that reason he went to Gram Itkohiya on motorcycle and his father went to Gram Itkohiya by his own motorcycle. When he (witness) was coming back after visiting sugarcane field and reached at the road, at the same time his father was also coming on his motorcycle and he saw that Anil Yadav and Sanjay were sitting on the culvert with sticks in their hands. When his father came near the culvert the accused Anil Yadav assaulted his father with stick on his hand and accused Sanjay caught his motorcycle from behind and made him fell down. Thereafter both the accused persons fired upon his father with an intention to kill him. He shouted loudly, hearing his shout villagers came there then both the accused ran away. Due to firing made by accused persons, his father sustained injuries in his chest. After that, with the help of the people of village he carried his father to the hospital where doctors declared him dead. Thereafter he dictated and got written an application by Bechu Verma and after hearing that put his signature on that application. The application was presented by him at the police station Jaisinghpur and an FIR was registered. He proved his written report as Exhibit Ka-1 and recognized his signature on that.

7. He has further stated that the Investigating Officer recorded his statement and he showed the spot to the Investigating Officer, this examination-in-chief of the witness was recorded on 24.04.2006, but on that day, the counsel for the accused persons did not cross examine the witness and sought adjournment, the adjournment was allowed and 25.4.2006 was fixed to continue with the evidence. On 25.04.2006 also the witness P.W.1 remained present, but the counsel for the accused persons moved adjournment and that was rejected and an opportunity to cross examine the P.W. 1 was closed and date 04.05.2006 was fixed. Thereafter the counsel for the accused moved application to recall P.W.1 and that was allowed and the witness was recalled for cross-examination and his cross-examination was recorded on 11.01.2007 and again on 17.01.2007. A lengthy cross-examination has been made on behalf of the convict/appellant, but no major contradiction could be brought in cross-examination. The ocular account presented by this witness has been supported by the medical evidence. P.W. 4 who conducted the postmortem, prepared the report, has proved the postmortem report as Exhibit Ka-4 and also the injuries noted therein. In the postmortem following injuries were found on the cadaver of the deceased.

" 1. Lacerated wound 4 cm x 1 cm x bone-deep present on the left side of skull.

2. Lacerated wound 3 cm x 1 cm muscle-deep present on occipital region of skull.

3. Fire arm wound of entry 1 cm x 1 cm x Chest cavity deep present on the center of chest, margins were inverted and lacerated and blackening and tattooing were present around the wound area of 4 cm x 3 cm. "

8. In the opinion of autopsy surgeon the death occurred due to shock and hemorrhage, as a result of fire arms injuries.

9. In the chest cavity 1.5 liter clotted blood was found. One bullet was found in the heart of the deceased and the autopsy surgeon after extracting the same from the cadaver put in an envelope and sealed it and handed over to the police personnel. In the opinion of the autopsy surgeon the injury No.1 & 2 can be caused by a stick (danda), injury No.3 can be caused by fire arm (tamancha). According to this medical witness injury No.3 was on vital part of the deceased and was sufficient enough to cause death. In his opinion injuries found on the body of the deceased would be possible in the incident occurred on13.06.2005 at about 7:15 PM. Thus the perusal of the evidence of this medical witness shows that the injuries found on the body of the deceased are in consonance with the ocular account given by the complainant P.W.1.

11. Learned counsel for the convict/appellant argued that the complainant in his written report has mentioned that accused hit his father by stick on his hand, but in the statement made before the court he improved his version and stated that the accused hit his father on his head and this creates serious doubt. No doubt the complainant in his written report has mentioned that accused hit his father on hand and in the statement made in the Court he stated that his father was hit on the head, but the main injury which was found on the chest and caused death was correctly mentioned by the complainant in the FIR and also in his evidence before the trial court. Hence this argument raised by defence counsel is of no importance.

12. The counsel for the convict/appellant also submitted that no independent witness has been examined. The only witness P.W.1 is a related witness as he is son of the deceased, hence his testimony should not be relied upon. This argument also of the defence is of no importance because it is well settled law that the evidence of a witness cannot be doubted only for the reason that he is a related witness.

13. 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."

14. 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 well settled 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."

15. Learned counsel for the defence vehemently argued that the place of occurrence is doubtful, as no blood was found by the Investigating Officer at the place of occurrence. It is true that the Investigating Officer has stated that he did not find any blood on the spot, but for this reason only the direct ocular evidence cannot be doubted. It is quite possible that due to the gathering of the people of the village at the place blood might have disappeared or it is also possible that most of the blood remained inside the body of the deceased, as per postmortem report 1.5 lt. blood was found in the chest cavity of the deceased.

16. In the case of ***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.

17. Learned counel for the convict/appellant has also argued that the recovery of weapon is doubtful. This argument also, of the defence counsel is very feeble, because the recovery has very well been proved by the prosecution by producing the independent witness P.W.3 Ram Jagpal and also by the evidence of P.W.8 Sub Inspector Hari Shankar Prajapati.

18. Thus to sum up, the prosecution has proved the commission of crime by the convict/appellant. P.W. 1 the eye witness has proved the incident and his testimony was supported by the medical evidence. The motive of the crime has also been proved i.e. convict/appellant used to drive the tractor of the deceased and some altercations took place between the deceased and the convict over the issue, for that convict/appellant was inimical to the deceased. The fact of dispute regarding driving of tractor has also been suggested by the defence counsel to P.W. 1 in cross-examination.

19. Thus the prosecution has proved the charges levelled against the convict/appellant beyond reasonable doubt and the learned trial court has rightly held him guilty and sentenced accordingly.

There appears no ground for interference in the conviction and sentence recorded by the trial court.

20. The convict/appellant is already in jail, he shall serve out the sentence awarded by the learned trial court.

21. The appeal is ***dismissed,*** accordingly.

22. 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)06ILR A499
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1212 of 1983

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

Counsel for the Appellants:
Sri P.S. Raghav, Sri Dharmendra Singhal, Sri S.I. Jafri, Sri S.P.S. Raghav, Sri Shivendra Raj Snghal

Counsel for the Respondent:
D.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Section 114 – Appeal against conviction - Abettor present when offence is committed, Section 302 - murder , The **Code of criminal procedure, 1973 - Section 313 .**

Appeal of appellant no.2 - abated - consequent to his death - appeal of appellant no.1 survives - accused were dismantling the water channel of deceased - deceased intervened - On his intervention , non surviving appellant no.2 - elder brother of deceased - exhorted his son (surviving appellant) to beat the deceased by uttering "Maar Saale Ko" - FIR lodged by son (P.W. 1) of deceased - surviving appellant no.1 administered multiple Fawra (spade) blows on vital part of the body of the deceased – property dispute. **(Para - 17,34)**

(B) Criminal Law - Indian Penal Code, 1860 - Section 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 - held - at the time of causing injury, the inflictor of that wound had inflicted that injury with the knowledge that he is likely by such act would cause death - No case of the defence that the injury no.1 was inflicted accidentally - appellant no.1 is liable for the offence of culpable homicide. **(Para -24,25)**

(C) Criminal Law - Indian Penal Code, 1860 - Section 300 - murder – when culpable homicide is murder - *clause "Secondly"* - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused - *clause "Thirdly"* - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death - multiple blows on head of deceased - three incised wounds found on head region - injuries no.2 and 3 not fatal - accused targeted a vital part - accused had the intention of causing such bodily injury which he knew that it is likely to cause death of the person to whom the harm is caused - injury no.1 reflects that the underlying tissues, vertebrae etc were all cut through and through - deceased had died on the spot - appellant's act traveled from the genus of culpable homicide to the species of murder. **(Para -26,31)**

HELD:-Prosecution successfully proved that injuries were caused by accused appellant.

Injuries were such that would fall in clause "Secondly' and "Thirdly' of Section 300 IPC . Appellant would be liable to be convicted for an offence of murder, as has been held by the trial court. Judgment and order of the trial court affirmed. **(Para – 48)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Litta Singh Vs St. of Raj., (2015) 15 SCC 327

2. Bhagwan Munjaji Pawade Vs St. of Mah., (1978) 3 SCC 330

3. Surain Singh Vs St. of Punj., (2017) 5 SCC 796

4. K.M. Nanavati Vs St. of Mah., AIR 1962 SC 605

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal is against the judgment and order dated 11.05.1983 passed by Special Judge, Bulandshahr in S.T. No.57 of 1983 whereby, the appellant no.1 (Jangaliya) has been convicted under Section 302 IPC and the appellant no.2 (Shiv Lal) has been convicted under Section 302 IPC read with Section 114 IPC and both have been sentenced to imprisonment for life.

2. The appeal of appellant no.2 (Shiv Lal) was abated vide order dated 27.11.2021 consequent to his death. This appeal therefore survives qua appellant no.1 (Jangaliya).

INTRODUCTORY FACTS

3. On a written report (Ex. Ka-1), dated 25.10.1982, scribed by Sunder Swarup (PW-2), made by Lakhpat Singh (PW-1), son of Nanua (the deceased), the first information report (FIR) was registered at P.S. Shikarpur, District Bulandshahr as Case Crime No.246 of 1982, at 19.00 hours, on 25.10.1982. The allegation in the FIR is that informant's chak (a consolidated piece of agricultural holding) adjoins the chak of his uncle (Tau - father's elder brother) Shiv Lal (appellant no.2). Three to four months before, the informant had installed a tube-well. The channel of its flow passed through the chak of his uncle (Shiv Lal). On 25.10.1982, the informant and the deceased were working in their chak when, at about 5 pm, informant's uncle (Shiv Lal) and his son (Jangaliya) (the surviving appellant no.1) started dismantling the channel which passed through their field. When the deceased requested them not to dismantle the channel, Shiv Lal abused him and exhorted Jangaliya to beat informant's father. On this exhortation, Jangaliya administrated "Fawra' (spade) blows hitting the head of the deceased. On witnessing this, the informant, who was at the spot, raised alarm, as a result, Gagan Singh, Kewal Singh came running to the spot and witnessed the incident. By alleging that informant's father died on the spot and Jangaliya and Shiv Lal escaped with the "Fawra' (spade), the FIR was lodged.

4. Ex. Ka-4) was prepared by Investigating Officer (Mahendra Singh-PW-3). On 26.10.1982 itself, blood stained earth and plain earth was recovered from the spot of which collection memo (Ex. Ka-11) was prepared. Autopsy was conducted by Dr. Chandra Prakash (PW-4) on 26.10.1982 at about 4.30 pm. The autopsy report (Ex. Ka-14) notices:

External Examination

Average built body. Rigor mortis present all over. No Sign of decomposition.

Ante-mortem injuries:-

(i) Incised wound 5½" x 4" into skull cavity deep extending from left parietal region to left lateral neck around left ear.

(ii) Incised wound 1" x ½" into bone deep on left frontal head 2½" above left eyebrow.

(iii) Incised wound 2" x ½" into scalp deep on posterior head in middle.

(iv) Incised wound ½" x ¼" into muscle deep on tip of right index finger on ventral aspect.

Internal Examination

Skull cavity cut underneath injury no.1. All soft tissues under injury no.1 cut through an through upto bone depth in neck. Membranes cut under injury no.1. Left lateral procuses of second to fourth cervical vertebrae cut under injury no.1.

Cause of death:- Death due to shock and haemorrhage as a result of injury no.1. The estimated time of death about one day back.

5. After investigation, the appellants were charge sheeted, vide charge sheet dated 28.11.1982 (Ex. Ka-13). On which, cognizance was taken and case was committed to the court of session. By order dated 01.02.1983, Jangaliya (the surviving appellant no.1) was charged for the offence punishable under Section 302 IPC whereas Shiv Lal (appellant no.2) was charged for the offence of instigating Jangaliya to commit the murder of Nanua punishable under Section 302 read with Section 114 IPC.

6. During the course of trial, the prosecution examined five witnesses. After taking on record the prosecution evidence and the statement of the accused under Section 313 CrPC, the trial court convicted and sentenced the appellants, as above. Hence, this appeal.

7. Before we proceed to notice the submissions of the learned counsel for the parties, it would be useful to notice, in brief, the testimony of the prosecution witnesses.

PROSECUTION EVIDENCE

8. The prosecution examined five witnesses. Their testimony, in brief, is as follows:-

9. **PW-1- Lakhpat Singh (the informant)**. PW-1 is the son of the deceased. He proved the incident as narrated in the FIR noticed above. He also stated that at the time of the incident Shiv Lal had abused the deceased and had exhorted Jangaliya by saying **"Maar Saale Ko"**. PW-1 stated that on that instigation, Jangaliya inflicted blows with Fawra (spade). The incident was witnessed by him along with Sunder and Gagan. PW-1 stated that on infliction of Fawra blows his father died on spot. PW-1 stated that he, Gagan and Sunder tried to catch the accused but they ran away with the spade. PW-1 stated that he dictated the FIR and after it was written and read out to him, he had put his thumb impression. The report was exhibited as Ex. Ka-1.

During cross examination, PW-1 stated that his grand father (Khamani) had three sons, namely, Shiv Lal (appellant no.2), Nanua (the deceased) and Bhagwanta. All three have common holding. PW-1 stated that he never saw Bhagwanta in his lifetime. Suggestion was

given to PW-1 that in the year 1967 from the informant side a suit was instituted for getting the share of Bhagwanta. In response to the suggestion, PW-1 stated that he has no knowledge of any such case and stated that, in all, in the joint khata, there were 24 bighas of land; out of which, Nanua (the deceased) had 12 bighas. PW-1 stated that tube-well was installed 3-4 months before the incident. PW-1 stated that before the incident he had ploughed 3 - 4 bighas of land. PW-1 stated that on that day Jangaliya (the appellant no.1) was working in his field. At the time of the incident, Gagan and Sunder were also present in their adjoining fields. PW-1 stated that the incident was witnessed by him, Gagan and Sunder but he was not aware whether any other person witnessed the incident. He clarified that the channel of the tube-well was not built by him but it was a government built channel (Sarkari Nali) and in that channel, his tube-well's water flowed. On further cross examination, PW-1 stated that towards west of the tube-well, he had made some constructions to derive water from the channel, these constructions fell in the field of Shiv Lal. When these constructions were raised, Shiv Lal and Jangaliya raised no dispute. PW-1 also stated that on that day, before dismantling the channel, there was no altercation or fight between the informant side and the accused side. PW-1 stated that the channel, which was dismantled, also irrigated the fields of Jangaliya and Shiv Lal. PW-1 stated that except for dismantling the channel, there was no other reason for the incident to have occurred. In respect of his presence at the spot, PW-1 stated that when his father (the deceased) had objected to the dismantling of channel by Jangaliya, PW-1 was ploughing his field with a plough (Hal). PW-1 stated that on his alarm, Gagan and Sunder arrived at the spot. Thereafter, they all three went to the spot where the deceased was lying. PW-1 stated that by the time he reached the spot, Nanua was dead. PW-1 stated that when he left the spot to lodge report, he had asked Gagan to be present near the body. PW-1 stated that he brought Sunder Singh to his house and there he dictated the report to him.

PW-1 stated that he reached the police station between 7-8 pm where his report was lodged and after lodging the report, he came back to the village. The I.O. came later, by night. The body kept lying at the spot over night and the police constables also remained near the body that night. In respect of the light condition when the report was lodged, PW-1 stated that at the time when the report was dictated, it had become dark. In respect of scribing the report, PW-1 stated that the report was scribed because he believed that the police personnel might insist for a written report. PW-1 stated that prior to this, he had never gone to the police station. PW-1 admitted that agriculturists used to purchase water from his tube-well and Gagan also used to purchase water from his tube-well but Sunder never purchased water. PW-1 stated that the spot where the deceased was killed is not the field of Sunder but is near the field of Gagan whereas Sunder was working in the field which he had taken on Batayi and was sowing potato. In respect of the site plan prepared by the I.O., PW-1 stated that the site plan was not prepared at his instance but it must have been prepared by the I.O. after spot inspection as he had shown the spot to the I.O. and had also shown him the field where he was working.

In respect of existence of light at the time of the incident, PW-1 stated that at the time when the incident occurred, the sun had not set. In respect of the spot, he

stated that when he arrived at the spot, Nanua was lying 2-4 paces north of the channel. He denied the suggestion that at the time of the incident no one was present.

10. **PW-2 Sunder Swarup**. He is the scribe of the written report (Ex. Ka-1). PW-2 stated that at the time of the incident, he was in the field of Gagan. With him, Gagan was there. At that time, he heard screams of Lakhpat (PW-1), who was ploughing his own field. On hearing his screams, they saw that near the tube-well Jangaliya was assaulting Nanua with his spade and near Jangaliya his father Shiv Lal was there. By the time they could reach the spot, Jangaliya and Shiv Lal had escaped. They checked whether Nanua was alive but he was found dead. PW-2 stated that Lakhpat (PW-1) dictated the report to him which was in his handwriting.

During cross examination, he stated that he had not informed the I.O. that Aziz's field was on Batayi with him. PW-2 also stated that towards west of the field of Gagan, there is his tube-well. PW-2 stated that he had to go towards his tube-well near which Gagan's field fell. When he was going towards his tube-well, Gagan joined him as it was evening time. He stated that, by mistake, he said that he told Gagan to come to his house. PW-2 stated that he had informed the I.O. that when he was going towards his tube-well, through the field of Aziz, from a distance of 100 paces, he watched Jangaliya assaulting the deceased. PW-2 stated that the spot from where he noticed the incident adjoins the field of Lakhpat (PW-1) and at that time Lakhpat was ploughing his field. PW-2 again reiterated that by the time he could reach the tube-well/spot, the accused had escaped and he had seen them running away. PW-2 stated that by the time he had arrived at the tube-well, the accused must have ran 100 paces. PW-2 stated that he had written the report at the house of Lakhpat (PW-1) and by the time he had written the report, it was not dark but 10-15 minutes later, it had turned dark.

In paragraph 3 of his statement, during cross examination, PW-2 stated that when he had left with Lakhpat to lodge the report, at the spot, except Gagan, there was no body else. He denied the suggestion that he takes water from Lakhpat for the field which is on Batayi with him. PW-2 stated that near that field, there is tube-well of Kanti, which is at a distance of 200-250 paces away from the field of Aziz. PW-2 also stated that he saw the I.O. next day morning and the I.O. was seen inquiring from people around him. PW-2 stated that the I.O. had prepared the site plan in his presence and in the presence of Lakhpat. PW-2 stated that the I.O. had recorded his statement. He denied the suggestion that he was not at the spot and that on account of his relations with PW-1, he is telling lies.

11. **PW-3 - Mahendra Singh - Investigating Officer.** PW-3 stated that on the date of lodging the report, he was posted as Sub-Inspector at the police station concerned and with him Lalta Prasad, Head Muharrir, was posted. By recognising the signature of Lalta Prasad, he proved the chik FIR and the GD entry of the written report, which were exhibited as Ex. Ka-2 and 3 respectively. PW-3 stated that, thereafter, he proceeded to the spot and found the body of Nanua at the spot. For the safety of the body, he deputed a constable there. PW-3 stated that by the time they could reach the spot, it was dark therefore inquest was deferred to next day. PW-3 stated that next day, inquest was conducted. He proved the inquest report

and the papers prepared by him for autopsy such as photo-nash, chalan-lash, letter to Chief Medical Officer, etc., which were exhibited as Ex. Ka-5 to Ka-10. He proved the sealing of the body as also lifting of blood stained and plain earth from the spot. The recovery memos were exhibited and recovered material were also produced and exhibited. PW-3 stated that he had recorded the statements of Lakhpat Singh (PW-1), Gagan Singh (not examined) and Sunder Swarup (PW-2) and had prepared the site plan at their pointing out. The site plan was exhibited as Ex. Ka-12. PW-3 stated that he obtained photocopy of the autopsy report on 28.10.1982 and made a search for the accused. PW-3 stated that on 12.11.1982 he recorded the statement of Head Muharrir Lalta Prasad who had made GD entry of the written report and on 27.11.1982, he had recorded the statement of Shiv Lal and on 27.11.1982 itself he had recorded the statement of Jangaliya in jail. PW-3 stated that after completing the investigation, he submitted charge sheet, which was marked as Ex. Ka-13.

During cross examination, PW-3 stated that the spot from where Lakhpat (PW-1) had witnessed the incident is shown by him in the site plan and that during site inspection he had noticed that the field had been recently ploughed. PW-3 stated that the field of Aziz would be at a distance of 150 paces from the tube-well. PW-3 stated that Sunder (PW-2) had no field of his own. PW-3 stated that he left for the spot after registration of the report at about 7.30 pm. PW-3 stated that he remained at the spot near the dead body till 9.30 pm to 10 pm and, in between, he had noticed the marks on the body and had given instructions to the constables to protect the body. PW-3 stated that he had not noticed any digging of the mud near the body. PW-3 stated that near the spot there was no tube-well of the witness Sunder Swarup (PW-2). PW-3 stated that he made spot inspection on the next day at 9.40 am and the body was handed over to the constable for autopsy at 7.15 hours. He stated that papers in connection with inquest and autopsy were prepared before 7.15 am. PW-3 stated that the first CD parcha was prepared on 26.10.1982, which was sent to the C.O. office on 27.10.1982. PW-3 stated that there is no endorsement of the C.O. office in respect of receipt of that parcha. PW-3 stated that he had prepared the site plan with the help of the informant and the witnesses. He denied the suggestion that at the time of preparing the site plan, he received no help from the informant.

12. **PW-4 - Dr. Chandra Prakash** - Autopsy Surgeon. He proved the autopsy report and the injuries mentioned therein, which have already been noticed above. On his statement, the autopsy report was marked as Ex. Ka-14. PW-4 also proved the clothes, etc. of the deceased which were marked material exhibit. He accepted the possibility of the injuries found on the body of the deceased as a result of Fawra (spade) blows. He also accepted the possibility of death to have occurred at 5 pm on 25.10.1982.

During cross examination, PW-4 stated that he had received 10 papers from the police at the time of autopsy and those papers were received by him around 12 noon of 26.10.1982. He accepted that it may be possible that those papers were received earlier or later. He also accepted the possibility of injuries found on the body of the deceased as a consequence of heavy sharp edged weapon.

13. **PW-5- Natthu Singh**- the constable who carried the cadaver for

autopsy. PW-5 stated that he was handed over the body for autopsy on 26.10.1982 and till the body was delivered for autopsy, the body was kept in secured custody and was not allowed to be touched by anyone.

During his cross examination, PW-5 stated that the body was delivered to him in the morning at 7.30 am. The mortuary was 34-35 km away and they covered the distance on a "Tonga' and reached the mortuary by 9.30 am. PW-5 stated that he delivered the papers concerning the body at around 4 pm.

14. After the prosecution had led its evidence, the incriminating circumstances appearing in the prosecution evidence were put to the accused. The accused-appellant Jangaliya pleaded that the deceased had installed a tube-well and was drawing a channel for selling water through the field of accused in connection with which there was litigation. In the litigation, the accused had won. In connection with the dispute, earlier also, altercations had taken place. But, on the date of the incident there was no altercation.

15. We have heard Sri Dharmendra Singhal, learned Senior Counsel, assisted by Sri Shivendra Raj Singhal, for the surviving appellant no.1; Sri Pankaj Saxena, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

16. The learned counsel for the appellant submitted that the incident occurred late evening when the sun was about to set. The incident occurred in an open field, near the tube-well which was far away from the village abadi. None was present to witness the incident and the prosecution story was developed against the accused persons on ground of enmity, as there existed a property dispute. If Lakhpat had been present at the spot he would have made an attempt to save his father but since Lakhpat neither made any attempt to save his father nor had suffered an injury in the incident, the prosecution story does not inspire confidence. The presence of PW-2 at the spot is not natural as he did not have any field adjoining the spot and being scribe of the written report, if his presence is not disclosed in the written report, the possibility of him being present at the spot is extremely doubtful. Further, there is no recovery of the spade to corroborate the prosecution story. In the alternative, learned counsel for the appellant submitted that even if the prosecution story is accepted as correct, the dispute was in respect of carrying water channel through the field of accused for selling water to others which, by itself, was an illegal act and the accused had every right to protect their field and if in connection with exercise of that right there had been an altercation or fight and there was no exhortation to kill but only to beat, if in that fit of rage, injury with the help of spade was caused, the offence would not travel beyond the one punishable under Section 304 Part II IPC therefore, in the worst case scenario, the appellant is not liable to be convicted under Section 302 IPC.

SUBMISSIONS ON BEHALF OF THE STATE

17. **Per contra**, learned AGA submitted that this is a case where a prompt first information report has been lodged. The distance of the police station from the spot is 3 km and the written report was lodged at 19.00

hours i.e. at 7 pm in respect of an incident that occurred at 5 pm. From the testimony of the witnesses, it has come on record that sun had not set by the time of the incident therefore, there was sufficient light to witness the incident. The presence of PW-1 was quite natural as he was ploughing his own field and his father (the deceased) was at his tube-well when the assault took place. Absence of injuries on the body of PW-1, or PW-1's attempt to save his father, is not a good ground to disbelieve his presence because by the time he could arrive at the spot, his father had been administered blows by the surviving appellant no.1 and the surviving appellant no.1 along with his own father (appellant no.2) had effected his escape. It has been submitted that the prosecution evidence appears natural and the medical report also corroborates the oral testimony. It has been submitted that there is no suggestion to the prosecution witnesses that the incident occurred at some other spot or at some other time and there is also no suggestion whatsoever to the prosecution witnesses that the first information report was ante-timed. Further, there is a suggestion to PW-2 that he takes water from the informant party to irrigate the field taken by PW-2 on Batayee therefore, the argument that PW-2 had no field around is not sustainable. Hence, PW-2's presence at the spot is also proved. It has thus been submitted that the eye witness account coupled with surrounding circumstances have clearly proved that the surviving appellant no.1 administered multiple spade blows on vital part of the body of the deceased and therefore he was rightly convicted for the offence punishable under Section 302 IPC.

ANALYSIS

18. Having noticed the rival submissions and the prosecution evidence in detail, the following features stand out:-

(a) that, the deceased Nanua is the brother of accused Shiv Lal (non surviving appellant no.2) and the surviving appellant no.1 (Jangaliya) is the son of Shiv Lal which means appellant no.1 is the nephew of the deceased, whereas the informant is the son of the deceased and nephew and cousin brother, respectively, of the two accused, namely, Shiv Lal and Jangaliya; (b) that, a tube-well was established by the deceased, the water channel of which passed through the field of the accused in respect of which the accused had raised objection and, according to own statement of the accused, in the past there had been altercations in that regard; (c) that, according to the explanation of the surviving appellant no.1 under Section 313 CrPC, a suit was instituted by the deceased which was decided in favour of the accused; (d) that, from paragraph 7 of the judgment of the trial court, it appears that the said suit, which was instituted by Lakhpat (PW-1) in the revenue court, was for partition against Shiv Lal (non surviving appellant no.2) and it was dismissed. In fact, this suit, as per the observations of the trial court, was not only against non surviving appellant Shiv Lal but against Nanua (the father of PW-1) also; (e) that, the witnesses were not in close proximity to the deceased at the time when the deceased was assaulted rather, they reached the spot after the assault had taken place and the accused were about to escape, which means that the witnesses were not in a position to intervene at the time of the assault; (f) that, according to the autopsy surgeon, the injuries found on the body of the deceased could have been a result of infliction of blows from a spade.

19. Bearing in mind the key features noticed above, what stands out is that there are no suggestions to the prosecution

witnesses in respect of the incident occurring at some other time or that there were other enemies of the deceased having a strong motive to finish him. There is also no challenge to the spot and of the spot having fields of the deceased and the accused around. Thus, if the accused were in their field and the deceased and his son were managing their own field the presence of the two parties at the spot is quite natural. According to the testimony of the prosecution witnesses, the incident occurred at 5 pm on 25.10.1982 and by that time the sun had not set and there was light. The first information report was scribed and was lodged at a police station 3 km away at 7 pm. There is no suggestion that the first information report was ante-timed. Nothing has been shown to indicate that the police was in collusion with the informant and being in collusion with the informant, the first information report was ante-timed. In these circumstances, the first information report is prompt and therefore it can be taken that there was no time for the informant to contrive the prosecution story.

20. In the aforesaid background when we notice the testimony of PW-1 (the son of the deceased), we find that according to him at the time of the incident his father had arrived at the spot upon noticing that the water channel was being dismantled by the accused. When the deceased intervened and objected to dismantling of the water channel, Shiv Lal (non surviving appellant no.2) exhorted his son (the surviving appellant no.1) to beat the deceased Nanua by stating "**Maaro Saale Ko**". On this exhortation, spade blows were inflicted by the surviving appellant no.1. Noticing this, PW-1, who was ploughing his field at a short distance, raised an alarm and ran towards the spot. By the time he could reach, the fatal blows had been inflicted and the accused had escaped. The presence of PW-1 at the spot does not appear doubtful and is rather proved by the circumstance that the investigating officer, during the course of investigation, at the time of spot inspection, noticed that the field had been ploughed. Thus, by keeping in mind that the medical evidence has accepted the possibility of the injuries sustained by the deceased as a consequence of spade blows and had also accepted the possibility of death to have occurred at or about the time put by the eye witness account, in our view, it has been proved beyond reasonable doubt that the deceased died due to infliction of spade blows by the surviving appellant no.1 (Jangaliya). At this stage, we may notice that there is no suggestion to the prosecution witnesses that the deceased had other enemies who could have been a cause of his murder. There is also no suggestion to the prosecution witnesses that PW-1 himself was interested in finishing off the deceased for some reason. Thus, for all the reasons mentioned above, we do not find a good ground to disbelieve the ocular account rendered by PW-1. The testimony of PW-1 is clear and is consistent throughout in respect of the time, place and the manner in which the incident occurred, which is corroborated by medical evidence as well as the material collected during investigation.

21. In so far as the PW-2 is concerned, he claims to have been there as he had the field of Aziz on "Batayee' from where he arrived at the spot with Gagan. Gagan has not been examined as prosecution witness and from the statement of PW-2 it appears that he arrived at the spot when the accused had already escaped and were away from the spot by quite a distance (100 paces). Most importantly, even though the written

report is stated to have been scribed by PW-2 but his presence as a witness of the incident is not shown in the first information report. In these circumstances, it appears to us that PW-2 may have arrived at the spot on hearing alarms raised by PW-1 and, therefore, it would not be appropriate for us to rely on his statement as an eye witness of the incident. Nevertheless, the statement of PW-2 serves as a corroborative material to prove that PW-1 had promptly taken his help to scribe the written report to lodge the first information report in respect of the incident. Thus, the testimony of PW-2 supports the prosecution case to prove that the incident occurred on or about 5 pm and that the report was promptly lodged.

22. As we have found the testimony of PW-1 wholly reliable and corroborated by surrounding circumstances including the material collected during the course of investigation, we affirm the findings returned by the trial court that the deceased died due to infliction of spade blows by the surviving appellant no.1 (Jangaliya).

23. Now, the question that arises for our consideration is whether the accused appellant no.1 Jangaliya is liable to be convicted for the offence punishable under Section 302 IPC or under Section 304 Part I or Section 304 Part II of the Indian Penal Code. The other question that arises for our consideration is that if we find the appellant not liable to be convicted under Section 302 IPC but under Section 304 Part I or Section 304 Part II, then what would be the appropriate sentence.

24. To appropriately address the above issue, we have to first examine as to when culpable homicide would amount to a murder. Before that we have to examine as to when a person commits the offence of culpable homicide. In that regard, Section 299 IPC provides as follows:-

"Culpable homicide.--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

25. In the instant case, there are four external injuries found on the body of the deceased. Injuries no.2 and 3 though are on vital part but there appears no underlying fracture to those injuries. Injury no.2 is bone deep and injury no.3 is scalp deep. Injury no.4 is on non vital part, namely, index finger and is muscle deep. The fatal injury is injury no.1. Injury no.1 is skull cavity deep extending from left parietal region to left lateral neck around left ear. Underlying the injury no.1, all soft tissues are cut through and through upto bone depth in neck. Membranes are cut, brain cut and second and fourth cervical vertebrae cut. In these circumstances, it can be said that at the time of causing that injury, the inflictor of that wound had inflicted that injury with the knowledge that he is likely by such act would cause death. Notably, there is no case of the defence that the injury no.1 was inflicted accidentally. Therefore, by all means, the appellant no.1 is liable for the offence of culpable homicide.

26. As to whether he is liable for the offence of murder, we have to examine the provisions of Section 300 IPC to find out as to when a culpable homicide is murder. Section 300 IPC, without exceptions, reads as follows:-

"300. Murder.--*Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--*

(Secondly) --If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

(Thirdly) --If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

(Fourthly) --If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

27. In the instant case, the argument of the learned counsel for the appellant is that the surviving appellant no.1 is a rustic villager. At the time of the incident, he was with his father (Shiv Lal-non surviving appellant no.2) in his own field and was with a spade, which is a common agricultural implement. Spade by its nature is not a weapon of assault but can be converted into one. Admittedly, according to the prosecution case, the deceased had set up a tube-well, water channel of which flowed through the field of the accused, as a consequence of which, the accused were annoyed and were raising objection and in the past also, there had been altercation. It is argued on behalf of the appellant that no one has a right to draw a water channel from another's field and therefore if the owner protects his interest and seeks to dismantle that water channel, his action is in furtherance of exercise of his right to property and that, by itself, is no offence. The intervention by the deceased in that exercise of right had evoked a strong reaction, leading a person to lose his self control and, therefore, if, as a result of which, blows were inflicted in that spur of the moment, it cannot be said that the blows were inflicted with an intention of causing death. Hence, it would not be a case of murder. It was argued that if it is assumed, from the nature of the injuries caused, that the injuries inflicted were such that they, in all probability, would have caused death then the case of the appellant would be covered by the exceptions to Section 300 of the IPC.

28. To appropriately test the aforesaid submissions, it would be useful to extract the exceptions to Section 300 IPC. These are extracted below:-

*"Exception 1.--**When culpable homicide is not murder.**--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:

First.- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.- That the provocation is not given by anything done in obedience to the law, or by a public servant in the

lawful exercise of the powers of such public servant.

Thirdly.- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

29. The learned counsel for the appellant submits that the case of the appellant would fall in any one or more of the following Exceptions, namely, Exception-1, Exception-2 and Exception-4.

30. **Per contra**, learned AGA submits that the case of the appellant would not fall in any of the exceptions and it would be covered by clauses secondly and thirdly of Section 300 therefore, the appellant is liable to be punished for murder.

31. Before proceeding further, we may notice that this is a case where there are multiple blows on the head of the deceased. There are three incised wounds found on the head region. No doubt, injuries no.2 and 3 were not fatal but what is important is that the accused was targeting a vital part, perhaps most vital part of the body. Therefore, it can be said with certainty that the accused had the intention of causing such bodily injury which he knew that it is likely to cause death of the person to whom the harm is caused, particularly, when we see it in the context of injury no.1 which reflects that the underlying tissues, vertebrae etc were all cut through and through. It is also important to notice here that the deceased had died on the spot. In these circumstances, in our considered view, appellant's act traveled from the genus of culpable homicide to the species of murder. Therefore, we would now have to ascertain whether the case of the appellant fell in any of the exceptions to Section 300 IPC.

32. At the outset, we may observe that Exceptions 3 and 5 to Section 300 IPC do

not apply to the facts of the case at all, therefore, we do not propose to discuss the same. Thus, we shall discuss the applicability of Exception 1, Exception 2 and Exception 4.

33. Before examining the applicability of Exceptions 1 and 4, we deem it appropriate to address the applicability of Exception 2. Exception 2 applies to a case where the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Here there is nothing to indicate that the deceased was armed and was doing some damage to the property of the accused. It is not shown that the deceased inflicted any blows to the accused. It has also not come in the prosecution evidence that the water channel was being installed on the day of occurrence and to protect the property, the appellant exceeded his right of self defence. Rather, the tube well was there since last few months. In these circumstances, if the deceased intervened and raised objection to dismantling of an existing water channel, it did not trigger exercise of right of private defence of either property or person. Hence, in our view, we rule out the applicability of Exception 2 to Section 300 IPC.

34. In the instant case, according to the prosecution case, the accused were dismantling the water channel of the deceased. The deceased intervened. On his intervention, non surviving appellant no.2 (Shiv Lal), elder brother of the deceased, exhorted his son (surviving appellant) to beat the deceased by uttering ***"Maar Saale Ko".*** It is argued by learned counsel for the appellant that in a recent decision in the case of ***Litta Singh Vs. State of Rajasthan: (2015) 15 SCC 327*** the Apex Court interpreted the utterances "***Maar Saale Ko***" as not ***"Maar Do***", that is, it may not mean that exhortation was with an intention that the person exhorted should kill. It is submitted that this would indicate that there was no intention to kill. In our view, this may be a mitigating circumstance qua the non surviving appellant no.2 (Shiv Lal) but would not serve as a mitigating circumstance qua the surviving appellant no.1 (Jangaliya) who inflicted three blows on the head including a fatal blow vide injury no.1 which not only cut underlying tissues through and through but also cut underlying skull, brain and vertebrae, resulting in instantaneous death. .

35. Now, we shall examine the applicability of Exception 4. The ingredients for applicability of Exception 4 are: (i) there must be a sudden fight; (ii) there was no pre-meditation; (iii) the act was committed in heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. If the said ingredients are present, the cause of quarrel would not be material as to who offered the provocation or started the fight. Although the term fight has not been defined in IPC but the consistent view is that it implies mutual assault by use of criminal force and not mere verbal duel. In ***Bhagwan Munjaji Pawade v. State of Maharashtra, (1978) 3 SCC 330*** (Para 6), it was observed that where the accused is armed and the deceased is unarmed, Exception 2 can have no application and Exception 4 to Section 300 would not apply if there is sudden quarrel but no sudden fight between the deceased and the

accused. It was held that "Fight' postulates a bilateral transaction in which blows are exchanged.

36. In the instant case, there is no disclosure about the sudden quarrel or altercation or exchange of blows. There is nothing to indicate that the deceased had any weapon such as lathi or agricultural implement in his hand which he may have raised to be used, or have used, at the time when he was assaulted by the surviving appellant no.1. In fact, the explanation of the appellant under Section 313 CrPC denies occurrence of any altercation or fight on the date of the incident. In such circumstances, in our considered view, Exception 4 to Section 300 IPC would not apply.

37. At this stage, we may notice two decisions, which were cited by the learned counsel for the appellant to bring out appellant's case within Exception 4 to Section 300 IPC. The first case cited by the learned counsel for the ***appellant is a decision in the case of*** Surain Singh Vs. State of Punjab: (2017) 5 SCC 796. The other decision cited was of Litta Singh (Supra).

38. In **Surain Singh's case (Supra**) the Apex Court reiterated the law as to when Exception 4 to Section 300 IPC would apply by observing as follows:

"The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the fight occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case."

39. In **Surain Singh's case (supra)** the facts, which have been noticed in the judgment of the Supreme Court, are as follows:-

"At about 11:00 a.m., both the sides started quarrelling and had a heated exchange of words as Surain Singh (the appellant-accused) objected to the presence of Bhajan Singh, who was relative of Amrik Singh and not a party to the proceedings. Surain Singh-the appellant-accused, took out his Kirpan and gave a blow to Bhajan Singh. When the complainant party tried to stop the appellant-accused, he gave a Kirpan blow to Mander Singh. He also assaulted Harbans Singh (since deceased) with Kirpan. Darshan Singh also took out his Kirpan and started giving blows to Santa Singh (since deceased). The injured were taken to Guru Gobind Singh Medical Hospital Faridkot, where Santa Singh and Harbans Singh succumbed to their injuries."

40. On the above set of facts, the Apex Court found Exception 4 to Section 300 IPC applicable and convicted the accused

under Section 304 Part 2 IPC instead of Section 302 IPC by observing as under:-

"The scuffle took place in the heat of passion and all the requirements under Section 300 Exception 4 of the IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300 IPC is attracted to the fact situations and the appellant-accused is entitled to this benefit.'

41. In the instant case, there is no evidence or even an explanation by way of statement under section 313 CrPC that there was a scuffle between the deceased and the surviving appellant no.1. There is virtually nothing to show that there was a fight between the two. Hence, in our considered view, the benefit of Exception 4 to Section 300 IPC would not be available to the appellant in light of the law noticed above.

42. In **Litta Singh's case (supra)**, the other decision which has been relied upon by the learned counsel for the appellant, the Supreme Court by considering the nature of the injuries and the weapons used to cause those injuries, namely, lathi, in paragraph 23, observed as follows:-

"17. Considering the nature of the injury caused to the deceased and the weapons i.e. lathi and gandasi (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused persons pre-planned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him."

43. In the instant case, there are three injuries caused by one person and all the three injuries were on the head. Those injuries are stated have been inflicted with a "Fawra' and injury no.1 is not only fatal but has been inflicted with great amount of force so much so that not only muscles were cut through and through but membranes, skull and the vertebrae were also cut as a consequence of which the deceased died on the spot. Thus, even if it is assumed that there is no premeditated intention to kill the deceased but the injury was caused with intention of causing such bodily injury as the offender knew to be likely to cause death of the person to whom the harm was caused and, in any case, that injury was sufficient, in ordinary course, to cause death and therefore, in our view, the benefit of the decision of Litta Singh's case (supra) would not be available to the surviving appellant no.1 (Jangaliya).

44. Although, the learned counsel for the appellant had not specifically argued that the case of the appellant would fall within the ambit of Exception 1 to Section 300 IPC but to explore whether the case would come under Exception 1, we proceed to examine the matter in that context.

45. To seek the benefit of Exception 1 to Section 300 IPC, following conditions are to be satisfied:- (1) there must be provocation to the accused; (2) the provocation must be grave; (3) the provocation must also be sudden; (4) the provocation must have deprived the accused of his power of self-control; (5) the offence must have been committed during loss of self-control; and (6) the person killed must have been the person giving provocation, or any other person by mistake or accident.

46. In ***K.M. Nanavati Vs. State of Maharashtra: AIR 1962 SC 605,*** it was held:-

"The test of "grave and sudden" provocation under the Exception must be whether a reasonable person belonging to the same class of society as the accused, placed in a similar situation, would be so provoked as to lose his self control."

47. In the instant case, if we go through the facts as laid out in the prosecution evidence it would appear that the water channel regarding which there appeared a dispute was there for quite sometime. The tube-well was installed 3-4 months before the incident. The prosecution evidence is that the water channel was being dismantled by the accused when the deceased intervened. The prosecution evidence is silent with regard to the nature of the intervention; with regard to an altercation having taken place consequent to the intervention; and with regard to exchange of blows between the accused and the deceased. The prosecution evidence is to the effect that when the deceased noticed the accused dismantling the water channel, he went to the spot. There, non surviving appellant no.2 exhorted his son (the surviving appellant no.1) to assault the deceased. On that exhortation, the surviving appellant no.1 inflicted blows with the help of his *"Fawra'* (spade). The determining factor for applicability of Exception 1 in this scenario would be whether the intervention of the deceased caused grave and sudden provocation to the offender that made him lose power of self control to inflict those kind of injuries while he had no control over his emotions. For applicability of Exception 1 the provocation should not be sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. In the instant case, the deceased intervened only when the water channel was being dismantled. If the water channel had been in existence from before and there had been a flow of water through that water channel from before and the suit for partition had been dismissed, as would be clear from paragraph 7 of the judgment of the trial court in respect of which no arguments have been raised in this appeal, there was no occasion, in our view, for the accused to be so provoked as to lose his power of self control and inflict three injuries on the head including one with so much force that it cut the skull, damaged the brain and the vertebrae including the muscle sheets as has been noticed by the autopsy surgeon. Therefore, in our view, the surviving appellant no.1 is not entitled to the benefit of Exception 1.

48. Having discussed the arguments advanced by the learned counsel for the appellant and having noticed the nature of the injuries caused and that the prosecution has been able to successfully prove that those injuries were caused by the accused appellant, keeping in mind that those injuries were such that would fall in clause "Secondly' and "Thirdly' of Section 300 IPC, we are of the considered view that the appellant would be liable to be convicted for an offence of murder, as has been held by the trial court. We, therefore, affirm the judgment and order of the trial court. The appeal is, accordingly, **dismissed.** The surviving appellant no.1 (Jangaliya) is reported to be on bail. His bail bonds are cancelled. He shall be taken into custody forthwith to serve out the sentence awarded by the trial court.

49. Let a copy of this order be certified to the court below along with the record for information and compliance.

(2022)06ILR A515
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 1407 of 2007
with
Criminal Appeal No. 1069 of 2007
with
Criminal Appeal No. 1223 of 2007

Sanjay Singh @ Bhooray
...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Smt. Shubhra Singh, Sri Abhay Raj Singh, Sri Ashutosh Tewari, Sri Atul Kumar Shahi, Sri Jitendra Pal Singh, Sri Manoj Kumar Singh, Sri Pradeep Kumar Singh, Sri S.K. Singh, Sri S.N.Pandey, Sri S.W. Ali,Sadhna Upadhayay, Sri Vinay Kumar Tripathi

Counsel for the Respondent:
G.A.

(A) Criminal Law - appeal against conviction - No direct evidence of crime - Circumstantial evidence - Indian Penal Code, 1860 - Sections 364, 302 / 34, 201 and 420 - The Code of criminal procedure, 1973 - Section 313,161,437-A - 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. (Para -26,)

Deceased was son of informant (PW-4) - deceased and accused were friends - were on visiting terms with each other - appellant had a widow cousin - deceased resided with his father and other family members in village - falls in territorial jurisdiction - deceased left his home on 03.04.2003 - went missing thereafter - FIR lodged by PW-4(father of deceased) - allegations - deceased has been abducted and secreted by accused - FIR suggests twin motive for crime (a) ransom (b) annoyance on account of relationship of deceased with cousin of appellant - no independent witness of recovery examined by prosecution - body recovered not photographed - extremely doubtful - recovery discarded by court. **(Para - 28,36)**

(B) Criminal Law- case based on direct ocular account of the crime - existence of motive is not of much importance - case based on circumstantial evidence - motive assumes importance - at times serves as a vital link to the chain of circumstances because, absence of a motive may serve as a catalyst to strengthen the alternative hypothesis - if there is a room for any, consistent with the innocence of the accused. (Para - 30)

(C) Criminal Law - matters relating to kidnapping or abduction for ransom - victim party awaits return of the kidnapee or abductee for fear or danger to his or her life therefore, in such matters, mere delay in setting the law into motion may not prove fatal to the prosecution story - where hope of return of the abductee disappears, delay in lodging the report would, in absence of plausible explanation, raise suspicion as regards the credibility of the prosecution story - held - inordinate delay in lodging the FIR shrouds the prosecution story with suspicion as regards demand and payment of ransom.**(Para - 32)**

(D) Criminal Law - prosecution story developed on strong suspicion and guess-work - howsoever strong suspicion might be it cannot take the place of proof - when

a reasonable doubt arises with regard to the prosecution story /the prosecution evidence, the benefit doubt would have to be extended to the accused.(Para -36)

HELD:-The prosecution story and the prosecution evidence do not inspire confidence of court . No option but to extend the benefit of doubt to the appellant (Sanjay Singh @ Bhooray). As regards other appellants, there is no worthwhile evidence against them. The evidence of the deceased being last seen with the accused appellants on a Tonga by PW-5 discarded. All the appellants are entitled to be acquitted. **(Para - 36,37)**

Criminal Appeals allowed. (E-7**)**

List of Cases cited:-

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

2. Shatrughna Baban Meshram Vs St. of Mah., (2021) 1 SCC 596

3. Mukesh & anr. Vs St. (NCT of Delhi), (2017) 6 SCC 1

(Delivered by Hon'ble Manoj Misra, J.)

1. These three appeals are against a common judgment and order dated 23.01.2007 passed by the Additional Sessions Judge, Court No.3, Pilibhit in S.T. No.797 of 2003 connected with S.T. No.212 of 2004, arising out of Case Crime No.320 of 2003, P.S. Bilsanda, District Pilibhit, whereby, the appellants Sanjay Singh @ Bhooray (appellant in Criminal appeal No.1407 of 2007), Vipin Singh (appellant in Criminal appeal No.1069 of 2007), Sompal Singh (whose Criminal appeal no.1063 of 2007 was abated by order dated 19.01.2022) and Bare (appellant in Criminal Appeal No.1223 of 2007) were convicted under Sections 364, 302 / 34, 201 and 420 IPC and were sentenced to imprisonment for life and fine of Rs.2500/- coupled with default sentence of additional six months each under Section 364 IPC and Section 302/34 IPC; three years R.I. and fine of Rs.2,500/- coupled with a default sentence of additional six months under section 201 IPC; and three years R.I. and fine of Rs.2500/- under Section 420 IPC coupled with a default sentence of additional six months. All sentences to run concurrently. It be clarified that in S.T. No.797 of 2003, three accused, namely, Sanjay Singh @ Bhooray (appellant in Criminal Appeal No.1407 of 2007); Vipin Singh (appellant in Criminal Appeal No.1069 of 2007); and Sompal Singh (appellant in Criminal Appeal No.1063 of 2007), were tried; whereas, in S.T. No.212 of 2004, Bare (appellant in Criminal Appeal No.1063 of 2007) was tried. Criminal Appeal No.1063 of 2007 separately filed by Sompal Singh was abated vide order dated 19.01.2022 consequent to his death.

INTRODUCTORY FACTS

2. The prosecution story elicited from the written report (Ex. Ka-1) is that on 01.04.2003 Sanjay Singh @ Bhooray, a resident of Village Majhgawa, P.S Bilsanda, District Pilibhit, came to informant's (PW-4's) house at village Jamuniya Jagatpur, P.S. Pooranpur, District Pilibhit and invited informant's son Parminder (the deceased) to Majhgawa. In response to that invite, on 03.04.2003 the deceased went on a cycle to Pooranpur, parked his cycle at the shop of Arvind (PW-1) and told PW-1 that he is going to the house of Bhooray at Majhgawa and would return by evening. But the deceased did not return. On 05.04.2003, at about 1.30 pm, PW-4 (the informant) received a call demanding Rs.2,00,000/- for release of his son. The voice on the phone appeared to

be of Bhooray. After receiving the call, on 05.04.2003 itself, PW-4 with Kashmir Singh (not examined), Sukhvinder Singh (PW-3), Sukhveer Singh (not examined) and Ravi Azad (PW-2) went to Bhooray's house at Majhgawa. There, Bhooray and other villagers admitted that Parminder Singh (the deceased) had come to Majhgawa and on 04.04.2003 he had lunch with Sanjay, Bare, Vipin and Som Pal at Som Pal's house at Rautapur. But Bhooray did not disclose as to where PW-4's son go after having lunch. As a result, information was given to the police of P.S. Bilsanda regarding abduction of informant's son. Upon this information, the police of P.S. Bilsanda neither registered a report nor arrested Bhooray but enquired from Sanjay @ Bhooray. Thereafter, on 16.04.2003, and two days thereafter, Bhooray called (phoned) the informant to bring Rs.50,000/- at Madnapur Chauraha, Jalalabad, at 2 pm, to secure release of his son. On this call, PW-4 and PW-3 along with Kashmir Singh (not examined) and Harjinder Singh (not examined) took the money to the specified place and gave it to Sanjay @ Bhooray. There, with Sanjay there was an unknown person. After receiving the money and extending the promise that informant's son would be released in 20 minutes, Bhooray went away with the money. Informant waited there till evening, but his son was not released. By making these allegations and by adding that Sanjay Singh's cousin Manju Singh (a widow) had close relations with informant's son (the deceased), which was not palatable to Sanjay Singh @ Bhooray and his family members, the written report was got lodged by expressing suspicion that Sanjay Singh @ Bhooray with the help of his associates has abducted informant's son with a view to kill him and in that process, they cheated the informant of Rs.50,000/-. The written report (Ex. Ka-1) was submitted to the Superintendent of Police, Pilibhit, which, on his direction, was registered as an FIR at P.S. Bilsanda, District Pilibhit on 04.05.2003 at 7.30 hours (i.e. Case Crime No.320 of 2003, under Section 364 IPC).

3. After registration of the FIR, on 06.05.2003, at about 12.05 hours, according to the prosecution, Sanjay Singh @ Bhooray was arrested of which entry was made in the G.D., vide Report No.25 at 12.35 hours. Thereafter, a disclosure statement of Sanjay @ Bhooray was allegedly recorded of which there is a G.D. entry, vide Report No.27 at 12.50 hours, at P.S. Bilsanda (Ex. Ka-12). On the basis of this disclosure, the police team accompanying Sanjay Singh @ Bhooray went to the spot and at about 3 pm, on 06.05.2003 itself, recovered the body of the deceased from the bottom of a canal (Nahar) and prepared a composite recovery as well as confession memo (Ex. Ka-13) including a site plan (Ex. Ka-14). The recovery/confession memo (Ex. Ka-13) was witnessed by Sukhdev Singh (not examined) and Arvind Singh (not examined) and thumb marked by Sanjay Singh @ Bhoorey. The fard/ memo of recovery (Ex. Ka-13) reflects that at the time of the recovery, the informant had arrived at the spot and had identified the body. At the time of the recovery, the body was in a decomposed state and except an underwear there were no clothes on it.

4. Inquest was conducted at the spot of recovery and was completed by 19.00 hours on 06.05.2003. Inquest report (Ex. Ka-2) was prepared by Sub Inspector Virendra Kumar (PW-8), which was witnessed by Sukhdev Singh (not examined), the informant (PW-4), Arvind Singh (not examined), Pradhan Singh (not

examined), Manoj Kumar (not examined) and Sarvender Singh (not examined). Inquest report while describing the body recites that right arm below elbow is missing.

5. Autopsy was conducted on 07.05.2003, at about 2 pm, by Dr. Bhagwan Das (PW-6), who prepared the autopsy report (Ex. Ka-3) on 07.05.2003. The autopsy report in respect of the external examination of the body recites:-

"A male body of average built and muscularity. Rigor mortis absent. Severe foul smell coming from body. Skin detached at places. Soft tissue as a whole absent on upper part of skull. Bone of skull exposed and seen. Sutures are loose. Soft tissue absent on right lower limb leg and both bone exposed. Same thing is on left side lower limb. Ligament and joints are loose. Soft tissue on left whole upper limb are absent and bones seen. Joints are loose. Soft tissue absent on left shoulder and scapular region. Both side only orbital fossa seen. Soft tissue present only. Orbital bones are seen. Fossa part of nose absent. Both jaws opened widely and teeth are seen. Two teeth right incision missing others are loose in socket. Tongue is putrefied and present in black mass. No skin present on face. Soft tissues are also absent on face. Skin over neck is peeling off. Right hand missing. Abdomen distended and skin peeled off at places. Ante mortem injury not detectable due to decomposition of body. Scrotum shrunken and penis in decomposed state.

Internal examination:- Scalp. No fracture noticed. Membranes - putrified and adherent to inner part of skull bones. Brain- highly liquefied. Pleura- adherent to chest cavity and decomposed state. Larynx- softened congested, hyoid bone intact. Lungs- both lungs shrunken and putrified congested; (sic) blood stained fluid present in both lungs. Pericardium- adherent to heart. Heart- shrunken, softened. Both chamber empty. Buccal cavity- 14 x 16 loose. Oesophagus- putrified. Stomach- bursted due to decomposition and empty. Small intestine- shrunken contains fluid and gasses. Large intestine- shrunken softened and contains faeces. Liver- softened shrunken congested weight about 600 gm. Gallbladder- half full adherent to liver. Pancreas. Putrified. Spleen- Softened shrunken congested weight 160 gm. Urinary bladder- decomposed state.

Cause of death due to asphyxia."

6. After completing the investigation, two separate charge-sheets were submitted. One charge sheet (Ex. Ka-15) was submitted against Sanjay Singh @ Bhooray, Vipin Singh and Sompal Singh and other charge sheet (Ex. Ka-16) was submitted against Bare. After taking cognizance on the two charge sheets, the case was committed to the court of session. In S.T. No.797 of 2003, Sanjay Singh @ Bhooray, Vipin Singh and Sompal Singh were charged for offences punishable under Sections 364, 302 read with Section 34, 201 and 420 IPC, whereas, in S.T. No.212 of 2004, the appellant Bare was separately charged for the same offences. As both sessions trial arose from Case Crime No.320 of 2003, they were connected with each other and on denial of charge framed against the accused, the trial commenced.

PROSECUTION EVIDENCE

7. The prosecution examined as many as nine witnesses. Their testimony, shorn of unnecessary details, is as follows:-

8. **PW-1 (Arvind Kumar)**. He is the cycle shop owner at Pooranpur where the deceased had parked his cycle. According to this witness, Sanjay Singh alias Bhooray was known to him since before the incident. Sanjay Singh was a friend of Parminder Singh (the deceased). PW-1 stated that about a year and a half back *(note: statement of this witness was recorded on 25.09.2004)*, while he was at his shop at Pooranpur, the deceased came on a cycle and parked his cycle there and stated that he is going to Majhgawa village to visit Bhooray and would return by evening. After that the deceased went away and did not return back. The cycle remained parked at PW-1's shop for 3-4 days; thereafter, PW-1 took the cycle and delivered it at deceased's house.

During cross-examination, he stated that many people come and leave their cycle at his shop but he does not know their name. PW-1 stated that he is well acquainted with deceased's father; that deceased's father had not told him that the deceased is missing; that in ordinary course he would never go to return cycle of his customers; that he went to return the cycle because the deceased as well as his family members were well known to him. In respect of financial status of the deceased, PW-1 stated that the deceased had a tractor and two motorcycles and is a big farmer.

On further cross-examination, he stated that his statement about the deceased having parked his cycle at his shop was told by him for the first time in court and that he had not told the I.O. about that cycle. He denied the suggestion that he is telling lies because of his friendship with the deceased and his family. He also denied the suggestion that the deceased never parked his cycle at his shop.

9. **PW-2 (Ravi Azad)**. He is a taxi owner residing at Pooranpur, whose taxi was used by the informant (PW-4) to go to Majhgawa. PW-2 deposed that he knows Sanjay Singh @ Bhooray and the deceased Parminder Singh from before the incident. He stated that on April 3, 2003, while he was going to the bus station, on way, at Arvind's Cycle Shop, he met Arvind (PW-1), who told him that Parminder (the deceased) had come in the morning and had parked his cycle at his shop and had told him that he is going to Bhooray's house at Majhgawa and would return by the evening. He stated that on 05.04.2003, Nirmol Singh (PW-4 - deceased's father), Sukhvinder Singh (PW-3), Kashmir Singh and Sukhvir Singh had come to PW-2's house and had told him that a phone call, which appeared in the voice of Bhooray, was received; as per which, Parminder Singh (the deceased) was in Bhooray's custody and for his release, a ransom of Rs.2,00,000/- has been demanded. PW-2 stated that, after telling all that, PW-4 requested PW-2 to take them to Majhgawa on his taxi. At the request of PW-4, PW-2 took PW-4, Kashmir Singh, Sukhvinder Singh (PW-3) and Sukhvir Singh to Majhgawa. They reached there by 5 pm and went straight to the house of Bhooray, where they met Bhooray. When they asked Bhooray about Parminder, Bhooray admitted that Parminder had come and they had lunch at Rautapur at Sompal's house and, thereafter, Parminder left. When PW-4 questioned Bhooray on that that ransom call, Bhooray denied having made any such call. PW-2 stated that thereafter they made inquiries from the people at Majhgawa. They all confirmed that Parminder (the deceased) had come. Thereafter, they all went to the police station. At the police station, PW-2 stayed outside the police station.

In his cross-examination, at the instance of Sompal Singh, PW-2 denied the suggestion that he was making a false statement with regard to having received information that the deceased had lunch at Sompal's house.

In his cross-examination, at the instance of Sanjay Singh @ Bhooray, he stated that he knew the deceased since last 10-12 years. Earlier, PW-2 had a fertiliser shop where the deceased used to come. PW-2 stated that his friendship is with the elder brother of the deceased and that he is in visiting terms with him. PW-2 stated that the deceased's elder brother with whom he has friendship has come with him to the court today and had earlier also come with him to the court. PW-2 stated that he has not known Sanjay personally but he knows him through Parminder (the deceased) otherwise, he has no relationship with Sanjay Singh. He also stated that on few occasions when he visited the house of Parminder (the deceased), he saw Bhooray @ Sanjay Singh there. He, however, could not tell the date, month or the year when he last visited the house of the deceased. However, he stated that in the marriage of Gurmeet he had seen Sanjay Singh @ Bhooray. He added that apart from that marriage, he had seen them together in the house of the deceased.

On further cross-examination, he stated that he purchased Marshal vehicle about two years before and prior to owning that vehicle, he had a fertiliser shop and before that he had an expeller and was also employed as a private bus stand manager. He admitted that the I.O. had enquired from him but he could not remember the date when he was interrogated by the I.O.

On further cross-examination, he stated that the information about the deceased having gone missing came to him for the first time on 05.04.2003 from the father of the deceased who had told him that a demand call of Rs.2,00,000/- has been received by him (PW-4) for release of Parminder and on his (PW-4's) request, PW-2 had gone to Majhgawa. He further stated that when they reached Sanjay's house and inquired about the deceased, Sanjay Singh stated that the deceased had come a day before.

On further cross-examination, PW-2 stated that PW-4 has about 22 acres of agricultural holding and has a tractor trolley as well as motorcycle, though he does not have a jeep. PW-2 stated that the distance between Jamuniya and Ghunghuchihai is about 3 km. Between Ghunghuchihai and Pooranpur, private buses ply regularly. The distance between Ghunghuchihai and Pooranpur is about 12 km and the distance between Pooranpur and Majhgawa is 53-54 km. He stated that if one has to go from Jamuniya Jagatpur to Majhgawa, Pooranpur does not fall in the route. In respect of his presence at the cycle shop of Arvind, PW-2 stated that he went on foot to the cycle shop as he used to go and sit there sometimes and whenever he used to go there, Arvind (PW-1) used to tell him who had visited his cycle shop. PW-2 stated that PW-1 often used to talk about Parminder Singh (the deceased) and his family members. PW-2 stated that earlier also, Arvind had informed him about Parminder (the deceased) coming to his shop. In respect of his return to Pooranpur after visiting Majhgawa, PW-2 stated that he returned back between 8 and 8-30 pm. PW-2 admitted that he had not taken rent for his taxi from the victim's family as they were known to him. PW-2 stated that after visiting Bhooray's house, they went to P.S. Bilsanda but he could not remember

whether they had gone to any other place before visiting the said police station.

On being questioned as to what Sanjay Singh @ Bhooray stated when he was questioned by PW-4 in respect of ransom call made by Sanjay Singh, PW-2 stated that Sanjay Singh stated that he had not made any such ransom call. PW-2 added that at Majhgawa village, he did not know anybody else. PW-2 stated that he had not given any advise to lodge a missing report in respect of Parminder having gone missing. He stated that he had reached Bilsanda Police Station by about 6 pm. They stayed there for 15-20 minutes. PW-2 stayed outside the police station and he does not know whether any written report was given or not. PW-2 stated that after visiting the police, they did not go to Majhgawa again from the police station but he does not know whether the police had gone there or not. He denied the suggestions that he is telling lies; that the deceased had not parked his cycle at Arvind shop; Arvind had not informed him about the deceased parking his cycle there; and that he is telling lies because of his family terms with deceased's family.

10. **PW-3 (Sukhvinder Singh**). He stated that he is a neighbour of PW-4 and is on visiting terms with PW-4 and that he knew Sanjay Singh @ Bhooray since before the incident. He stated that Sanjay Singh had been on visiting terms with PW-4. PW-3 stated that about quarter to two years before, the deceased had left by saying that he is going to Bhooray's house. On 05 April, 2003 PW-4 told him that Bhooray had made a call demanding Rs.2,00,000/- for release of Parminder. On this information, PW-3, PW-4, Kashmir Singh and Sukhveer Singh took PW-2's taxi to go to Majhgawa. When they met Bhooray there, Bhooray's family members were also there. Bhooray told them that day before yesterday, Parminder (the deceased) had come; yesterday, they had lunch at Rautapur with Bare and Sompal. Bhooray had also told them that the deceased was with them till lunch and, thereafter, where he went, he does not know. After getting this information, PW-4 along with PW-3 and others went to P.S. Bilsanda, where PW-4 informed the Station Officer about his son having gone missing. There, the Station Officer took a note on a plain paper but did not record the information. Station Officer, thereafter, called Bhooray at the police station and assured the complainant party that he would enquire from Bhooray and they may go. Thereafter, the complainant party left the police station. PW-3 stated that PW-4 had informed him regarding receipt of a fresh call on 16.04.2003 from Bhooray for making arrangements of the ransom amount to secure release of his son and, thereafter, again, ransom call was received on 18.04.2003, reducing the ransom amount from Rs.2,00,000/- to Rs.50,000/-. PW-3 stated that upon getting this information from PW-4, after taking Rs.50,000/-, PW-3 and PW-4 along with Kashmir Singh and Harjinder Singh went to Madna Chauraha *(the place where the cash was to be delivered as per the phone call)* and reached there between 4-5 pm; where they met Bhooray and one unknown person, who, according to Bhooray, was Bhooray's maternal uncle. PW-3 stated that Bhooray was delivered Rs.50,000/-, after which, Bhooray requested them to wait for 20 minutes to enable him to come with Parminder but, thereafter, Bhooray did not return even though they waited for two hours; and few days later, Parminder's body was recovered, which he saw.

During cross-examination, PW-3 stated that PW-4 i.e. deceased's father is

his real elder brother and that PW-3's house is near PW-4's house. In respect of the time when they left for Majhgawa, PW-3 stated that they left for Majhgawa between 1-1.30 pm and they reached Majhgawa by about 5 pm. Before reaching Jamuniya, they visited Pooranpur. At Pooranpur, they took the vehicle of PW-2 to go to Majhgawa. He denied the suggestion that he has a Maruti car. PW-3 stated that PW-4's elder son did not own a four wheeler at the time of the incident. PW-3 also stated that he left Pooranpur by about 2 pm. On further cross-examination, PW-3 stated that he learnt about Parminder Singh having gone missing for the first time on 05.04.2003 when PW-4 had told him that they had to go to Majhgawa as Parminder was in the custody of Bhooray. He stated that the I.O. had interrogated him about 4-6 days after Parminder had left. Immediately thereafter, he clarified by stating that he is not sure whether his statement was taken after 2 days, or 4 days, or 6 days, but was taken for sure within 10 days. Whereafter, he did not meet the I.O.

In respect of Bhooray, PW-3 stated that Bhooray used to visit Parminder very often and therefore, he knows Bhooray. PW-3 also stated that he knows Bare and Sompal.

In respect of his visit to the house of Bhooray at Majhgawa, PW-3 stated that on their visit there, they enquired from Sanjay for about 20-25 minutes; Bhooray @ Sanjay had told them that till a day before, Parminder was with Bhooray and had had his meal with him. Bhooray, however, claimed that he has no knowledge of Parminder's current whereabouts. PW-3 stated that after visiting Sanjay's house at Majhgawa, they all went straight to the police station at Bilsanda and arrived there by about 5.30 pm. Except Ravi (PW-2), all had entered the police station and they orally informed the Station House Officer there. Within next 20 minutes, the Station House Officer had called Sanjay at the police station and till arrival of Sanjay at the police station, they were there.

In respect of the incident of 18.04.2003, PW-3 stated that he, Kashmir Singh, Nirmol Singh (PW-4) and Harjinder Singh went to Madnapur on 18.04.2003 in Maruti van of Harjinder Singh. He added that they went to Madnapur via Shahjahanpur; that before going to Madnapur, they had not informed the police; that when they reached there, they asked Bhooray about Parminder; Bhooray told that if the money is delivered, he would ensure the release of Parminder within 20 minutes. PW-3 stated that neither he nor his men insisted for release of Parminder before taking the money. On being questioned as to why they did not capture Bhooray and his companion at that time, PW-3 stated that they had no idea that Bhooray would violate the promise as they believed in Bhooray. PW-3 stated that after delivery of money, they all returned straight from Madnapur to their house and they did not consider it necessary to inform the police. PW-3 also stated that he does not know whether PW-4 had gone in search of Parminder after visiting Madnapur. PW-3 stated that he does not remember whether any information was given on a plain paper about Bhooray at police station Bilsanda, though he remembers that the S.O. had called Bhooray to the police station and had told them that he would inquire from Bhooray.

In respect of Nirmol Singh (PW-4), PW-3 stated that Nirmol Singh had worked in films. PW-3 stated that Sukhvir

Singh and Bunty are sons of Nirmol Singh (PW-4). He stated that he does not know whether those sons of PW-4 are involved in extremist activity. He denied the suggestions that Sukhvir and Bunty were detained under TADA; that he is telling lies because of his relationship with Nirmol Singh (PW-4); that he did not go to Madnapur and Majhgawa; that no money was paid at Madnapur; that no demand for money was made; and that he and Nirmol Singh have a four wheeler.

PW-3 was also cross-examined on behalf of Bare and Sompal. In his cross examination on their behalf, he stated that the distance between Majhgawa and Bilsanda is of 10 minutes. The I.O. had come to his house to investigate. His statement was recorded at his house by the I.O. He had received knowledge that the body had been hidden in the canal. He denied the suggestion that he is telling lies.

11. **PW-4 (Nirmol Singh).** PW-4 is the father of the deceased. He stated that on 01.04.2003 Sanjay Singh @ Bhooray came to his house and invited Parminder Singh (the deceased) to Majhgawa. On 03.04.2003, the deceased went to Pooranpur on a cycle. He parked his cycle at Arvind Cycle Shop and told Arvind that he is going to Majhgawa to the house of Sanjay Singh @ Bhooray and would return by evening. Parminder Singh, thereafter, did not return. On 05.04.2003, he received a ransom call demanding Rs.2,00,000/- for release of Parminder Singh. The ransom call was in the voice of Sanjay Singh @ Bhooray. Thereafter, PW-4, Sukhvinder, Kashmir Singh and Sukhvir Singh along with Ravi went to Bhooray's house. There, they met Bhooray and his family. On inquiry about Parminder (the deceased), Bhooray and his family admitted that Parminder had come and on 04.04.2003 Parminder had lunch with Sompal, Bare, Vipin and Sanjay but they did not disclose his current whereabouts. PW-4 stated that since no useful information was given by Bhooray regarding the whereabouts of Parminder, PW-4 went to P.S. Bilsanda and informed the Station Officer regarding his son having gone missing. But his report was not written. However, the S.O. called Bhooray to inquire from him. Thereafter, on 16.04.2003, he received a call to arrange for Rs.2,00,000/- for release of Parminder. On 18.04.2003, another phone call came to bring Rs.50,000/- for release of Parminder. On this call, PW-4, Sukhvinder Singh, Kashmir Singh and Harjinder Singh went to Madnapur Chauraha with Rs.50,000/-. There they found Sanjay Singh @ Bhooray with his maternal uncle Vijay Kumar Singh alias Chhotey Lalla. When they were inquired about Parminder Singh, they stated that Rs.50,000/- may be given to them and within 20 minutes, they will come with Parminder. PW-4 stated that they gave the money to them and waited, but they did not return and, therefore, PW-4 and others returned back. After stating as above, PW-4 added that Sanjay Singh @ Bhooray's cousin, Manju, widow of Pramod, a resident of Pooranpur, had relations with Parminder (the deceased); Parminder used to visit her house; that Sanjay Singh and his family were not appreciative of that relationship and, therefore, it appears, Parminder was abducted and killed. PW-4 added that Parminder Singh's right arm was amputated from below the elbow joint. PW-4 alleged that after killing Parminder, the accused cheated him of Rs.50,000/-. PW-4 stated that on 02.05.2003 he gave application to the Superintendent of Police. The written report was exhibited as Ex. Ka-1. PW-4 stated that when the body of Parminder was

being dug out by Bhooray and two constables from the canal, then Bhooray had pointed out that this is the body of Parminder. He stated that he recognised the body on the basis of body structure and the amputated hand. PW-4 stated that the inquest was conducted in his presence. The inquest report (Ex. Ka-2) was exhibited. PW-4 stated that he knew all the accused from before as they used to visit his house. He also stated that about 14 months before, he received a phone call. The caller stated that he is elder brother of Sompal and that Sompal wants to meet him in jail. He stated that he went to jail to meet Sompal, where Sompal stated that if he is exonerated, he would be ready to give evidence as a witness. He also stated that Sompal had admitted his guilt.

During his cross examination at the instance of accused Sompal, PW-4 stated that he went to jail to meet Sompal after about 14 months of the recovery of his son's body. After stating that, PW-4 stated that it must be 10 months after recovery of the body. He denied the suggestion that he never visited the jail to meet Sompal there.

In his cross-examination at the instance of accused Sanjay Singh @ Bhooray, PW-4 stated that he has 22 acres of land. He has a motorcycle but no car. He stated that for going to Pooranpur one has to catch a bus from Ghunghchihai. Ghunghchihai is about 5 km from his house and from Ghunghchihai to Pooranpur it is 12 kms. He stated that if one has no personal conveyance, one can take bus, tempo, etc. There is a short cut route also via Jamuniya Sherpur to go to Pooranpur. The short cut route is 10-11 kms. He denied the suggestion that the short cut route is also 20-22 kms. He also denied the suggestion that in between Jamuniya and Pooranpur, there is jungle. PW-4 stated that when the deceased had left his house, it must have been 8 or 9 am in the morning. Deceased had left the house after telling PW-4 that he is going to Sanjay Singh @ Bhooray's house at Majhgawa. PW-4 stated that the distance between Pooranpur and Majhgawa is 53 kms and to go to Majhgawa from Pooranpur one has to go first to Ghunghchihai. There is also a straight rasta from Ghunghchihai to Majhgawa which is about 41 kms. PW-4 stated that he did not ask his son to go on a motorcycle. He stated that at that time probably the motorcycle was not there. He stated that when his son went away and did not return that night, or even next night, he did not have any anxiety as earlier also he used to visit Sanjay Singh's house and used to stay there for 3-4 days and Sanjay Singh used to visit his house and used to stay for 3-4 days. He stated that he got disturbed only after receipt of ransom call on the third day. He stated that on receipt of ransom call, he made no attempt to inform the police immediately. Rather, they took the vehicle of Azad to go to Bhooray's house where Bhooray admitted that Parminder had come and that Parminder, Bhooray, Vipin and Sompal all had lunch at Rautapur at Sompal's place.

On further cross-examination, he stated that when he had visited Bhooray's house after receipt of ransom call, he saw Bhooray and his family members. He enquired from them but not from the villagers. He also stated that he had not enquired from the family members of Sompal. He stated that he remained at Majhgawa for 15-20 minutes and while they were there, neither Bhooray nor his family members made any attempt to run away but they did not give information regarding the whereabouts of Parminder.

Therefore, he had given information on a plain paper to S.O. Bilsanda with regard to the ransom call and had also orally informed S.O., Bilsanda about that. He then reiterated that he had not given any written application. PW-4, however, clarified that the police had gone to call Bhooray and had brought him to the police station. But, in his presence, Bhooray was not inquired. Rather, S.O. told PW-4 that he will enquire. PW-4 stated that on 08.04.2003 when he visited P.S. Bilsanda again, he did not meet Bhooray there. PW-4 admitted that his visit to P.S. Bilsanda on 08.04.2003 has not been mentioned in his written report addressed to the Superintendent of Police. PW-4 denied the suggestion that this was stated for the first time in court. PW-4 stated that after 05.04.2003 they had visited Bhooray's house 2-3 times. Later, he corrected it by stating that he visited the house two times. PW-4 stated that he had requested Bhooray to search out his son. Bhooray assured that he is searching for Parminder and as soon as he is able to find him, he would give information.

During cross-examination, PW-4 stated that on 16.04.2003 he received ransom call from Bhooray, demanding Rs.2,00,000/- for release of Parminder. PW-4 stated that though this fact was not disclosed by him in his written application but he told it orally to the I.O. but if the I.O. had not noted it, he cannot tell the reason for the same. He denied the suggestion that this statement is made for the first time in court as a result of tutoring. He stated that on receipt of phone call on 16.04.2003, he filed no complaint at the police station. He added that he did not make a complaint because he wanted to have his son back alive and was worried that if he would make a complaint to the police or authorities, the abductors may kill his son. He stated that he was arranging for the money and when he had given the application, he thought that his son was alive. PW-4 added that on 18.04.2003 Bhooray called him to ask as to how much money PW-4 could arrange. When, PW-4 stated that he could arrange Rs.50,000/- only, Bhooray said that PW-4 should come with Rs.50,000/- at Madanpura Chauraha near Jalalabad. PW-4 stated that Madnapura is about 150 kms away from his house. It would take 4 to 5 hours to reach there on a bus. PW-4, thereafter, quickly corrected himself by stating that he took his own car and it took him 4-5 hours. On a question as to whether in between Shahjahanpur to Madnapur he crossed any police station, he stated that he does not remember clearly but a factory was noticed by him. He stated that the distance between Shahjahanpur and Madnapur was covered in one and a half hour and by the time they could reach there, it was 4-5 pm. PW-4 stated that at Madnapur Chauraha, he saw Sanjay Singh @ Bhooray and Vijay Kumar Singh @ Chootey Lalla standing at the Chauraha. He stated that when he gave the money, he did not insist Bhooray to show his son first, because he believed that on payment of money his son would be released therefore, he did not even request the other person accompanying Sanjay to wait there, till his son was released. PW-4 stated that he himself waited there for about two hours, but when no one returned, as it was getting dark, he returned back. Next day, he did not go to Majhgawa under the belief that Parminder may be released by about night. PW-4 added that he did not go to Majhgawa after 18.04.2003 because he had no hope of help from the Station Officer (S.O.) Bilsanda. He stated that he tried to meet the S.O. two or three times but he could not meet him. He stated that he went to the Superintendent of Police on

22.04.2003 and 28.04.2003 but he did not meet him. He stated that he did not give any written application on either of those two days. He stated that between 23.04.2003 and 28.04.2003 neither he met the commanding officer nor he gave application in his office. He also stated that he did not give any application by registered post to DIG or IG. He clarified that by stating that till 02.05.2003 he met no other officer to lodge complaint. He admitted that in his written application given on 02.05.2003 to the Superintendent of Police, he made no mention that he had visited his office twice but he could not meet him. He admitted that in his application he had not mentioned the phone number on which he received the phone call. He admitted that he disclosed the name of Bhooray's Mama in the court for the first time and that before this he never made any disclosure about Bhooray's Mama.

On further cross-examination in respect of relationship of Manju and Sanjay Singh @ Bhooray, PW-4 stated that Manju is not sister, but a cousin, of Sanjay. PW-4 denied the suggestion that Parminder Singh (the deceased) had no relations with Manju. He added that Bhooray's father Bajrangi Singh had disclosed that Parminder and Manju were in a relationship, which they did not appreciate. He added that father and brothers of Manju did not make any complaint with regard to the relationship between Manju and Parminder. PW-4 also stated that there is no animosity between Manju's father and Bhooray's father. He denied the suggestion that Bhooray's father never objected to the relationship between Manju and Parminder.

On further cross-examination, PW-4 admitted that his son Bunty and Sukhvir Singh were detained under TADA. He, however, denied the suggestion that on account of extremist activity of his sons the members of locality were against his family. He also denied the suggestion that some unknown person had killed his son.

In respect of recovery of the body of his son, PW-4 stated that his son's body was recovered on 06.05.2003 at about 3 pm from the northern corner of a canal near Bhedan Kanja. He stated that when he reached the police station, he got information that his son's body is being dug out. On receiving this information, within 25 minutes, he had reached the spot from where the body was recovered. He stated that the spot from where the body was recovered is 20-22 kms away from the police station. He stated that at that spot there were number of villagers (agriculturists) present. He stated that he was not told at the police station as to when the investigating officer had left the police station for recovery of the body. He stated that he was a witness to the inquest and at the time of inquest he had told the I.O. that his son has been killed by Bhooray with Sompal and Bare but no other accused was named at that time. He stated that writing of the papers/reports in respect of recovery of the body started at about 3 pm and continued upto 7-7.30 pm. He stated that police jeep was parked 70-80 yards away from the place from where the body was recovered. He denied the suggestion that the body was not recovered in his presence.

In respect of arrangement of Rs.50,000/- to pay as ransom, he stated that the money was borrowed by him from his maternal uncle Gurbax Singh but this fact was not disclosed earlier.

In respect of his earlier statement made on 05.04.2003 that he had received a

ransom call for Rs.2,00,000/- for release of Parminder, he stated that if this was not written in his written application then he cannot tell the reason for the same because he had disclosed it to the I.O.

He denied the suggestions that his statement is an outcome of tutoring; that he had not made any complaint at Bilsanda on 05.04.2003; that Bhooray had not disclosed to him that they had gone to have lunch at Sompal's house; that he received no call from Bhooray; that Sanjay Singh had no animosity because of Parminder's relation with Manju; that no phone call of Sanjay came to him; that Sanjay had not called Parminder to his house; that Sanjay had not received the money; that Sanjay has no hand in the murder of Parminder; that Parminder was killed for some other reason; that the body of the deceased was not recovered in his presence; that the body was not identified; and that whatever he has stated is false.

12. **PW-5 Vikram Singh**. He is a witness who allegedly saw Sompal, Bare and Sanjay Singh @ Bhooray along with one or two others on a Tonga going towards Bhedan Kanja in the evening at around 6.30 to 7 pm. This witness stated that he knows PW-4 and the deceased. He states that Parminder was killed about two and half months prior to 16.08.2003. Immediately thereafter, he corrected himself by stating that about two and a half months prior to 18.06.2003 he saw the deceased on a Tonga near Bilsanda. PW-5 stated that he and Dilbag Singh were talking to each other when he witnessed Rautapur's Sompal, Bhedan Kanja's Bare and Majhgawa's Sanjay @ Bhooray as well as Parminder along with one or two others, whom he does not know, going on a Tonga towards Bhedan Kanja. It must have been 6.30 to 7.00 pm at that time. PW-5 stated that thereafter he had not seen Parminder. He stated that Parminder's body was recovered from a canal at Bhedan Kanja. He stated that the information that he saw the deceased on a Tonga with the accused was given to Parminder's father on 18.06.2003.

In his cross-examination at the instance of Sanjay, PW-5 stated that he has come from Central Jail, Bareilly to give his statement. He admitted that he has been convicted in the murder of Dheer Singh. PW-5 stated that he has no relations with the son of Nirmol Singh (PW-4); his village is at a distance of 20 kms from the village of Nirmol Singh, which is at Jamuniya Jagatpur; he has relationship with Kashmir Singh, who is a resident of Jamuniya Jagatpur; he does not know whether Kashmir Singh is a relative of Nirmol Singh; that PW-5 used to visit Kashmir Singh's house; that he does not know any other person in that village; that he does not know where the sons of Nirmol Singh are married; that he does not know as to how many sons Nirmol Singh have; that at the time when the body was recovered, he was not present; that the day when he saw the deceased with the accused on a Tonga, he had gone to purchase his tractor's bearing; that he had gone on a cycle; that he had left his house at about 1 pm; that day he consulted the tractor mechanic and the whole process of purchasing the bearing and consulting the mechanic must have taken him 2-3 hours; that he does not know as to when body of Parminder was recovered after he went missing; that he cannot say as to how many months before, he saw the deceased with the accused; and that he does not remember the day when he saw the deceased with the accused. He, however, added that he saw 6-7 persons on

the Tonga. In respect of dress worn by Parminder, he stated that he was wearing shirt with square. He also stated that he did not ask Parminder as to where he was going. He corrected himself to state that he had wished Sompal. In respect of the date when his statement was recorded by I.O., he stated that the I.O. had questioned him a month and a half after Parminder had gone missing. He stated that he did not tell the I.O. about his meeting with Sompal. He stated that he had informed the I.O. that about two and half months before 18.06.2003, he had seen them on Tonga near Durga Talkies, Bilsanda but if that was not written by the I.O. then he cannot give the reason for that. He further stated that the name of persons whom he saw were given to the I.O. but if there is any difference in those names, he cannot give a reason for it. PW-5 stated that he had named three accused and not four but if the I.O. had written four names then he does not know the reason for that. He further stated that he is not aware of the others who were sitting on that Tonga. He admitted that the I.O. had not required him to identify the accused.

He denied the suggestion that he is telling lies because of tutoring and his relationship. He also denied the suggestion that he had not seen Parminder with three accused together on a Tonga.

In his cross-examination at the instance of Bare and Sompal, he stated that his statement was recorded by I.O. on 18.06.2003 and prior to that he gave information to the police. He admitted that in newspapers, reports were published with regard to Parminder having gone missing but as he was busy in his agricultural work, he gave no information earlier. PW-5 further stated that his father has 60 bigha land and a tractor but he does not know whether he and his father were challaned under Section 151 Cr.P.C. He denied the suggestion that he and his father were lent Rs.20,000/- by the accused Sompal. PW-5 admitted that Kashmir Singh of Jamuniya Jagatpur is his relative and that he was on visiting terms with Kashmir Singh. He also stated that Kashmir Singh is a neighbour of the informant. PW-5 stated that he does not have any relationship with either Sompal or Bare and is not acquainted to them. He denied the suggestion that he is telling lies on account of pressure from his relatives. He also denied the suggestion that he did not see the deceased with accused Sompal and Bare.

13. **PW-6 Dr. Bhagwan Das**. He is the doctor who carried out autopsy of the cadaver. He stated that on 07.05.2003 he examined the body of the deceased Parminder Singh at 2 pm, who must have been aged between 28-30 years. The body was received by him in a sealed state. He conducted the autopsy after verifying the seal. He proved the autopsy and described the body as well as its condition noticed and mentioned by him. He stated that he could not notice any ante mortem injury because the body was in a decomposed state. He did not notice any fracture. He stated that the hyoid bone was intact. He, however, accepted the possibility of death as a result of strangulation. He stated that the death might have occurred a month before the date of the autopsy. On the basis of his statement, the autopsy report was marked as Ex. Ka-3.

In his cross-examination, he stated that the body was not identifiable as it had decomposed. He also stated that if a body is buried in soil and is dug out from it, the body would carry mud on it. On the

body of Parminder Singh there was no mud. He stated that if a body is buried in soil or sand, then it is natural to notice mud inside jaws and the eye orbits. He further stated that if somebody is strangulated, there is possibility of a fracture of the hyoid bone. He added that the estimated time of death could have a variation of seven days. He also stated that if the body is thrown in an open area, in hot climate of June or May, decomposition of the body would be quicker.

14. **PW-7 Head Constable Jagat Pal Yadav.** He stated that on 04.05.2003, he received the written report of PW-4, which was marked by the Superintendent of Police, Pilibhit for registration as a first information report and for investigation by SHO, Pooranpur. He stated that under the above direction as also the order of S.O, he registered the case as Case Crime No.Nil under Section 364 IPC against Sanjay Singh @ Bhooray and others. He proved the chik FIR, which was marked Ex. Ka-4 as also its GD entry, made at 7.30 am, which was marked Ex. Ka-5. He proved GD entry No.40, dated 06.05.2003, at 22.20 hours, by which Sections 302, 201 IPC were added. The conversion GD entry was proved and marked as Ex. Ka-6.

In his cross-examination, he stated that on the day when this case was registered, no other case was registered. He stated that he was posted between October, 2002 to November, 2004 at P.S. Bilsanda as Head Moharrir and before lodging of this case Nirmol Singh (PW-4) had never come to the police station. He denied the suggestion that the chick FIR and the GD entry were prepared later and were ante-timed.

15. **PW-8 S.I. Virendra Kumar Sharma**. He stated that, on 06.05.2003, he was posted at P.S. Bilsanda as a Sub-Inspector. The investigation of this case was conducted by Rajan Tyagi, Incharge Inspector, P.S. Pooranpur. He stated that the accused Sanjay Singh @ Bhooray was arrested by the I.O. and was put in the lock up at P.S. Bilsanda. The accused Sanjay made disclosure to the I.O. that he, Vipin, Bare and Sompal had taken the deceased to village Rautapur where he was fed liquor and as he was using abusive language for the cousin (Manju) of Sanjay, Sanjay and Vipin planned to kill the deceased; in furtherance of that plan, they took the deceased to the Jungle of village Bhedan Kanja in the night where they strangulated the deceased. After strangulating the deceased, they took his body to a canal at Bhedan Kanja and buried the same, whereas his clothes were thrown in the canal. Sanjay said that he could get the body recovered. On the above statement of Sanjay, after making GD entry No.27, at 12.50 hours, accused Sanjay was taken by S.H.O. Rajan Tyagi and other police personnel on a police vehicle with papers relating to Panchnama, etc including a spade. There, on the pointing out of Sanjay Singh @ Bhooray, the body was recovered from the canal. He added that Sanjay Singh had led the team to the spot, descended into the canal and dug out the body with the help of a spade. He stated that at the nick of time, the father of the deceased, namely, Nirmol Singh, and his other family members arrived and identified the body. There, it was sealed and the I.O. Rajan Tyagi prepared the recovery memo and completed the inquest proceedings, the inquest report and autopsy related papers were prepared by PW-8. He proved the inquest report which was marked as Ex. Ka-2. He also proved preparation of Chalan lash, letter addressed to the CMO, etc., which were all exhibited. He also proved

sealing of the body and maintenance of the seal.

In his cross-examination at the instance of Sanjay Singh @ Bhooray, he stated that Manju is Sanjay's cousin; that to recover the body, they had left in two jeeps, one was a government jeep and the other was private; that he does not remember the number of both the jeeps however, one jeep was of P.S. Pooranpur and the other was a private jeep; that he does not remember as to of which company that jeep was and whether that jeep was borrowed or was on rent, though that jeep was procured by the inspector and the inspector must be having knowledge about that jeep; that the inspector had his own force with him whereas, from PW-8's police station there was only one constable; that he does not remember the number of men accompanying the inspector; that in the private jeep, P.S. Pooranpur's force was there and there was no private person.

On further cross-examination, he stated that the place from where the body was recovered must be 8 km away from the police station. They all had reached the place of recovery by about 2 pm from there they dispatched the body by about 7 pm. He stated that the body was recovered within half an hour after their arrival at the spot. The pit from where the body was recovered must have been dug 3-4 feet and the spade used in digging out the body was brought from the police station itself. He stated that the place from where the body was dug out must be 150-200 meters away from the village Bhedan Kanja and that place was surrounded by fields of agriculturists of that village. In some of the fields there was standing sugarcane crop though some were lying barren. He stated that when the body was recovered, neither before, nor after, any villager of Bhedan Kanja was called to be a witness. However, villagers on their own arrived there but he does not remember who all were called to be a witness.

PW-8 stated that the body had decomposed and was emitting foul odour but was recognisable as one hand was cut. He denied the suggestion that the body was identified only because one hand was cut. He stated that at the time of recovery no artificial hand was recovered. The hand was missing below the elbow. He denied the suggestion that the hand of the body was cut from above the elbow. He stated that it was cut from below the elbow. He stated that in the inquest report he wrote that because of decomposition of the body no injury was visible. He stated that the eyes had decomposed and both jaws were visible. He stated that the skin had peeled off and the body was recovered in supine position. He stated that the spot of the recovery was inside the canal and at that time there was no water in the canal, though it was moist and the soil of that canal was wet. He stated that the body was not having clothes, except a neckar. No shoe or clothes were recovered. He stated that the inquest proceeding took about one and half hour to complete.

PW-8 denied the suggestions that Sanjay gave no statement to the I.O.; that no body was recovered on the pointing out of Sanjay Singh @ Bhooray; that the body was recovered from an open place; and that recovery is fabricated. On being questioned whether he noticed mud/sand on the eyes and inside the jaws, ears and mouth of the body, PW-8 stated that he does not remember. He stated that if it had been so, it would have been mentioned in the inquest report. He denied the suggestion

that the entire exercise has been done while sitting at the police station.

In his cross-examination at the instance of accused Bare, Sompal and Vipin, he denied the suggestion that he is telling lies and that the entire exercise was not as per law.

16. **PW-9 S.I. Rajan Tyagi (Investigating Officer).** He stated that on 05.05.2003, he was the Incharge Inspector at P.S. Pooranpur. The case was registered on 04.05.2003 at P.S. Bilsanda. The investigation of the case was assigned to him by the order of Superintendent of Police, Pilibhit. On 05.05.2003, he took over the papers with reference to the case; on 06.05.2003 he recorded the statement of Nirmol Singh (PW-4); and raided the house of Sanjay Singh @ Bhooray where Sanjay Singh @ Bhooray was found. He was entered in the lock up at P.S. Bilsanda and was interrogated. His statement was recorded in C.D., entry of which was made vide GD Entry No.27 at 12.50 hours, which was entered on his direction and dictation by S.I. J.N. Tiwari. He proved GD entry No.27, which was marked as Ex. Ka-12. After recording the disclosure statement of accused Sanjay Singh @ Bhooray, PW-9 with fellow police personnel, namely, S.I., J.N. Tiwari, Constable Satyendra Singh, Constable Jeetpal Singh, Head Constable Mohan Lal Saroj, Shyam Sundar Verma, Anil Kumar Mishra, Constable Rajpal in police jeep No. U.P.26 B 4301 along with driver Azmer Ali and S.S.I. Trivedi and others, who arrived in private jeep No. U.P.27 A 2395 with driver Autar Singh and S.I. Virendra Kumar Verma of P.S. Bilsanda and Constable Lajja Ram along with papers and a spade, went to the spot disclosed by the accused. The vehicles were stopped at the instruction of the accused Sanjay @ Bhoora. The accused alighted from the vehicle and pointed towards the canal where the body of the deceased was buried. There, Sukhdev Singh and Arvind Singh working in the adjoining fields were roped in as witnesses. There also, the accused confessed his guilt and assured recovery of the body. Thereafter, the accused led the team and pointed out the place where the body was buried and descended into the canal and thereafter dug out the body which was taken out of the canal with the help of constable Ram Bahadur Patel, Constable Nawab Singh and Constable Rajendra Singh. During the proceeding of recovery, the informant Nirmol Singh and his family members also arrived and identified the body whereafter the inquest report was prepared by S.I. Virendra Kumar Sharma (PW-8) and the body was sealed.

PW-9 stated that he made an effort to search out the clothes but they could not be found. He also stated that the memorandum of recovery was prepared on his dictation by constable Satyendra Singh and after the memorandum was prepared, the same was got signed and thumb marked by Sanjay Singh and a copy of it was handed over to him. He stated that thereafter he prepared site plan of the place from where the recovery was done. The site plan was proved and marked as Ex. Ka-14. He stated that on 07.05.2003 he recorded the statement of Arvind Kumar. He stated that accused Sompal Singh had surrendered of which entry was made in the GD. He stated that on 22.05.2003, he recorded the statement of Sompal in District Jail, Pilibhit. On 18.06.2003, he recorded the statement of witnesses Vikram Singh and Dilbag Singh and made search for accused Vipin Singh and Bare but they could not be found. On 04.07.2003, he arrested Vipin

and recorded his statement. On 01.08.2003, he recorded the statement of Ravi Azad, Kashmir Singh, Harjinder Singh, Sukhvinder Singh and Sukhvir. Thereafter, he submitted charge sheet against Sanjay Singh @ Bhooray, Vipin and Sompal, which was marked as Ex. Ka-15; whereas, the charge sheet (Ex Ka-16) against the accused Bare was submitted by showing him as an absconder.

In his cross-examination at the instance of Vipin, he denied the suggestion that the investigation was not conducted in a lawful manner and that all the material was fabricated to set up a fictitious story.

In his cross-examination at the instance of Sompal Singh and Bare, he stated that on 18.06.2003 the informant Nirmol Singh had brought Vikram and Dilbagh Singh to the police station. PW-9 stated that Vikram Singh had not told him that he exchanged greetings with Sompal when he had seen Sompal in the company of the deceased. He also stated that during investigation, the informant had not disclosed to him that the accused had confessed their guilt to him. He stated that he had not enquired from anyone at village Rautapur. He denied the suggestion that he did not conduct the investigation properly and prepared a false case.

In his cross-examination at the instance of Sanjay Singh @ Bhooray, he stated stated that it is correct that on 03.04.2003 the accused Sanjay Singh had not visited the house of Parminder Singh and that the deceased left his house alone on 03.04.2003. He stated that he does not know whether Parminder and his family members were detained under TADA. He stated that Manju is not the real sister of Sanjay Singh and that he did not interrogate Manju. He stated that he is not aware whether Manju had illicit relations with Parminder Singh. He stated that though the informant had informed him about the ransom call but had not given him the phone number nor he disclosed to him the place from where the phone had come. He also admitted that he had not entered the time when he had recorded the statement of witnesses. He also admitted that in the CD, the signature of the Circle Officer bears no date. He stated that on 06.05.2003, the day Sanjay was arrested, he had left the police station at 8.55 am and had returned next day on 07.05.2003, though he does not remember the time of his return at the police station. He sated that the GD of that police station is not before him therefore he cannot disclose the time of his return. He stated that as many as 8 persons including him had left the police station for investigation on that day. He stated that the day when the accused Sanjay was arrested, they had arrived at Majhgawa via Bisalpur. They arrived there at 12 noon (12 hours). The accused was found in his house. He stated that he had not prepared any arrest memo of Sanjay. He stated that he had not recorded the statement of any villager of that village and that Sanjay did not try to escape when the police had arrived. He stated that Sanjay was arrested at the door of his house and that he is not aware as to who else were present in his house. He stated that Majhgawa must be 50-60 kms away from P.S. Pooranpur. He stated that from Majhgawa they left for P.S. Bilsanda by about 12.15 hours. He stated that from Nirmol Singh's (PW-4's) place of residence, Majhgawa is 40 km away. He stated that the statement of Sanjay Singh was taken at P.S. Bilsanda where he gave information with regard to the body being buried. The spade to dig out the body was picked up from Bilsanda. Whose spade it was, he

does not know. The jeep carrying the accused and the person was stopped 70-80 paces away from the spot from where the body was dug out. He admitted that the statement of the people around from where the body was dug out was not recorded.

PW-9 denied the suggestions that the body was not recovered in the manner stated; that the body was found unattended at some other place; and that it was not identified by family members. He also denied the suggestion that the body was decomposed and was not recognisable; he also denied the suggestion that it was not recovered at the instance of Sanjay Singh.

PW-9 stated that from the place from where the body was recovered neither clothes nor shoes or artificial limb was recovered. He denied the suggestion that some other body was got identified as that of Parminder Singh. He also denied the suggestion that Sanjay Singh was called at the police station and by showing a false arrest, a body was got identified. He admitted that the cycle on which Parminder Singh had left his house was not recovered. He denied the suggestion that Ravi Azad had told him that when Parminder's father had enquired from accused Bhooray, the accused Bhooray had stated that Parminder had left. He admitted that he had not recorded the statement of Sukhvinder Singh prior to 01.08.2003. He admitted that Nirmol Singh had not informed him that Parminder had gone to Majhgawa after informing him. He admitted that no photograph of the body was taken as the body has been identified. He denied the suggestion that he is telling lies and that he had presented a false case by fabricating evidence.

STATEMENT OF ACCUSED PERSONS UNDER SECTION 313 CrPC

17. Before noticing the submissions advanced on behalf of the learned counsel for the appellants, it would be useful to have a glimpse at the statement of the accused-appellants, recorded under Section 313 CrPC.

Statement of accused-appellant Sanjay Kumar Singh @ Bhooray.

Sanjay admitted that Parminder Singh (the deceased) was his friend. He stated that he does not know Arvind Kumar (PW-1). He admitted that Manju is his cousin sister but he denied the relationship of Manju with Parminder. He denied that the deceased had visited Majhgawa and that they all had lunch together. He denied that any ransom call was made by him and that he received any money towards it. He denied having made any confessional disclosure. He denied the recovery at his instance and stated that he was called at the police station and falsely implicated by the police. He denied the other incriminating circumstances appearing against him in the prosecution evidence.

Statement of Bare.

He denied that the deceased had come to Rautapur at lunch and denied the other incriminating circumstances appearing against him in the prosecution evidence and stated that that he does not know the informant, the deceased and the other co-accused and that he has no relationship with them.

Statement of Vipin Singh.

He denied the incriminating circumstances appearing against him. He stated that he has been falsely implicated.

Statement of Som Pal Singh.

He denied the incriminating circumstances appearing against him. He stated that the story that the deceased had lunch at his place is absolutely false. He stated that he does not know the informant, the deceased and the other co-accused and that he has been falsely implicated. Interestingly, the incriminating circumstance appearing in the testimony of PW-4 that Sompal had confessed before him was not put to Sompal.

18. The trial court found that the prosecution was successful in proving that the deceased was called by the accused to come over to Majhgawa; the deceased went to Majhgawa; the deceased was killed; despite the deceased being dead, ransom was demanded to cheat PW-4; and the ransom was paid therefore, upon finding the chain of circumstances complete by recovery of the body at the instance of accused Sanjay @ Bhoora, convicted the accused-appellants as above.

19. Having noticed the prosecution case and the entire prosecution evidence as well as the statement of the accused under Section 313 CrPC, we now proceed to notice the submissions of the learned counsel for the parties.

20. We have heard Sri Atul Kumar Shahi, Amicus Curiae, for Sanjay Singh @ Bhooray (the appellant of Criminal Appeal No.1407 of 2007); Sri Abhay Raj Singh for Vipin (the appellant in Criminal Appeal No.1069 of 2007) and Bare (the appellant in Criminal Appeal No.1223 of 2007); and Sri J.K. Upadhyay, learned AGA, along with Sri Gaurav Pratap Singh, Brief Holder, for the State in these three appeals and have perused the record carefully.

Submissions on behalf of the appellant Sanjay Singh @ Bhooray

21. Sri Atul Kumar Shahi, learned Amicus Curiae, appearing for the appellant Sanjay, submitted as follows:-

(i) that the first information report is highly belated; that there is no cogent explanation as to why first information report was not lodged when, on 05.04.2003, the informant received a ransom call. Even no missing report was lodged on 05.04.2003 when the accused, as per the own allegation of the informant, had informed the informant that the deceased though had come but had left without leaving any information. Further, there was no reason to wait for lodging the first information report after 18.04.2003 when the ransom of Rs.50,000/- was allegedly paid but the deceased was not returned. The lodging of the first information report on 02.05.2003 i.e. after 15 days of having paid the ransom amount, with no result, clearly suggests that there is no merit in the prosecution story and the same is imaginary and baseless.

(ii) That, admittedly, no witness of village Majhgawa was interrogated to ascertain whether the deceased arrived at Majhgawa and was seen with the accused at Majhgawa.

(iii) That the story that the accused and the deceased had lunch together on 04.04.2003 is not supported by

any evidence except the confessional statement of the accused-appellant, which has no legal value.

(iv) That, admittedly, description of the phone through which, and on which, the ransom call was made and received has not been disclosed either during the course of investigation or in the testimony of PW-4, therefore, the story in respect of receipt of ransom call is rendered unacceptable for withholding best evidence.

(v) That the arrangement of Rs.50,000/- to pay to the accused is stated to have been made by borrowing the amount from another person but that other person has not been examined to prove that any such amount was lent to the informant, which clearly suggests that the story of payment of ransom amount is bogus.

(vi) That the story of payment of ransom amount is also bogus for the reason that if Rs.50,000/- had been paid on the date as alleged by the informant and the deceased was not produced or handed over or released as stated by the informant, there was no occasion to wait for 15 days more to lodge the first information report.

(vii) That the story that an effort was made to lodge the report at P.S. Bilsanda on 05.04.2003 is totally bereft of proof as PW-7 has categorically stated that PW-4 had never come to P.S. Bilsanda to lodge a report prior to the lodging of the first information report, which was lodged on 04.05.2003.

(viii) That the recovery of the body at the pointing out of the appellant is nothing but bogus and it is fabricated. The recovery is totally unreliable and cannot be taken as an incriminating circumstance for the following reasons:

(a) that there is no arrest memo prepared by PW-9 (I.O.) to disclose the date and time of the arrest of the accused-appellant Sanjay;

(b) that no independent witness of the recovery has been examined;

(c) that the presence of the informant at the time and place of recovery makes the recovery doubtful. Notably, the disclosure statement of the accused-appellant Sanjay Singh was recorded at P.S. Bilsanda after his arrest. According to the prosecution, the arrest was made at 12 hours; at 12.15 hours the accused was brought to the lock up at P.S. Bilsanda and, thereafter, his statement was recorded of which GD entry was made at 12.50 hours. Meaning thereby that between 12.50 hours and the time by which the recovery was made, which is stated to be at 3 pm, there was hardly two hours gap and in that short interval the informant, who is stated to be a resident of village Jamuniya Jagatpur under P.S. Pooranpur, had arrived at the spot to witness the recovery. This shows that he had prior information that recovery is to take place. Hence, the recovery in absence of examination of independent witnesses is totally unreliable.

(d) Neither the inquest report nor the autopsy report indicates that the body carried soil/mud/sand on any of its part even though, the body is stated to have been buried 4-5 feet deep beneath the surface of a canal where the mud/soil was wet/moist as per the prosecution evidence. Interestingly, the photograph of the body was also not taken to record its condition under the pretext that the body had been identified. All of this clearly suggests that either the body was not identifiable or the body was not recovered in the manner and

from the spot as alleged. Further, the doctor, who carried out the autopsy, deposed that if the body had been dug out from beneath the surface of a canal, the presence of mud/soil/sand would have been noticed, if present. All of this would suggest that the recovery is nothing but bogus and the entire prosecution case has been developed on suspicion because the informant believed that the deceased had left for Majhgawa and from there he went missing.

(ix) That the motive for the crime is also not substantiated as the crucial witness, namely, Manju, was neither interrogated nor examined. Further, Manju was admittedly a widow and the relationship of the deceased with Manju, according to the own story of PW-4, had been there for quite a while therefore, there was no reason as to why this should trigger emotions of the accused to kill the deceased.

(x) Lastly, it was submitted, the doctor who opined that death could be a consequence of strangulation had found the hyoid bone intact and there were no noticeable ante mortem injury, thus, there was no ground to assume that death was homicidal. Hence, there was no basis to convict the appellant for the offence of murder.

Submissions on behalf of the appellants Vipin and Bare

22. Sri Abhay Raj Singh, learned counsel appearing for the appellants, Bare and Vipin, submitted that except for the confessional statement of the co-accused made to the police, there is no worthwhile evidence against them; nothing incriminating has been recovered from them or at their instance; that, admittedly, the ransom call was not made by them and no ransom money was paid to them and, therefore, their conviction is liable to be set aside.

23. It be noted that the appeal of Som Pal was abated therefore, no submissions were made on his behalf.

Submissions on behalf of the State

24. Sri J.K. Upadhyay and Sri Gaurav Pratap Singh, who have appeared for the State, submitted that in matters of abduction where negotiation for ransom takes place, a prompt first information report is rarely made therefore, the prosecution story is not to be doubted merely on the ground that there has been a delay in lodging the first information report. They submitted that this is a case where the prosecution has succeeded in proving that Manju, a widow and cousin of the appellant Sanjay Singh @ Bhooray, who resided at Majhgawa, had relationship with the deceased and that the deceased and Sanjay Singh were close friends; the deceased went on 03.04.2003 from home stating that he is going to Majhgawa; on 05.04.2003 the informant party visited Majhgawa where the accused Sanjay Singh and other villagers admitted that the deceased Parminder Singh had come to Majhgawa and that on 04.04.2003 they all had lunch together at accused Sompal's place at Rautapur and, thereafter, the deceased was not seen alive. They submitted that it is proved by the prosecution that a demand was raised by the accused Sanjay Singh and, pursuant to that demand, Rs.50,000/- was paid to Sanjay Singh yet, after receipt of that amount, Sanjay Singh did not fulfill his promise to return the deceased. The informant is a farmer who under expectation that his son would return alive, kept waiting for his son to return alive

and when his son did not return, he lodged the report giving the details of what had happened. In such circumstances, the prosecution story with regard to murder of the deceased by the accused and thereafter cheating the informant of Rs.50,000/- under false promise of bringing back the deceased, has a ring of truth about it which finds corroboration from the recovery of the dead body at the pointing out of accused appellant Sanjay Singh. They also submitted that since recovery of the dead body has been proved and the body was dug out from a canal, the knowledge of the place from where the body was dug out is a clinching circumstance which no one else than the person who buried the body could have had therefore, the trial court rightly convicted the appellant Sanjay Singh and other accused who had joined hands with accused Sanjay. Learned AGA also submitted that since the doctor had opined that the deceased was strangulated and the body of the deceased was in a decomposed state therefore, absence of noticeable ante-mortem injuries by themselves would not rule out a case of homicide. More so, when the deceased was a young and healthy person. Thus, in absence of any explanation as to in what manner the deceased died, the court was justified in concluding that the deceased was killed and buried by the accused to remove the evidence of murder. Hence, the conviction of the appellants is justified under section 364, 302/34 and 201 IPC and since the informant was duped of Rs.50,000/-, the conviction under Section 420 IPC is also justified. They, accordingly, prayed that all the appeals be dismissed and the conviction recorded by the trial court be upheld.

ANALYSIS

25. Before proceeding further we must remind ourselves that this a case where there is no direct evidence of the crime. It is a case based on circumstantial evidence. In a case based on circumstantial evidence as to when conviction can be recorded, law is well settled by the Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116** where, in paragraph 153, it was observed:-

"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 following observations were made:

"19. .....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."

26. A three-judge Bench of the Apex Court in the case of **Shatrughna Baban Meshram Vs. State of Maharashtra (2021) 1 SCC 596** reiterating the legal principles set out in the case of **Sharad Birdhichand Sarda (supra),** in para 42, observed:-

".....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."

27. In light of the legal principles noticed above, we shall now evaluate the prosecution evidence to consider, inter alia, firstly, whether the incriminating circumstances were fully established and, secondly, whether they form a chain so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and whether it shows that in all human probability the act was done by the accused.

28. In the instant case, there are certain circumstances as regards which there is no serious dispute therefore, they may be treated as proved. These are : (i) the deceased Parminder was son of the informant (PW-4); (ii) the deceased and accused Sanjay @ Bhooray were friends and were on visiting terms with each other; (iii) Sanjay @ Bhooray had a widow cousin named Manju; (iv) the deceased resided with his father and

other family members in village Jamunia Jagatpur, which falls in territorial jurisdiction of P.S. Pooranpur whereas the accused: (a) Sanjay and Vipin resided in village Majhgawa, (b) Bare resided in village Bhedan Kanja and (c) Som Pal Singh resided in village Rautapur, all falling under P.S. Bilsanda; (v) the deceased left his home on 03.04.2003 and went missing thereafter; (vi) FIR dated 02.05.2003 was lodged by PW-4, father of the deceased, through a written report addressed to Superintendent of Police Pilibhit, which was registered on 04.05.2003 at P.S. Bilsanda but was marked for investigation by P.S. Pooranpur; (vii) the FIR made allegations that the deceased has been abducted and secreted by the accused; (viii) the FIR suggests twin motive for the crime: (a) ransom; and (b) relationship of Parminder (the deceased) with Manju, a cousin of Sanjay @ Bhooray, which was not palatable to Sanjay @ Bhooray; and (ix) a decomposed body was recovered on 06.05.2003, which was claimed to be of the deceased.

29. Before we proceed to evaluate the prosecution evidence in light of the rival submissions, it would be worthwhile to notice the key features of the prosecution case/evidence with our observations in brief. These are:

(a) The accused Sanjay Singh @ Bhooray and Parminder Singh (the deceased) were friends. Their friendship is admitted by the accused Sanjay Singh in his statement under Section 313 CrPC.

(b) Parminder Singh allegedly went from home on 03.04.2003. When Parminder Singh left his house on 03.04.2003, Sanjay Singh or any of the other accused were not there and they did not accompany him.

(c) The evidence that Parminder Singh, after parking his cycle at the shop of Arvind (PW-1), went to Majhgawa is not proved by any direct evidence or by call detail records of the deceased. The only evidence in that regard is statement of the deceased to the witnesses that he was going to Majhgawa and the statement of prosecution witnesses that when they visited Majhgawa to inquire about the deceased, on inquiry, on 05.04.2003, the accused had admitted that the deceased had come to Majhgawa and that they all had lunch together at Som Pal's place in village Rautapur on 04.04.2003.

(d) The evidence of the deceased Parminder Singh last seen in the company of the accused is provided by Vikram Singh (PW-5). Vikram Singh (PW-5) admits that his statement was recorded by the I.O. on 18.06.2003. Notably, PW-5 admitted that from newspaper reports he was aware from before that the deceased Parminder Singh had gone missing. Further, Vikram Singh was brought by PW-4 (the informant) to the investigating officer for getting his statement recorded under section 161 CrPC. PW-5 admits that he was on visiting terms with Kashmir Singh who is a neighbour of the informant (PW-4). All of this would suggest that PW-4 and Vikram Singh knew each other from before and if the deceased was actually noticed by him in the company of the accused soon before his disappearance, and there had been newspaper reports of deceased's disappearance, there was no occasion for PW-5 not to report the incriminating circumstance of last seen, earlier, to PW-4 or to the police. Further, PW-5's testimony does not specify the date on which he saw the deceased in the company of the accused appellants on a Tonga and going towards Bhedan Kanja. Thus, in our considered view, the evidence of last seen rendered by PW-5, firstly, is not wholly trustworthy and, secondly, is inconclusive.

(e) The investigation of this case, under the order of the Superintendent of Police, Pilibhit, was carried out by police of police station Pooranpur and not by police of police station Bilsanda where the case was registered. Admittedly, the house of the informant falls in the territorial jurisdiction of police station Pooranpur. Notably, on the date the body of the deceased was allegedly recovered, the I.O. of the case had left police station Pooranpur early morning at 8.50 am to go to Majhgawa i.e. the residence of accused Sanjay. As per evidence, the police team of P.S. Pooranpur arrived in two Jeeps. One was a police Jeep, the other was private. According to the I.O. (PW-9), he arrived there at about 12.00 noon and arrested Sanjay from his house. Admittedly, no arrest memo was prepared. PW-9 states that after his arrest Sanjay was brought to P.S. Bilsanda where he made a confessional disclosure and, thereafter, they left P.S. Bilsanda to effect recovery of the body. The GD entry of P.S. Bilsanda shows that at 12.50 hours, the police team on the disclosure made, left the police station to effect recovery on the basis of the disclosure made by the accused appellant Sanjay Singh. As per the prosecution evidence, the body was dug out by about 3 pm and by that time the informant had arrived there at the spot. The body is stated to have been dug out from the bottom of the canal after digging about four feet. But neither the inquest report nor the post mortem report shows any sign of mud/sand on any of the orifices of the body or in the eye orbits and, admittedly, the photograph of the body has not been taken. No doubt, the defence has sought to challenge the identity of the body by claiming that it was unidentifiable but the defence has not challenged that the deceased was amputated from below elbow joint of right arm and the body recovered had no right arm from below elbow joint as is recited in the inquest report. Further, suggestions were put to prosecution witnesses that the body could be identified only because of that portion of the arm missing. Thus, in our view, the prosecution was successful in proving that the body was of Parminder Singh (the deceased).

(f) The prosecution failed to examine any independent witness of that recovery. What is also noticeable from the recovery /confession memo (Ex. Ka-13) that minus the confession part it is a replica of the FIR allegations.

30. Ordinarily in a case based on direct ocular account of the crime, the existence of motive is not of much importance but where a case is based on circumstantial evidence, motive assumes importance and at times serves as a vital link to the chain of circumstances because, absence of a motive may serve as a catalyst to strengthen the alternative hypothesis, if there is a room for any, consistent with the innocence of the accused. In the instant case, the prosecution set up twin motive for the crime. One was ransom and the other was annoyance of Sanjay @ Bhooray with the deceased on account of his relationship with Manju i.e. cousin of Sanjay @ Bhooray. In so far as the latter is concerned, admittedly, Manju was a widow and the deceased was unmarried. In such circumstances, if the deceased wanted to marry Manju whether it would be a strong motive for the crime is anybody's guess. Further, from the testimony of PW-4 we have noticed that the brothers and father of Manju raised no objection to this relationship. But, assuming that the accused party was annoyed on that score and this annoyance was known to the informant

then, if the deceased had gone to Sanjay's place after informing the informant and had not returned thereafter, there would have been a prompt report because of the underlying suspicion of an untoward event. But, here, there was no missing report or FIR. It is only after a month of the deceased having gone missing, the report was lodged. To explain this delay, it appears to us, the story was developed that a ransom call was received from Sanjay Singh and negotiations were on to settle for an amount to secure release of the deceased. This story does not appeal to us for the reason that had there been a ransom call by Sanjay, and Sanjay had denied making the ransom call on 05.04.2003, as is alleged by PW-4, there would have been a prompt report as, after denial by Sanjay, the caller's identity became uncertain. PW-4 tries to explain this by saying that he tried to lodge a report but it was not taken. This statement has no basis. In fact, PW-7 has stated that PW-4 never came to the police station Bilsanda to lodge a report. Assuming that PW-4 had gone to P.S. Bilsanda to lodge a report but the same was not taken, why PW-4 made no effort to lodge a report at P.S. Pooranpur, more so when the deceased had gone missing from within its jurisdiction, is inexplicable. Therefore, the delay in lodging the report after 05.04.2003 seems inexplicable. Further, if the ransom amount was resettled and paid on 18.04.2003, yet, the deceased was not returned, there was no occasion to wait till 02.05.2003 to lodge a report.

31. In **Mukesh and another Vs. State (NCT of Delhi) (2017) 6 SCC 1**, a three judges Bench of the Supreme Court, in para 50 of its judgment, observed as under:-

"50. Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused."

32. Ordinarily, in matters relating to kidnapping or abduction for ransom, victim party awaits return of the kidnapee or abductee for fear or danger to his or her life therefore, in such matters, mere delay in setting the law into motion may not prove fatal to the prosecution story. But where hope of return of the abductee disappears, delay in lodging the report would, in absence of plausible explanation, raise suspicion as regards the credibility of the prosecution story. In the instant case, the prosecution story is in three parts, namely, (a) pre receipt of ransom call; (b) post receipt of ransom call; and (c) post payment of ransom. Not lodging the report till receipt of ransom call has explanation to the effect that the deceased often used to be out for days therefore, his not returning back did not raise suspicion. Ransom call was received on 05.04.2003. According to PW-4, the caller for ransom, as per his belief, was Sanjay @ Bhooray therefore, he went to Majhgawa to confirm. Notably, on 05.04.2003 the informant was informed by Sanjay that he never made that ransom call and the informant was also informed that the accused persons were not aware as to where the deceased went after having lunch on 04.04.2003. In such a scenario, the delay in lodging report after 05.04.2003 required a plausible explanation. The explanation

given was that information was given at P.S. Bilsanda in the evening of 05.04.2003, upon which, Sanjay @ Bhooray was called but, after enquiry he was let off. Yet, no formal report was lodged. Interestingly, P.W.-7, constable posted at P.S. Bilsanda, during cross-examination, stated that PW-1 never came to P.S. Bilsanda before registration of the FIR. Notably, PW-4 also states during cross examination that he had not given any written application at P.S. Bilsanda. Even in the written report (Ex. Ka-1) dated 02.05.2003 there is no disclosure about any written information given earlier. This would suggest that the explanation for not lodging the report earlier is not credible. Further, if, allegedly, ransom was paid on 18.04.2003 to Sanjay @ Bhooray on a promise that he would secure the release of the deceased and, after payment of ransom, deceased was not released and no further promise was allegedly extended, there was no plausible reason not to report the matter promptly. The explanation that PW-1 waited thereafter under the expectation that his son might be released does not inspire our confidence. More so, because PW-1 did not disclose the phone number from where the ransom call was made. He also did not disclose the phone number on which the call was made. Most importantly, PW-4 states that ransom money of Rs. 50,000/- was arranged from his maternal uncle Gurbux Singh but that was not disclosed during investigation and, admittedly, Gurbux Singh was not produced as a witness to enable us to be satisfied about the authenticity of the story. Further, there is no corroboratory recovery of the cash. Thus, for all the reasons above, the inordinate delay in lodging the FIR shrouds the prosecution story with suspicion as regards demand and payment of ransom.

33. As we have already discarded PW-5 i.e. the witness of last seen circumstance (vide para 29 (d) above), what remains is the testimony of PW-2, PW-3 and PW-4 in respect of going to Majhgawa to enquire about the deceased. The witnesses do state that the accused party admitted that the deceased had come to Majhgawa and that they had lunch with him on 04.04.2003 at Som Pal's place at Rautapur, but this circumstance is denied by the accused persons in their statement under Section 313 CrPC. No witness of that village has been examined to confirm deceased's presence at Majhgawa. No call detail records are available to show deceased's presence with the accused. Under these circumstances, when the FIR was so delayed, it is difficult for us to hold that the prosecution was successful in proving beyond reasonable doubt that the deceased had come to Majhgawa on 3/4.04.2003. The statement of cycle stand owner (PW-1) that the deceased had parked his cycle with him to go to Majhgawa does not inspire our confidence at all, firstly, because why would the decease travel to that place (Pooranpur) on a cycle when he had a motorcycle and could go to Majhgawa directly and, secondly, even if he had parked his motorcycle, why would the decease tell the cycle stand owner as to whose house he had to go. When we notice these circumstances in conjunction with introduction of his name in the FIR lodged on 4.5.2003, when it was not necessary to disclose, it appears to us, that PW-1 is a witness set up on legal advise to provide a link evidence. We, therefore, do not propose to rely on PW-1 to lend credence to the prosecution story of the deceased visiting Majhgawa on 03.04.2003. We may hasten to clarify that we do not rule out the possibility of PW-2, PW-3 and PW-4 visiting Majhgawa to enquire about the

deceased as, admittedly, Sanjay @ Bhooray was friend of the deceased and the deceased and Sanjay were on visiting terms. We also do not rule out the possibility of PW-4 suspecting Sanjay @ Bhooray having a hand in his son's disappearance, perhaps, on information that the deceased had an eye on Sanjay @ Bhooray's cousin. But it is well settled that suspicion cannot take the place of proof. Once this the position, the only worthwhile circumstance that remains is of recovery.

34. In so far as recovery of the body of the deceased at the instance of Sanjay @ Bhooray is concerned, it is stated to have been made by a police team comprising members of two police stations (namely, Pooranpur and Bilsanda), headed by PW-9, the Investigating Officer, who was from P.S. Pooranpur. Notably, the investigation of the case was marked by Superintendent of Police of the district to the police of P.S. Pooranpur. The FIR was registered on 04.05.2003 and two days later, the I.O. (PW-9) comes to Majhgawa and straight away arrests Sanjay @ Bhooray. PW-9 (I.O.) makes no inquiry from the villagers at Majhgawa as to whether they had seen the deceased at Majhgawa or not. PW-9 makes no inquiry from any of the villagers at Rautapur, where the deceased allegedly had his last meal. Yet, PW-9, straightaway arrests the appellant Sanjay and proceeds to record his disclosure statement and effect the recovery. Although we cannot rely on confessional part of the disclosure as contained in Ex. Ka-13 but to understand the story set out by the prosecution we have read it, which reflects the same story as in the FIR. As per that confession, the murder was committed because of abusive expletives used by Parminder for Manju. Confession suggests that ransom call was made to deflect suspicion. What assumes importance here is that if Sanjay @ Bhooray had been smart enough to bury the deceased to remove the evidence and to have made ransom call to hoodwink the informant with regard to the real motive for the crime, why would he make disclosure/ confession within 15 minutes of interrogation as noted in paragraph 29 (e) above. Notably, in his statement under section 313 CrPC, Sanjay has denied making any disclosure or confessional statement and has challenged the recovery as fabricated and bogus.

35. The prosecution did not examine a single independent witness either of the recovery or of the inquest. The recovery is proved only by police witnesses and the informant whose presence appears questionable at the time of the recovery and, in fact, casts a shadow on the disclosure statement being the basis of the recovery. Because, unless and until the informant was made aware, well in advance, that the body is about to be recovered, he would not have been able to arrive at the spot being resident of another village, which was far away from the spot. Notably, according to the prosecution evidence, the investigating team left early morning at 8.50 am to go to Majhgawa. What is interesting to note is that the informant (PW-4) resides within the jurisdiction of police station Pooranpur and the I.O. was of P.S. Pooranpur even though the case was registered at P.S. Bilsanda therefore, the speed with which arrest was made, followed with the disclosure and the recovery, coupled with presence of informant at the spot, all within a span of couple of hours, creates suspicion regarding the entire exercise being genuine. According to PW-9, police team reached Majhgawa on 6.5.2003 at about 12 noon. They arrested Sanjay @ Bhooray and

brought him to P.S. Bilsanda. Notably, no arrest memorandum was prepared. At P.S. Bilsanda, disclosure statement was made and at 12.50 hours, the police team left the police station Bilsanda with the accused Sanjay to effect recovery. Assuming that the information that the accused has been arrested got percolated to the informant (PW-4) and on that information he arrived at Bhedan Kanja, which is 40 km away from his place, what attracts our attention is the alacrity with which the disclosure was made, as if, the accused was waiting to confess and cooperate. When we see all of this in the context of the fact that the police made no effort to record the statement of villagers of Majhgawa and Rautapur and had straight away proceeded to arrest the accused, record his confession and effect recovery of the body of the deceased, despite the fact that in the preceding one month no lead could be had about the deceased, we get a strong feeling that the entire exercise was stage managed. Our doubt gets fortified by the circumstance that no independent witness of that recovery is examined by the prosecution. This doubt is further fortified by the fact that the body recovered is not photographed. In addition to that, the autopsy surgeon noticed that the body carried no mud/ soil/ sand even though, the body was recovered from about 4 feet below the surface of the bottom of a canal which, in ordinary course, would carry sufficient moisture to make the mud stick around the body. Noticeably, the autopsy surgeon (PW-6) was questioned on this aspect and he had stated that if the body had been dug out from the bottom of a canal, presence of mud would have been noticed but there was no such mud noticed by him . For all the reasons above, the recovery of the body on the disclosure statement of the accused Sanjay @ Bhooray is rendered extremely doubtful and there is a strong probability that information about the body might have been received from some source and its recovery was ascribed to the accused Sanjay @ Bhooray.

36. Once we discard the recovery, nothing much remains in the prosecution evidence. On the analysis above, it appears to be a case where the informant's son went missing. The informant was under the impression that his son had gone to Majhgawa. Informant strongly suspected that Sanjay Singh was involved in his son's disappearance. As the informant had no proof, he kept waiting. It is possible that he might have been given assurances by the accused that they would help him in tracing out his son. But when things did not materialise, it appears the prosecution story was developed on strong suspicion and guess-work. But it is well settled howsoever strong suspicion might be it cannot take the place of proof. It is equally well settled that when a reasonable doubt arises with regard to the prosecution story /the prosecution evidence, the benefit doubt would have to be extended to the accused. In the instant case, for all the reasons recorded above, since the prosecution story and the prosecution evidence do not inspire our confidence, we have no option but to extend the benefit of doubt to the appellant Sanjay Singh @ Bhooray. As regards other appellants, namely, Bare and Vipin, we find that there is no worthwhile evidence against them. Notably, the evidence of the deceased being last seen with the accused appellants on a Tonga by PW-5 has already been discarded by us above (vide para 29 (d)).

37. In view of the discussion above, all the appellants are entitled to be

acquitted. Consequently, all the three appeals are **allowed.** The judgment and order of conviction and sentence recorded by the trial court is set aside. The appellants are acquitted of the charge for which they have been tried and convicted. The appellants Bare and Vipin are reported to be on bail, they need not surrender, subject to compliance of the provisions of Section 437-A CrPC. The appellant Sanjay Singh @ Bhooray is reported to be in jail. He shall be released forthwith from jail, unless wanted in any other case, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

38. Let a copy of this order be certified to the court below along with the record for information and compliance.

(2022)06ILR A545
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No.1703 of 1989

Jiut & Anr . ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Siddhartha Shukla, Sri Dinesh Kumar Pandey, Sri Ronak Chaturvedi (A.C.)

Counsel for the Respondent:
D.G.A., A.G.A.

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 302 read with Section 34 - The Code of criminal procedure, 1973 - Section 161 - circumstantial evidence - no eye-witness account - duty of the prosecution to prove all the circumstances to form a complete chain unerringly pointing towards the guilt of the accused-appellants - leaving all reasonable hypothesis of a third person entering into the scene of the crime - circumstances from which conclusion of guilt is to be drawn should be fully established, "must" and "should" and not "may be" established - each and every circumstance brought in the chain of circumstance by the prosecution should be fully established beyond all reasonable doubt. (Para -23)

Appellant no. 1 died - appeal abated - Sole surviving appellant is appellant no. 2 - information given by village Chaukidar (P.W.3) about deceased - stated that village Pradhan (P.W.4 , witness of inquest, chance witness) had suspicion about the reason of the death - statement in the inquest - deceased was a patient of Tuberculosis (T.B.) - body found inside the room in the house of deceased - no visible injury seen on dead body - No recovery memo of blood stained and plain earth brought on record - presence of child witness (PW-5, son of deceased) at the time of incident - doubtful . **(Para - 3,4,5,16,44)**

(B) Criminal Law - appreciation of the testimony of a child witness - Indian Evidence Act, 1872 - Section 118 - competence of the persons to testify which also includes a child witness - while assessing evidence of child witness - Court must carefully observe his/her demeanor to eliminate likelihood of tutoring - rule of prudence - desirable to see corroboration of evidence of a child witness from other reliable witness on record - Court can rely upon the testimony of a child witness, if the same is credible, truthful and is corroborated by other evidence brought on record - child witness (PW-5, son of deceased) could not be found to be trustworthy and his testimony cannot be read in favour of the prosecution. **(Para - 18,20)**

(C) Criminal Law - Indian Evidence Act, 1872 - Section 106 - last seen theory –

last seen alive - not prudent to base the conviction solely on "last seen theory" - duty of the prosecution to prove the evidence of last seen beyond all reasonable doubt by the testimony of a witness who is truthful, consistent and free from embellishments - held - prosecution failed to establish beyond reasonable doubt and the presence of PW-1 near the place of the incident on the fateful night so as to establish that PW-1 was the witness of last seen of the accused coming out of the house of the deceased while he was standing outside the house of P.W. 2 (witness of last seen).**(Para -23,24,40)**

(D) Criminal Law - motive of commission of crime – civil dispute - Mere pendency of a civil suit between the deceased and the accused persons cannot be said to be a strong motive so as to treat it as a circumstance fully established for commission of the crime - Mere narration of motive in a case of circumstantial evidence without bringing anything further to prove the same cannot be taken as a circumstance to establish the case of the prosecution. **(Para - 36,)**

(E) Criminal Law - suspicion cannot take the place of proof and even if the circumstances on record is a pointer to a strong suspicion, it in itself is not sufficient to lead to the conclusion that the guilt of the accused stands established beyond reasonable doubt - mode of appreciation of evidence - presumption of innocence - criminal trial is not like a fairy tale wherein one in free to give flight to one's imagination and phantasy - 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 favorable to the accused should be adopted – finding with regard to testimony of PW-1 and PW-4 - based on conjectures and surmises - trial court did not evaluate statement of PW-1 independently - not based on proper appreciation of the evidence on record - rather more out of the own imagination or belief of the trial court. **(Para-48,52)**

HELD:- Prosecution failed to establish the guilt of the accused-appellant (Brij Kishor) , beyond all reasonable doubt. Benefit of doubt goes to accused-appellant. **(Para - 53)**

Criminal Appeal allowed. (E-7)

List of Cases cited:-

1. Suresh & anr. Vs St. of Har., (2018) 18 SCC 654

2. Harbeer Singh Vs Sheeshpal & ors., (2016) 16 SCC 418

3. Bhagwan Singh & ors. Vs St. of M.P., (2003) 3 SCC 21

4. Digamber Vaishnav & anr. Vs St. of Chhattisgarh, (2019) 4 SCC 544

5. Suresh Vs St. of U.P. , (1981) 2 SCC 569

6. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622

7. Nizam & anr. Vs St. of Raj., (2018) 1 SCC 550

8. St. of Raj.Vs Kashi Ram, (2006) 12 SCC 254

9. Bhagwan Singh & ors. Vs St. of M.P., (2003) 3 SCC 21

10. Suresh & anr. Vs St. of Har., (2018) 18 SCC 654

11. Ganpat Singh Vs St. of M.P., (2017) 16 SCC 353

12. The St. of Punj. Vs Jagir Singh, Baljit Singh & Karam Singh, (1974) 3 SCC 277

13. Kali Ram Vs St. of H.P., (1973) 2 SCC 808

14. Latesh @ Dadu Baburao Karlekar Vs St. of Mah., (2018) 3 SCC 66

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

1. Heard Sri Raunak Chaturvedi, learned Amicus Curiae for the appellant Brij Kishor and Sri Rupak Chaubey, learned AGA for the State-respondent.

2. The present appeal is directed against the judgment and order dated 4th August, 1989 passed by the Ist Additional District & Sessions Judge, Gorakhpur in Sessions Trial No. 189 of 1987 whereby two appellants herein namely Jiut and Brij Kishor were convicted for the offence punishable under Section 302 readwith Section 34 IPC and sentenced for life imprisonment and a fine of Rs. 1000/- each.

3. At the outset, we may note that the appellant no. 1 Jiut had died during the pendency of the present appeal and the appeal has been abated on his behalf by the order dated 16.7.2019.

Sole surviving appellant is appellant no. 2 namely Brij Kishor who is lodged in the District Jail, Gorakhpur since 21.8.2019 in execution of the non-bailable warrant, as is evident from the report dated 31.8.2019 submitted by the Chief Judicial Magistrate, Gorakhpur.

We are, therefore, considering this appeal only on behalf of the appellant no. 2 Brij Kishor.

4. The prosecution story began with an information given by the village Chaukidar namely Nihor on 30.3.1986 at about 7:05 AM at the Police Station Maharajganj, District Gorakhpur about death of one Pitamber, the deceased herein, resident of village Parsameer, P.S. Maharajganj, District Gorakhpur. The said information provided by the Village Chaukidar was entered in the GD Rapat No. 5 at about 7:05 AM as proved by PW-8, as Exhibit Ka-9. PW-8 further proved that he was posted on the fateful day as Head Moharrir, Police Station Maharajganj and on the receipt of the postmortem report in the police station, case under Section 302 IPC was lodged on 1.4.1986 and entered in the GD as Rapat No. 27 dated 1.4.1986 at 20:45 Hours. The original GD was brought in the Court and the carbon copy thereof was proved as Exhibit Ka-10. The inquest of the dead body was conducted on 30.3.1986, commenced at about 10:30 AM and ended at 12:00 Noon. As per the statement in the inquest, deceased Pitamber was a patient of Tuberculosis (T.B.); the body was found inside the room in the house of Pitamber; no visible injury was seen on the dead body. Black colour blood was oozing out of the mouth and spread on both sides towards the ears of the deceased. The inquest report was proved by PW-7, the Sub-Inspector posted in the Police Station Maharajganj, being in his handwriting and signature as Exhibit Ka-8. In cross, PW-7 stated that the village Pradhan Ram Preet Singh was a witness of the inquest which is evident from the report itself.

5. At this juncture, we may also note the statement of PW-8, in cross, wherein he stated that the village Chaukidar Nihor while giving information of the death of Pitamber stated that village Pradhan had suspicion about the reason of the death.

6. The other documentary evidence on record are the Supurdiginama of torch seized from the witness PW-1 Ram Preet. The memo of recovery dated 2.4.1986 was proved by PW-6, the Investigating Officer as Exhibit Ka-2, being in his handwriting and signature. Another memo of recovery dated 2.4.1986 is about the recovery of blood soaked vest of Mitthu son of Pitamber which had been proved as Exhibit Ka-3, being in the handwriting and signature of PW-6. The postmortem report proved in the handwriting and signature of Doctor C.P. Singh (PW-9) is Exhibit Ka-

11. The ante-mortem injuries found on the person of the deceased Pitamber are as under:-

"1) Faint brown colour patch on right side of laryngical prominance 1.75 cm x 1.5 cm.

2) Faint brown colour patch coupled with irregular margin on left side of laryingical prominance measuring 5cm x 2.5 cm.

On internal examination of the body, brain and its membranes were found congested. Blood was found in subcutaneous walls and muscles of neck on front side. Pleura was adharent to the chest wall. The hyoid bone and thyroid cartilage were found fractured. The trachea was filled with frothy blood. The lungs were congested. Heart was empty and the buccal cavity was full of frothy blood. Digested food was found in the stomach. Intestines and bladder were empty. Spleen and kidneys were congested. In the opinion of the doctor, the death had occurred about 18 hours before the postmortem examination was conducted and the cause of death was asphyxia due to throttling. It was opined by the doctor that the death could occur in the night of 29/30.3.1986.

7. The Investigating Officer had entered in the witness-box as PW-6 and proved the reports prepared by him. In the cross examination, he stated that the vest of Mitthu son of the deceased was sent for forensic examination but report was not received till submission of the charge sheet. He also proved that the charge sheet was submitted by him after completion of the investigation as Exhibit Ka-4.

The formal witnesses, thus, proved the reports prepared by them during the course of investigation and medical examination.

8. Challenging the conviction by the trial court, it is argued by the learned counsel for the appellant that the star witness of the prosecution is the child witness (PW-5) who had been discredited by the trial court. PW-2 one witness of last seen had been declared hostile and he did not support the case of the prosecution at all. The remaining witnesses PW-1 and PW-4 had been relied by the trial court to convict the appellant. The findings returned by the trial court that the witness of last seen (PW-1) told the Gram Pradhan who entered in the witness-box as PW-4 about witnessing the accused persons coming out from the house of the deceased and that fact by itself was sufficient to record conviction, is based on conjectures and surmises. The evidence of PW-4 is a hearsay evidence, the only evidence of last seen on the testimony of PW-1 was not sufficient to hold the appellants guilty of commission of the crime. In any case, the prosecution has failed to form a complete chain of circumstances, each one to be proved beyond reasonable doubt, so as to bring home the guilt of the accused persons namely the appellant herein. In any case, burden of proving its case beyond all reasonable doubt lies on the prosecution and the onus to offer explanation upon the appellant would shift only in case, the prosecution has been able to prove the guilt of the accused/appellant herein beyond reasonable doubt. The trial court has erred in shifting onus upon the accused persons namely the appellant herein to offer explanation as to why they were present in the house of the deceased on the fateful night, when the prosecution has not been able to prove the presence of PW-1 at the

place wherefrom he allegedly seen the accused persons, beyond reasonable doubt.

Reliance is placed on the decision of the Apex Court in **Suresh and another vs. State of Haryana1** to assert that PW-1 being a chance witness, his testimony requires a very cautious and close scrutiny. The behaviour of PW-1 subsequent to the incident as he remained out of scene for a period of more than two days and had entered only at the instance of Gram Pradhan (PW-4) raise suspicion on his presence. The contention 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. Reference has been made to the decision of the Apex Court in **Harbeer Singh vs. Sheeshpal and others2.**

9. Further on the question of motive, it is submitted that the motive assigned by the prosecution for commission of the crime is too weak. Mere pendency of a civil suit in the civil court between the deceased and the accused persons cannot be said to be a motive strong enough for committing such a ghastly crime. At worst, it raises strong suspicion against the accused. The suspicion, however, so strong cannot take the place of proof and cannot be the basis of conviction. Reference has been made to the decision of the Apex Court in **Bhagwan Singh and others vs. State of M.P.3.**

It is then argued that the Investigating Officer did not collect incriminating material from the spot of the incident so as to prove the presence of the child witness in the house at the time of the occurrence. It was a blind murder of the deceased and the accused persons namely the appellant herein had been implicated only on the suspicion raised by the villagers because of the pendency of the civil suit between the deceased and the accused persons.

The role of the Gram Pradhan in the entire sequence of events is more of an investigator and prosecutor rather than a truthful independent witness.

10. Learned AGA, in rebuttal, argued that the evidence of last seen and the motive brought by the prosecution are clinching. The dead body was found in the house. The incident was of night. The fracture of hyoid bone found in the medical evidence is clearly suggestive of the homicidal death. The presence of the accused person namely the appellant herein, at the scene of the crime clearly established the guilt of the appellants. There is no suggestion of enmity of the Gram Pradhan. The hostile witness was contradicted with his statement under Section 161 Cr.P.C., wherein he also proved the presence of accused persons near the scene of the crime. Delay in recording Section 161 Cr.P.C. statement of the prosecution witnesses would not be fatal to the prosecution case. In the instant case, the factum of homicidal death came into knowledge only after the postmortem was conducted as there was no sign of injury nor any weapon was used as per the postmortem report. The GD was converted on 1.4.2006 and the case under Section 302 IPC was lodged though the accused remained unknown. The delay, if any, in recording statement of the prosecution witnesses stood explained with the GD entry dated 1.4.2006. The motive stated by the prosecution is admitted to the accused persons and in absence of any dispute about the same, it is a reason of strong suspicion

which can be brought in the category of motive to commit the crime. The chain of circumstances has been completed by the prosecution with the relevant circumstance of last seen and motive which are clinching in the incident. The evidence brought by the prosecution cannot be discarded on any suggestion given by the defence.

It is argued on behalf of the prosecution that the lacuna shown in the prosecution evidence is not such which would create a reasonable doubt in the minds of the Court. As the cogent evidence of prosecution witnesses cannot be discarded only on the doubt raised by the Court, inasmuch as, the doubt has to be a reasonable doubt which must not be based on any hypothesis.

To prove the factum of murder of deceased Pitamber, the prosecution had produced five witnesses of fact.

11. PW-3 Ram Nihor is the Village Chaukidar who proved the factum of giving information of the death of deceased Pitamber in the Police Station Maharajganj. In cross, PW-3 stated that he went to the police station alongwith the Gram Pradhan and Ram Preet Dhobi (PW-1) did not accompany him.

12. PW-2, the prosecution witness of last seen had turned hostile and did not support the case of the prosecution at all. In the examination-in-chief, PW-2 stated that he was sleeping in his house at around 11:00 PM and upon asking as to who went to his house, he replied that no one came. He then stated that he did not know anything and kept mum when he was asked further to explain as to what had happened at around 11:00 PM. PW-2 then stated that he did not see the accused persons coming out of the house of the Pitamber on the fateful night and that Ram Preet Dhobi (PW-1) did not go to his house to call him.

In cross, PW-2 was confronted with his statement under Section 161 Cr.P.C., contents of which he denied and stated as to how it was written that he had seen the accused persons coming out of the house of Pitamber was not known to him. The suggestion that he was won over by the accused persons was categorically denied by PW-2. From the testimony of PW-2, it is evident that he did not support the case of the prosecution at all. No part of his statement can be read in favour of the prosecution.

13. Now we are left with three witnesses amongst whom PW-1 is the witness of last seen, PW-4 is the village Gram Pradhan who is the witness of inquest. PW-5 is the son of the deceased who is a child witness aged about 7 years on the date of the incident (10 years on the date of deposition). This witness was the star witness of the prosecution. On appreciation of his testimony, however, the trial court rejected him as being the witness of the crime and recorded that the possibility of PW-5 Mitthu not being present at the time of the occurrence cannot be ruled out.

14. Testing the testimony of PW-5, we may further note that apart from his presence being doubtful on the spot, as noted by the trial court, the possibility of this witness being tutored also cannot be ruled out. As rightly noted by the trial court, PW-5, the child witness, in the cross-examination, stated that he narrated the entire incident to the Investigating Officer on the very next morning of the death of his father when the officer came to the village

in the presence of Ram Preet Dhobi (PW-1), Ram Preet Singh Pradhan (PW-4) and Bechu (PW-2). As per the statement of PW-5, he intimated the Investigating Officer that two accused persons namely the appellants herein were present in the room of his house on the fateful night. On the contrary, no such statement was recorded by the Investigating Officer and when crossed, Investigating Officer PW-6 categorically stated that no such statement was made to him.

PW-5, the child witness further stated in his examination-in-chief that he was threatened by the accused persons/the appellants herein that he should not tell anything to anyone otherwise he would be killed. This part of the statement was not found in the previous statement of PW-1 (Section 161 Cr.P.C. statement) as is evident from the cross-examination of PW-5 and the Investigating Officer (PW-6). PW-5 then stated that when he woke up, he lit up the lamp, to bring in the source of light to prove that he saw the accused-appellants. In cross, this witness (PW-5) stated that he had shown the Dibbi and the matchbox, which was lit up by him but it was not seized by the Investigating Officer. The Investigating Officer (PW-6), to the contrary, had categorically denied that no such Dibbi or matchbox was found by him at the place of the incident, i.e. the room wherein the incident had occurred.

Further statement of the child witness is very important to consider wherein he stated that after the accused persons went away, he called his father who did not speak and then he went to the village. Upon this statement of PW-5 in his examination-in-chief, when he was asked by the Court repeatedly as to what did he do after coming out, PW-5 remained silent and lastly replied to the Court that villagers were collected. In cross, the child witness stated that after the accused persons went away, Ram Preet Singh Pradhan (PW-4) reached at the spot and no one else had reached. He (PW-5) then told that he informed Ram Preet Singh Pradhan that the accused-appellants namely Brij Kishor and Jiut were inside the room and that apart from Ram Preet Singh Pradhan he did not talk to anyone on the fateful night and that in the next morning, he was sent by the Pradhan to the Police Station. The statement of PW-5, the child witness about coming out of his house after the accused had left, at about 11:00 PM on his own, is unbelievable, firstly, that being a child of seven years coming out of the house in the odd hours was not normal and further that his version of coming out of his house is lacking in material details and secondly, his version that Ram Preet Singh Pradhan (PW-4) came in the night is in contradiction with the statement of PW-4 who stated that he came to know through Ram Preet Dhobi (PW-1) in the next morning/afternoon that the accused persons namely Jiut and Brij Kishor were witnesses by him while they were coming out of the house of deceased Pitamber at about 10:30 PM. On confrontation about his statement under Section 161 Cr.P.C., PW-4 admitted that in his statement he had mentioned the names of accused persons, having been last seen by PW-1 Ram Preet Dhobi coming out of the house of deceased Pitamber. The statement of Gram Pradhan was recorded at the time when inquest was prepared, i.e. in the morning of 30.3.1986. On confrontation on this aspect, the Investigating Officer (PW-6) stated that he could not record the statement of the child witness (PW-5) before 3.4.1986 as the child was scared and was not in a position to make a statement.

15. From the above noted facts, it is evident that the Investigating Officer was not intimated by anyone on the next day about the presence of the accused persons/appellants in the house of deceased Pitamber having been seen by PW-5. The statement of PW-6, the Investigating Officer that the child witness (PW-5) was not in a position to make a statement prior to 3.4.1986 is in complete contradiction to the testimony of the child, wherein he stated that he gave the details of the incident on 30.3.1986, i.e. the date of report of the death in the presence of the witnesses namely Ram Preet Dhobi (PW-1) and Ram Preet Singh Pradhan (PW-4) and Bechu (PW-2). The trial court had rightly concluded that the inconsistencies in the statement of the child witness (PW-5) could have been ignored giving him advantage of being a child, had his statement been plain and simple but the statement of this witness is full of material improvement on vital points of the case.

As noted above, PW-5 could not explain as to what did he do after coming out of the house when the accused persons left and his father did not speak on his calling. The source of light, allegedly created by PW-5 could not be proved by the prosecution. The statement of the child witness (PW-5) that the entire village was collected and then that the Gram Pradhan only had reached in the night and the entire incident was narrated to him, could not be proved by the prosecution, inasmuch as, the Gram Pradhan (as PW-4) stated that he raised suspicion about involvement of the appellants only on the information passed on to him by the witnesses of last seen namely PW-1 and PW-2.

It was also rightly noted by the trial court that the recovery of blood soaked vest was made by the Investigating Officer on 2.4.1986, i.e. after a period of two days from the date of recovery of the body in the house though the blood soaked vest, according to the version of the child witness (PW-5), was given to the Investigating Officer on the very next morning, i.e. on 30.3.1986. As per the Investigating Officer, the vest of the child witness was given to him by one Haribhajan and the recovery memo Exhibit Ka-3 does not contain signature or thumb impression of the child to prove that it was given by him to the Investigating Officer. Further from the testimony of the child witness, we may note that he stated that he was sleeping with his father over a 'Kathri' covering themselves with a 'Rajai' (quilt). The Investigating Officer, on the other hand, stated that he did not find any 'Rajai' (quilt) at the place of the incident and only one "Kathri' was found. We may also note that a suggestion was given to the Investigating Officer that the child witness was not present in the village on 1.4.1986 and 2.4.1986 and that he was called from the house of his maternal aunt which was denied by him (PW-6).

It may be noted from the statement of the child witness that he stated that his maternal aunt was living in another village and he and his father (the deceased) went to the village of his aunt and came only 2-4 days prior to the incident. PW-5 though denied that he was in the house of his aunt on the date of the incident but admitted that his maternal aunt was alive on the date when he made deposition in the Court. PW-4, the village Gram Pradhan had admitted that after death of the deceased, the civil case for cancellation of the sale deed instituted by the deceased was being pursued by him by getting himself appointed as the guardian

of the child Mitthu, i.e. PW-5, the son of the deceased. Giving explanation for this conduct, PW-4 stated that since the child had no one as such he was pursuing the case, which fact is found incorrect from the testimony of PW-5 recorded after the statement of the Gram Pradhan. PW-5, the child witness further admitted that he was living with Ram Preet Singh Pradhan (PW-4) and came to depose in the Court alongwith the Gram Pradhan Ram Preet Singh though stated that he was not tutored by PW-4, about what was to be stated in the Court.

Lastly, it may be noted that PW-5 admitted that he was not attending any school and on a question he wrongly answered that there are ten months in one year.

16. For the aforesaid, on a careful evaluation of the testimony of PW-5, it can be concluded that the presence of this witness in the room of the house wherein dead body was found, on the fateful night i.e. 29/30.3.1986, is highly doubtful. It is hazardous to rely on the testimony of the child witness as it was not available immediately after the occurrence and the possibility of coaching and tutoring this witness (PW-5) by the Gram Pradhan namely PW-4 with whom he was residing also is highly probable.

17. The trial judge has recorded the demeanour of the child. The child was vacillating in the course of his deposition. From a child of seven years of age, absolute consistency in deposition cannot be expected but if it appears that there was possibility of his being tutored, the Court should be careful in relying on his evidence.

18. Agreeing with the findings of the trial court, on the doubt raised about the credibility of child witness (PW-5) we may further note that it is settled that while assessing evidence of the child witness, the Court must carefully observe his/her demeanor to eliminate likelihood of tutoring. As a rule of prudence, it is desirable to see corroboration of evidence of a child witness from other reliable witness on record. The Court can rely upon the testimony of a child witness, if the same is credible, truthful and is corroborated by other evidence brought on record.

In a recent decision of the Apex Court in **Digamber Vaishnav and another vs. State of Chhattisgarh4**, while noticing the principles of appreciation of the testimony of a child witness, it was noted by the Apex Court that Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one. It was noted that the evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. The requirement of adequate corroboration of the testimony of a child witness before placing reliance upon the same is more a rule of practical wisdom than law. [Reference Paragraphs 22 and 23]

In his legendary style, Justice Y. V. Chandrachud as he then was stated in **Suresh vs. State of U.P.5** as follows:-

"(11).....xxxxxxxxxxxxxxxxxx..... Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life."

19. We may further note that the child witness PW-5 did not claim himself to be an eye-witness of the incident, as according to him, he had only seen the accused persons/appellants inside the room on the fateful night where the dead body was found and as per his version he was threatened by the accused persons not to speak to anyone and they went away.

20. As noted above, we do not find corroboration of the testimony of child witness from any other evidence on record. Rather for the inconsistencies/embellishments in his statement and the possibility of the child witness (PW-5) being a tutored witness, we are afraid to rely on his testimony as a witness of last seen of the accused persons/appellants at the place of the incident on the fateful night. The crux is that PW-5, the child witness could not be found to be trustworthy and his testimony cannot be read in favour of the prosecution.

21. Now we are left with two witnesses namely PW-1 & PW-4. PW-1 claim himself to be the witness of last seen of the accused persons/appellants coming out from the house of the deceased on the fateful night.

22. We may note that the trial court had heavily relied upon the testimony of this witness (PW-1) of last seen and, in fact, solely relied on his statement to conclude that it was sufficient to connect the accused persons with the crime and that as no explanation was offered by the accused persons in respect of their presence in the house of the deceased they be held guilty. The trial court has further noted that the motive to commit the crime because of a civil litigation pending between the accused-appellants with the deceased was proved by the prosecution and the accused-appellants had no business to be at the residence of the deceased at the odd hours. No explanation had been given by the accused in respect of their presence in the house of the deceased and the circumstance that the deceased was found dead in the morning and his death was proved to be homicidal, the chain of circumstance put forth by the prosecution was complete and fully established the guilt of the accused leading to no other conclusion.

We are afraid to agree with the aforesaid findings returned by the trial court for the reasons noted herein below.

23. Before testing the testimony of PW-1 and PW-4, independently one by one, we may record that this is a case of circumstantial evidence and there is no eye-witness account. It was the duty of the prosecution to prove all the circumstances to form a complete chain unerringly pointing towards the guilt of the accused-appellants leaving all reasonable hypothesis of a third person entering into the scene of the crime. As has been held by the Apex Court in **Sharad Birdhichand Sarda vs. State of Maharashtra6**, the circumstances from which conclusion of guilt is to be

drawn should be fully established, "must" and "should" and not "may be" established.

The five golden principles constituting of the proof of the case based on circumstances, laid down by the Apex Court in the said case are noted as under:-

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra, (1973) 2 SCC 793, where the following 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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

It is, thus, settled that each and every circumstance brought in the chain of circumstance by the prosecution should be fully established beyond all reasonable doubt.

It was noted in **Harbeer Singh** (supra) that:-

"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the 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. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11

SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242]."

As regards, the evidence of last seen or theory of last seen, it is stated by the Apex Court in **Nizam and another vs. State of Rajasthan7** that the "last seen alive" or the "last seen theory", undoubtedly is an important link in the chain of circumstance that would point towards the guilt of the accused with some certainty. The logic is that the "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is, however, noted therein that the settled principle of the law is that it is not prudent to base the conviction solely on "last seen theory". The evidence of last seen, i.e. "last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

As noted in **State of Rajasthan vs. Kashi Ram8**, the last seen theory is based on Section 106 of the Evidence Act which cast an obligation on the accused to offer a reasonable explanation in discharge of the burden placed on him. If the accused fails to adduce any explanation or offers a false explanation, the Court can consider it as an additional link in the chain of circumstances proved against the accused, so as to complete the chain. However, Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. [Reference Paragraph '23']

24. Meaning thereby, it is the duty of the prosecution to prove the evidence of last seen beyond all reasonable doubt by the testimony of a witness who is truthful, consistent and free from embellishments.

25. In light of the above legal principle, when we examine the balance evidence of the prosecution namely PW-1 and PW-3, we find that as per the statement of PW-1, he had seen the accused persons namely the appellant herein Brij Kishor alongwith the co-accused coming out of the house of deceased Pitamber on the fateful night at about 10:30 PM. According to the version of PW-1, he had seen the accused persons on lighting the torch, which he was carrying while standing in front of the house of Bechu (PW-2). Upon seeing the accused persons, he confronted them by asking as to what were they doing at the said place at that odd hours. The accused replied that a litigation relating to an agricultural field was going on and they went to the house of deceased Pitamber to settle the same by compromise. After saying that the accused persons went to their way. On the next day, he came to know that Pitamber was killed.

As per the testimony of PW-1, when the police came at the spot, he was not present there and was in his brick kiln. He was also not present when the body was sent for the postmortem. He came to know in the brick kiln from a villager that the body was taken for the postmortem at about 10:00 AM. His brick kiln was at a distance of two furlong from the house of deceased Pitamber. PW-1, however, stated that the same day when body was taken away, in the evening, he told the Gram Pradhan that he had seen the accused persons coming out of the house of the deceased in the night and prior to telling the said fact to the Gram Pradhan, it was not disclosed to anyone. When confronted, PW-1 stated that on the third day of the incident, when Gram

Pradhan passed on this information to the police, he was called in the village by the Investigating Officer and his statement was then recorded in the presence of the Gram Pradhan. PW-1 further stated that when he was interrogated by the Investigating Officer, Bechu (PW-2) was not present.

26. We may further note from the testimony of PW-4, the village Gram Prahdan Ram Preet Singh that as per his version, the fact of last seen was intimated to him by PW-1 Ram Preet Dhobi on the next day of the incident though in cross, PW-4 could not fix the time when the said fact was disclosed by PW-1. He however, stated that the inquest was conducted at about 9:30 AM and the Investigating Officer recorded his statement at the time when the inquest was written and that the time of the same was 9:30 AM. He was then confronted that whether he told the Investigating Officer about PW-1 having seen the accused persons coming out of the house of the deceased, he stated that since that was written in his statement by the Investigating Officer, he would have told him but was not sure about the time when that statement was made.

27. To ascertain as to when the statement of PW-4, the Gram Pradhan was recorded by the Investigating Officer, who was also a witness of the inquest, we have gone through the Case Diary.

28. A perusal thereof indicates that the Case Diary, Parcha No. 1 started from 1.4.1986 when the case under Section 302 IPC was registered. We may also note, at this juncture, that as per the statement of PW-8, the Head Moharrir; GD entry No. 27 of registration of the case was made on 1.4.1986 at about 20:45 Hours (10:45 PM). From a perusal of the Case Diary, it is evident that the Parcha No. 1 of the Case Diary commenced at about 20:45 Hours on 1.4.1986 and the inquest and the postmortem were copied therein. The statement of the Gram Pradhan as a Panch witness was recorded in the Case Diary, Parcha No. 2 on 2.4.1986 which began from 7:00 AM.

29. From a reading of the statement of the Gram Pradhan under Section 161 Cr.P.C., we may note that pressing his suspicion about the cause of the death of deceased, PW-4, Ram Preet Singh Pradhan stated that on getting information of the death of Pitamber at about 10:45 PM on 29.3.1986, he also went to the spot and saw that blood was coming out from the mouth of the deceased and it was flowing at the place where his son was sleeping. The vest of the son of the deceased was soaked with blood but the child could not say anything because of the fear and was only crying. The village Chaukidar Nihor and Ram Kishan Dhobi as also one Haribhajan were sent to the police station to give the intimation. The accused Jiut and his family members were creating rumor that Pitamber died on his own death due to TB and were creating a scene so that no information could be given to the police but when the Investigating Officer came, the inquest was done and the body was sent for postmortem. The accused persons also tried to get the postmortem report in their favour but when they failed, they absconded. PW-4 then stated that he started making enquiry on his own and then Ram Preet Dhobi told him that by chance he had seen the accused persons coming out of the house of the deceased in the torch light and also asked them the reason for going there.

30. As per the statement of PW-4 in the examination-in-chief, the fact of last

seen of the accused persons coming out from the house of the deceased was told by PW-1 Ram Preet Dhobi on the next day of the incident, i.e. on 30.3.1986. From the version of PW-4, he had intimated the Investigating Officer about the fact of last seen transpired by PW-1, the witness of last seen, who also came to know on 30.3.1986 that the deceased was killed, as per his own version in his examination-in-chief.

31. From the statements of PW-1 and PW-4, it seems that they got suspicious about the death of Pitamber on the very next morning when his dead body was found, i.e. on 30.3.1986 but confirmation of homicidal death could be made only after the postmortem report was received, which was conducted at about 2:00 PM on 30.3.1986. It is established from the record that PW-4 Ram Preet Singh Pradhan was a witness of inquest, but it is not explained by the prosecution as to why the Investigating Officer took the whole next day, i.e. 1.4.1986 in registering a case under Section 302 IPC and recording statements of material witnesses which was recorded on the next day, i.e. 2.4.1986. It is evident from the record that the accused persons were in the village on the next day of the incident.

32. It is evident from the record that the Gram Pradhan, i.e. Ram Preet Singh had been instrumental in solving the entire case by introducing the presence of child witness, PW-5, in the house, which was found doubtful, both by the trial court and also by us and further with the introduction of Ram Preet Dhobi (PW-1) as a witness of last seen. The Gram Pradhan PW-4 during the continuation of the trial was also contesting the civil litigation of cancellation of the sale deed as a guardian of the minor son of the deceased. The statement of Gram Pradhan that since there was no one in the family of the deceased so he was contesting the civil case, is found false from the statement of the child witness that his maternal aunt was alive at the time of deposition and 2-4 days prior to the incident, he and his father (deceased) came back from the house of his maternal aunt. What interest the Gram Pradhan had in getting the accused persons convicted can be inferred from the circumstances of the present case, wherefrom it is evident that he was taking active interest in getting cancellation of the sale deed of a land which was purchased by the accused persons namely Jiut and Brij Kishor, by getting himself as the sole guardian of a young child who was introduced in the witness-box as a witness of seeing the accused inside his house in the odd hours.

33. As to the conduct of PW-1, the witness of last seen, he stated that he came to know in the next morning that Pitamber was killed but he told the Gram Pradhan for the first time about the fact of seeing the accused persons coming out of the house of the deceased and that his statement was recorded by the Investigating Officer on the third day at the instance of the Gram Pradhan in his presence. From this part of the testimony of PW-1, it is evident that the statement of PW-1 was recorded by the Investigating Officer at the instance of the Gram Pradhan. The version of PW-1 that when his statement was recorded, the other witness of last seen namely Bechu (PW-2) who had turned hostile was not present, is found false from a perusal of the Case Diary which records that the statements of Ram Preet Singh Pradhan (PW-4), Bechu PW-2 and Ram Preet Dhobi namely PW-1 were recorded on the same day, i.e. 2.4.1986 at the place of the incident, when the investigation was commenced by the

Investigating Officer at about 7:00 AM. As per the sequence in the Case Diary, after recording statement of the first informant Ram Nihor Chaukidar, the statements of Panch witnesses were recorded and the Investigating Officer had then recorded the statements of witnesses of last seen namely Bechu (PW-2), Ram Preet Dhobi (PW-1).

34. Having analysed the statements of PW-1 and PW-4 conjointly, we may further note that the testimony of PW-4, the Gram Pradhan is a hearsay evidence, he did not project himself as the witness of any of the incriminating circumstance brought against the accused persons by the prosecution except that a case for cancellation of the sale deed was instituted by deceased Pitamber against the accused persons. We may also note from the cross-examination of PW-4 that he stated on his own that deceased Pitamber had no money to contest the case and he was begging for the money from the villagers and he (PW-4 Pradhan) also helped him financially.

35. Another witness of last seen Bechu had turned hostile and did not support the prosecution at all.

36. The motive of commission of crime, i.e. civil dispute instituted by the deceased against the accused persons though stated but cannot be said to be so strong so as to commit the murder, inasmuch as, from the version of PW-4, it transpires that deceased Pitamber had no money to contest the suit. Moreover, the suit was for cancellation of the sale deed executed in favour of the accused persons. It had not been established nor brought by the prosecution that the accused persons did not get possession of the purchased property and, thus, had immediate motive to commit the crime. It has also not come in the evidence nor can it be inferred from the circumstances brought forth by the prosecution that the suit had matured to the stage that the accused persons had an apprehension that they would loose the purchased land. Rather as per the version of PW-4, the Gram Pradhan, he was contesting the suit even after three years of the occurrence, when the deposition of the witnesses was recorded in the trial court. Thus, the prosecution though stated the motive for commission of the crime but had not established it by bringing forth such circumstance which would be strong enough to be the immediate cause of commission of the offence. Mere pendency of a civil suit between the deceased and the accused persons cannot be said to be a strong motive so as to treat it as a circumstance fully established for commission of the crime. Mere narration of motive in a case of circumstantial evidence without bringing anything further to prove the same cannot be taken as a circumstance to establish the case of the prosecution. [Reference **Bhagwan Singh and others vs. State of M.P.9** Para 32]

37. It is settled that in a case of circumstantial evidence, motive may be considered as a circumstance, which is relevant factor for the purpose of assessing evidence, in such cases where there is an unambiguous evidence to prove the guilt of the accused. It is true that the motive is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime but in a case like the present one where the only motive narrated is the pendency of a civil litigation where the accused persons were on beneficial side, in absence of unambiguous evidence, it cannot be treated to be a circumstance

which is such as to create a high degree of probability that the offence was committed by the accused persons.

38. As noted above, PW-1 cannot be found to be an independent witness but seems to be a witness prompted by the Gram Pradhan (PW-4) who was behind the entire prosecution story. The statement of PW-1 being the witness of last seen is, thus, not found to be credible. Even otherwise, PW-1 could not establish the reason for his presence at the house of Bechu (PW-2) wherefrom he had allegedly seen the accused persons coming out from the house of the deceased Pitamber. On confrontation of this witness, he admitted that Bechu was not present in the Brick Kiln on the next day when the dead body was found. The conduct of this witness in not coming forward to intimate the Investigating Officer about having seen the accused persons on the very next day when he got the information that the deceased was killed also shakes the credibility of this witness. The explanation offered by him that he was present in his brick kiln and for the fear that he would be abused by the police he did not go to the house of the deceased even on getting information that the police had reached there, is found to be an effort of the prosecution to fill up the lacuna. Also the presence of PW-1 at the place wherefrom he had seen the accused coming out from the house of the deceased was not natural. He could only be kept in the category of a chance witness whose testimony is to be evaluated with caution and circumspection before resting the conviction on the same.

39. We find it profitable to note the observations in Para '23' in **Harbeer Singh** (supra).

"23. The defining attributes of a "chance witness" were explained by Mahajan, J., in the case of Puran Vs. The State of Punjab, AIR 1953 SC 459. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence."

The observations in Para '47' in **Suresh and another vs. State of Haryana1**0 are also relevant to be noted hereunder:-

"47. .....xxxxx.....Nonetheless, the evidence of a chance witness requires a very cautious and close scrutiny. A chance witness must adequately explain his presence at the place of occurrence. [refer to Satbir v. Surat Singh, (1997) 4 SCC 192; Harjinder Singh v. State of Punjab, (2004) 11 SCC 253]. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded [refer Shankarlal v. State of Rajasthan, (2004) 10 SCC 632]. The behavior 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. [refer Thangaiya v. State of Tamil Nadu, (2005) 9 SCC 650]. "

40. The prosecution has, thus, failed to establish beyond reasonable doubt and the presence of PW-1 near the place of the incident on the fateful night so as to establish that PW-1 was the witness of last seen of the accused coming out of the house of the deceased while he was standing outside the house of Bechu.

41. In the totality and facts and circumstances of the present case, we find that the prosecution has not been able to bring the circumstances of implication of the accused-appellant in such a manner so as to establish their guilt in the commission of crime beyond reasonable doubt.

42. We may also record that the role of Investigating Officer in the whole investigation process is also questionable.

43. Record shows that even after the postmortem conducted on 30.3.1986 at about 2:00 PM, the Investigating Officer whosoever was Incharge, did not proceed with the investigation for more than 24 hours and the case was registered under Section 302 only on 1.4.1986 in the night at about 20:45 hours when the Investigating Officer only extracted the inquest and the postmortem in the Case Diary. The entire investigation was proceeded only on 2.4.1986 when the Investigating Officer went on the spot, recoveries were then made, the site plan was prepared. As per the statement of the Investigating Officer, he inspected the site of the incident after recording the statements of the witnesses. As stated in the examination-in-chief, PW-6 prepared the site plan after recording statements of Bechu, Nihor, Mitthu, Ram Preet Singh Pradhan, Ram Preet Dhobi. The site plan is dated 2.4.1986.

As per the statement of the Investigating Officer, he prepared the site plan at the instance of child witness Mitthu, which fact is further evident from the narration in the site plan wherein it is stated that the place "A" was shown by child witness Mitthu as the place where deceased was killed by throttling and from the said place itself, blood stained and plain earth were collected previously.

44. No recovery memo of the blood stained and plain earth was brought on record by the prosecution in consonance with the version of the Investigating Officer recorded in the site plan at Item No. 'A' of the index. The statement of the child witness, however, was recorded on 3.4.1986, a day after recording the statements of all other witnesses and completion of papers pertaining to the investigation. As per the first version of the child witness recorded in the site plan by the Investigating Officer prepared on 2.4.1986, he showed the place where the accused persons had killed the deceased by throttling his neck. The explanation offered by the Investigating Officer for delay in recording the statement of the child witness that the child was shaken by the incident and was not in a position to make a statement belied from the own version of the Investigating Officer recorded in the site plan as noted above.

45. Further the Investigating Officer, in cross, admitted that a 'Kathri' made of pieces of cloth was found from the place of the incident which was on a 'Puwal' but no recovery memo of the said 'Kathri' was prepared. The blood soaked vest of the child witness was not recovered on the first day of the investigation, i.e. 30.3.1986 and it was not handed over by the child witness PW-5 as against his testimony. The said vest was handed over on 2.4.1986 by one Haribhajan as noted in the recovery memo Exhibit Ka-3 and the statement of the Investigating Officer PW-6. As per the statement of the Investigating Officer, the said vest was sent to FSL for chemical examination but the results of the said examination was not brought by the prosecution before the trial court. The prosecution has, thus, failed to prove the recovery of blood soaked vest from the spot

of the incident as is narrated in the recovery memo Exhibit Ka-3 which admittedly does not contain the signatures or thumb impression of the child witness Mitthu.

46. As per the statement of the Investigating Officer, the investigation was initially conducted by SI Narendra Pratap Singh (PW-7) who had completed the inquest proceedings. The investigation was handed over to PW-6 after the receipt of the postmortem report. It could not be explained by the prosecution as to when the postmortem was conducted on 30.3.1986 at about 2:00 PM and report was received, at what time the investigation was handed over to PW-6. PW-6, the Investigating Officer who started the investigation on 1.4.1986 at about 20:45 Hours did not explain this gap.

Further from the statement of the previous Investigating Officer namely S.I. Narendra Pratap Singh (PW-7), it is evident that after reaching the spot on 30.3.1986, he only conducted the inquest and sent the body for the postmortem. It is not known as to who collected the blood stained and plain earth from the spot of the incident and why it was not produced in the evidence. PW-7 admittedly did not record the statement of anyone on the spot and only noted in the evidence that people present on the spot including the inquest witnesses raise apprehension about the cause of death.

47. It was a case of circumstantial evidence, the responsibility of the Investigating Officer to investigate the murder was more onerous, inasmuch as, he would be the first person to enter into the scene of crime and collect all incriminating circumstances/material so as to solve the crime so as to bring the culprits before the Court. In the instant case, it is evident from the record that the Investigating Officer (PW-6) who commenced investigation after two days of the incident instead of doing investigation on his own, was guided by PW-4 Ram Preet Singh Pradhan whose statement was recorded on the first day of the commencement of the Investigation, i.e. 2.4.1986. The entire investigation, as is clear from the record, proceeded in the manner in which it was prompted by Ram Preet Singh Pradhan namely PW-4. The investigation in this case, as is evident, was guided only in one direction just as to implicate the accused persons namely Jiut and Brij Kishor being the culprits since the beginning on the suspicion raised by the Gram Pradhan and was not independent at all. A vitiated investigation would ultimately prove to be a precursor of miscarriage of criminal justice. In such a case the Court would simply try to decipher the truth only on the basis of guess or conjectures as the whole truth would not come before it.

48. The suspicion raised by the Gram Pradhan because of the pendency of the civil litigation between the accused persons and the deceased had been the reason for the implication in the instant case. Though the needle of suspicion was pointed at the accused-appellants but the legal evidence in the shape of definite circumstances pointing unerringly towards the guilt of the accused-appellants could not be brought forth by the prosecution.

It is well settled that the suspicion cannot take the place of proof and even if the circumstances on record is a pointer to a strong suspicion, it in itself is not sufficient to lead to the conclusion that the guilt of the accused stands established beyond reasonable doubt. [Reference

Ganpat Singh vs. State of Madhya Pradesh11 Paragraph '13']

49. In the entirety of the facts and circumstances of the instant case, we are afraid to agree with the conclusion drawn by the trial court that the chain of circumstance is complete and fully establishes the guilt of the accused persons leading to no other conclusion and that the accused had failed to furnish any explanation in respect of their presence in the house of the deceased. The reason being that the presence of the accused persons in the house of the deceased could not be established once the trial court itself had rejected the evidence of PW-5, the child witness.

50. As regards the testimony of PW-1 and PW-4, the trial court has committed an error in reading both the testimonies together and not evaluating the statement of PW-1, the witness of last seen, independently. The finding recorded by the trial court that PW-4 Gram Pradhan had confirmed that the fact of last seen was told by PW-1 to him on the day following the incident and that it was not believable that PW-1 was under possible pressure or influence of Ram Preet Singh Pradhan so as to falsely implicate the accused persons in the case of murder, is not based on proper appreciation of the evidence on record rather more out of the own imagination or belief of the trial court. The said finding is based on conjectures and surmises for the fact that the trial court did not evaluate the statement of PW-1 independently so as to analyse as to whether he (PW-1) had established his presence at the place wherefrom he allegedly had last seen the accused persons or whether his presence at the said place was natural. The conduct of PW-1 Ram Preet Dhobi in not coming forward to make a statement before the Investigating Officer (PW-7) who conducted inquest on the very first day and making a statement only at the instance of the Gram Pradhan after two days of the receiving of the dead body has also been completely ignored by the trial court. The trial court has wrongly treated the Gram Pradhan (PW-4) as a wholly reliable witness and conveniently ignored that he was also an interested witness, who was taking undue interest in the civil litigation initiated by the deceased against the accused persons, apart from being the creator of the entire prosecution story, since the beginning on his own suspicion. He (PW-4) cannot be treated to be an independent and reliable witness so as to base the conviction on his testimony.

51. In the totality of the facts and circumstances of the present case, we find that because of the irresponsible attitude of the Investigating Officers (PW-6 and PW-7), the lopsided investigation made by PW-6 has resulted in causing serious prejudice to both the prosecution as also the defence. The omission on the part of the Investigating Officer (PW-6) has result in miscarriage of justice as it left the Court only to guess-work rather than helping it to decipher the truth.

52. We also find it profitable to note the observations of the Apex court in **The State of Punjab vs. Jagir Singh, Baljit Singh and Karam Singh12** wherein while laying down the mode of appreciation of evidence and the general principles regarding presumption of innocence, it was observed by the Apex court that a criminal trial is not like a fairy tale wherein one in free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused

arraigned at the trial is guilty of the crime with which he is charged. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses.

Reference has been made to the decision of the Apex Court in **Kali Ram vs. State of Himachal Pradesh13**. Relevant paragraph '25' is quoted hereunder:-

"25. Another golden thread which runs through the web of the 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 favorable to the accused should be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with, the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either-so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. As mentioned by this Court in the case or Slate of Punjab v. Jagir Singh, (Crl. A. No. 7 of 1972 d/ August 6, 1973) a criminal trial is not liked a fairy tale wherein one is free to give flight to one' In arriving at the conclusion about the guilt of the imagination and phantasy. accused charged with the evidence by the yardstick of witnesses. Every case own facts. Although the. to the accused the courts commission of a crime, the court has to judge the of probabilities, its intrinsic worth and the animu, in the final analysis would have to depend upon it benefit of every reasonable doubt should be given should not at the same time reject evidence which is ex facie trustworthy or grounds which are fanciful or in the nature of conjectures."

We may further note the observations in **Latesh alias Dadu Baburao Karlekar vs. State of Maharashtra14** noted in Para '54' of the report in Suresh and another vs. State of Haryana (supra):-

"54. .....xxxxxxxxxxxxxx.....In Latesh v. State of Maharashtra, (2018) 3 SCC 66 , this court had observed that:

"46.... When you consider the facts, you have a reasonable doubt as to whether the matter is proved or whether it is not a reasonable doubt in this sense. The reasonableness of a doubt must be a practical one and not on an abstract theoretical hypothesis. Reasonableness is a virtue that forms as a mean between excessive caution and excessive indifference to a doubt."

53. On a careful appreciation of the evidence on record, with the degree of caution and circumspection required in the

facts of the instant case, we reach at an irresistible conclusion that the prosecution has failed to establish the guilt of the accused-appellant namely Brij Kishor herein, beyond all reasonable doubt. The benefit of doubt obviously has to go to the accused-appellant Brij Kishor.

The judgment and order dated 4th August, 1989 passed by the Ist Additional District & Sessions Judge, Gorakhpur in Sessions Trial No. 189 of 1987 is, therefore, liable to be set aside and the appeal deserve to be allowed.

We, therefore, **allow** this appeal while setting aside the judgment of the trial court.

The accused-appellant Brij Kishor is in jail. He shall be released from the jail forthwith, if he is not wanted in relation to any other crime.

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

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

Before parting with this judgment, we record our appreciation to Sri Raunak Chaturvedi learned Amicus Curiae who rendered valuable assistance to the Court. The Court quantifies Rs. 15,000/- (Rupees Fifteen Thousand only) to be paid to Sri Raunak Chaturvedi, learned Advocate as fee for his precious time provided in preparation and hearing of this Criminal Appeal. The said amount shall be paid to him by the Registry of the Court within the shortest possible time.

(2022)06ILR A565
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No.1862 of 1989

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

Counsel for the Appellant:
Sri P.N. Lal, Sri R.L. Varma

Counsel for the Respondent:
D.G.A., A.G.A.

Criminal Law- Indian Evidence Act, 1872- Sections 3 & 154- Hostile Witnesses- 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 relevant parts of evidence of a hostile witness can be relied upon by the trial court.

Indian Evidence Act, 1872- Sections 3 & 33 - Non-completion of cross-examination of the witness- 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 - The part of the testimony of a witness whose cross-examination is not over, would not make the entire examination as inadmissible. The evidence of the hostile witness who after examination-in-chief had abandoned the case of the prosecution because of the long delay in

completing his testimony, cannot be read in favour of the defence or against the prosecution. It is for the Court to utilize the said evidence appropriately and decide that the issues over which the evidence is completed could be read in evidence and the issues for which the cross-examination is not over, as inadmissible.

Where the cross examination of a witness who has turned hostile has not been completed, then it is the duty of the Court to consider the issues over which the evidence has been completed as admissible and also those issues for which the cross- examination has not been completed as inadmissible- Evidence of a hostile witness whose cross-examination has not been completed cannot be discarded.

Indian Evidence Act, 1872- Sections 3 &154- Hostile Witness - The place of the incident was also proved by this witness namely PW-1 in his cross-examination. Nothing contrary could be found from the record with this part of testimony of PW-1 which stood proved from his incomplete cross-examination. The above noted part of the testimony of PW-1, therefore, is to be appreciated alongwith the surrounding circumstances of the case, i.e. the other evidence on record.

The relevant parts of the testimony of a witness, whose cross-examination remained incomplete, can be appreciated along with the other evidence by the trial court and the same would not be inadmissible in evidence.

Criminal Appeal rejected. (E-3)

Case law/ Judgements relied upon:-

1. Rajesh Yadav & anr. etc. Vs St. of U.P, 2022 (3) ADJ (SC)

2. C. Muniappan Vs St. of T.N (2010) 9 SCC 567

3. Jodhi @ Ayodhya Vs St. of U.P 2014(87) ACC 543

4. St. of U.P. Vs Ramesh Prasad Misra & anr. (1996) 10 SCC 360

5. Subbu Singh Vs St. by Public Prosr. (2009) 6 SCC 462

6. Vinod Kumar Vs St. of Punj. (2015) 3 SCC 220

7. St. of U.P. Vs Moti Ram & ors. (1990) 4 SCC 389

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

1. Heard Sri R.L. Varma learned counsel for the appellant and Sri Roopak Chaubey learned A.G.A. for the State-respondent.

2. This appeal is directed against the judgment and order dated 11.8.1989 passed by the Special/Additional Sessions Judge, Shahjahanpur in Sessions Trial No. 470 of 1987 (State vs. Ram Chandra) arising out of Case Crime No. 235/1987, under Section 302 IPC, Police Station Jalalabad, District Shahjahanpur whereby appellant Ram Chandra has been convicted of the offence under Section 302 IPC and sentenced to life imprisonment.

3. The first information report of the incident, occurred on 25.7.1987 at about 6:00 PM, was lodged by Puttu son of Lakhan Kahar (PW-1) on the same day, i.e. 25.7.1987 at about 22:15 hours. As per the case of prosecution, the wife of the first informant named as Smt. Laraiti (deceased) was the daughter of one Jodha Kahar whose only son Maiku Lal had died a year before the incident and the wife of Jodha Kahar had predeceased him. The deceased Maiku Lal had no children. Jodha Kahar was survived by two daughters Laraiti, wife of the first informant and Kalawati mother

of the appellant. A civil case about the inheritance of 40 Bighas of land of deceased Jodha was going on between the wife of the first informant and sons of his brother-in-law, namely Ram Chandra, Lala Ram and Roop Ram, residents of Village Mishripur, P.S. Sadar Bazar, District Shahjahanpur, wherein 27.7.1987 was the date fixed.

It is the case of the first informant that the said civil litigation was the cause of enmity between the parties. On 25.7.1987 at about 6:00 PM, the wife of the first informant Smt. Laraiti was collecting "Nimouri" from the Neem tree of one Raja Ram son of Rameshwar Dayal near the village. From the North side, Ram Chandra son of Jodha came having 'tabal' in his hand and as soon as he reached near Smt. Laraiti, he hit in her head by 'tabal'. The first informant, Ashiq Ali son of Munir, Krishna Pal, Chhote son of Maiku, Badri son of Sipahi and other villagers ran towards him and at that time the accused-appellant gave another blow of 'tabal' on the neck of the deceased and ran away towards the North-East direction. The first informant and the witnesses chased him but could not nab him. The injured Smt. Laraiti was brought to her home and while they were arranging for the vehicle to take her to the hospital, she died at around 8:30 PM.

4. The factum of lodging of the written report on the date of the incident by PW-1 (the first informant) was proved by PW-5, the Head Constable posted in P.S. Jalalabad, District Shahjahanpur. He stated that the written report was given to him by the first informant (PW-1) and on the basis thereof, Check report was prepared as Check No. 100. PW-5 proved the Check report being in his handwriting and signature, marked as Exhibit Ka-2. The GD entry of the FIR was made at GD Rapat No. 75 Time 22:15 Hours on 25.7.1987, the original of which was produced in the Court. The certified copy of the carbon copy of the GD Rapat entry, prepared in the same process was filed and proved as Exhibit Ka-3. PW-5 had denied the suggestion of the report having been prepared Ante-time.

5. The inquest of the dead body was conducted on 26.7.1987 at about 8:30 AM in the house of the deceased and the inquest report is proved as Exhibit Ka-8.

6. PW-4, the Constable posted in P.S. Jalalabad at the time of the incident, stated that the body of deceased Laraiti kept in a sealed cloth alongwith the sample seal and relevant papers was handed over to him and Pooran Chaukidar on 26.7.1987 at about 8:30 AM to carry for the postmortem and they moved to Shahjahanpur and handed over the dead body in the Police Lines Shahjahanpur. It was then sent for the postmortem and was handed over to the doctor in the sealed state alongwith the sample seal. The body was identified by them before the doctor and the postmortem was done. After completion of the postmortem, one sealed bundle of clothes of the deceased was submitted in the police station concerned alongwith all the relevant papers kept in two sealed envelops. PW-4 stated that during the entire process, no one had touched the dead body.

7. PW-6, the Doctor who conducted autopsy, stated on oath that on 26.7.1987 when he was posted in the District Hospital, the body of deceased Laraiti was brought by Constable Magan Singh CP No. 709 with Pooran in sealed state and the sample seal was tallied with the seal on the bundle of the dead body. It was then opened and the body was identified by two police personnel who brought it. The

postmortem was conducted at about 4:15 PM. The external appearance of the dead body as indicated in the postmortem report:-

The age of the deceased about 60 years, average build body, Rigor Mortis passed on from upper extremity and was passing off from lower extremity. Eyes and mouth were closed.

The ante-mortem injuries found on the person of the deceased are:

(1) Incised wound 16 cm x 2 cm x Bone deep present over the Right side of the Head. 10 cm above the Right ear, Bone is cut underneath the injury. Margins are clean cut

(2) Incised wound 7 cm x 1 cm x muscle deep on the Right side lower part of neck 1 cm above the Right clavicle in middle. Margins clean cut.

On internal examination, right parietal bone was found fractured. In stomach, semi digested food of about 200 gms. was present. In small intestine, gases were present; faecal matter was present in the large intestine. The cause of death indicated in the postmortem report is "Coma as a result of ante-mortem head injury". The postmortem report was proved in the handwriting and signature of PW-6 as Exhibit Ka-4. PW-6 stated that both the injuries could be caused by sharp-edged weapon and were sufficient to cause death. The proximate time of death as indicated in the postmortem report was about one day.

8. In cross, PW-6 admitted that there might be a gap of 6-7 hours on both sides. On the nature of the wounds, he stated that incised wounds could have been caused by any sharp edged weapon such as Sword, Knife, Kanta, Khurpi or Kulhari.

9. The Investigating Officer had entered in the witness-box as PW-7. He proved that the initial investigation was conducted by one Senior Inspector I.H. Jafri and the investigation was handed over to him on 5.8.1987. He arrested accused Ram Chandra on 20.8.1987 and submitted the charge sheet on the same day, which was proved in his handwriting and signature as Exhibit Ka-5. PW-7 stated that the previous Investigating Officer had conducted the investigation between 25.7.1987 to 28.7.1987 and recorded statements of the witnesses namely the first informant Puttu, Ashiq Ali and Chhote and inspected the spot. The site plan on the record was proved in the handwriting and signature of the previous Investigating Officer, identified by PW-7, as Exhibit Ka-6.

PW-7, in cross, stated that he did not record the statement of any of accused nor he ever participated in the investigation alongwith the previous Investigating Officer I.H. Jafri.

10. The formal witnesses, in the instant case, proved the reports prepared by them from the inception of the case, i.e. lodging of the first information report to the submission of the charge sheet.

11. Nothing contrary to the case of the prosecution could be elicited from their testimony.

12. Amongst the witnesses of fact, three in number, PW-1 is the first informant Puttu son of Lakhan, husband of the deceased. He stated on oath that he knew accused Ram Chandra who was son

of his brother-in-law. His father-in-law was Jodha Kahar whose son and wife had died and whose agricultural land was inherited by Smt. Laraiti, the deceased as also the mother of accused-appellant Ram Chandra, namely Smt. Kalawati and that they both were legal heirs of deceased Jodha Kahar. Two sons of Smt. Kalawati namely Lala Ram and Roop Ram, brothers of accused Ram Chandra got prepared a forged Will of the land in dispute in their names and a case related to the Will was going on wherein the date fixed was about three days after of the incident. Smt. Laraiti had all hopes of success in the case and on account of this enmity, accused Ram Chandra caused murder of Smt. Laraiti (the deceased) so that the landed property may come to the share of him and his brothers.

While narrating the incident, PW-1 reiterated his version in the written report that two blows of 'tabal' were given by accused Ram Chandra to deceased Laraiti in the field of Raja Ram while she was collecting 'Nimouri' from the Neem tree and that he brought his wife to his house from the place of the incident, PW-1 stated that where Ram Chandra gave blow of 'tabal', he was cutting the grass and there he heard the cries of deceased Laraiti. The place where he was cutting the grass was at a distance of 30-40 paces from the place of the incident. On the alarm raised by him from that place itself, the witnesses Badri, Chhote, Krishna Pal and Ashiq Ali who were cutting grass nearby also reached the spot and witnessed the incident. On the hue and cries raised by them, the accused fled away towards the North-Eastern direction and the witnesses also chased the accused. The report of the incident was scribed by Awadhesh Kumar Shukla on his dictation and it was read over to him then he put his signature. The written report on the record was read over to this witness (PW-1) and he deposed that it was the same report which was dictated by him. The written report is marked as Exhibit Ka-1 on the testimony of this witness. PW-1 further stated that he went to file the written report in P.S. Jalalabad alongwith the Chaukidar and it was lodged at around 10:15 PM.

In cross, PW-1 described the topography of the place of the incident and location of his house in the village. When the written report (Exhibit Ka-1" was put to this witness, in cross, he stated that he put his thumb impression on the same. He further stated that there was one Chaukidar in the village, and he called him and then after talking to him, the written report was scribed. On a suggestion, PW-1 categorically stated that the Investigating Officer did not ask him to call the Chaukidar rather he himself called him at about 7-7:30 PM and it became dark by then. After writing the report, he went to the police station and the Investigating Officer met him there only. PW-1 stated that the Investigating Officer came to the village after lodging of the report and after that he (PW-1) did not go to the police station. The body was taken for the postmortem at about 12:00 Noon by a tractor and he alongwith the police personnel accompanied it.

In cross, PW-1 further narrated the location of the Neem Tree in the field of Raja Ram. He then stated that after his wife got injured, he picked her and put her on a cot.

It is pertinent to note here that though the examination-in-chief of PW-1 was recorded on 2.5.1989 and he was cross-examined to some extent but without completion of his cross-examination, for

the reasons best known to the Judicial Officer concerned, he had proceeded to record the statement of other witnesses of fact namely PW-2 and PW-3 on the same day.

13. We may further record that the cross-examination of PW-3 was concluded on 2.5.1989 whereas the cross-examinations of PW-1 and PW-2 were not completed by the Court concerned. After more than two months, i.e. 20.7.1989, when the case was taken up for cross-examination of the remaining witnesses, i.e. PW-1 and PW-2, it was transpired that PW-1 Puttu had died a month before and the report in that regard was submitted by the police station concerned on 22.6.1989. The trial Judge, therefore, noted that the attendance of PW-1 Puttu could not be procured for his cross-examination by the defence. PW-2, however, was cross-examined on 20.7.1989 itself.

14. We may further record that PW-2 & PW-3 both had been declared hostile on 2.5.1989, the first day when only the evidence of PW-3 was concluded.

From the statement of PW-2, Ashiq Ali son of Munir, in chief, it may be noted that he had fixed the time of the incident being at about 6:00 PM and stated that when the incident had occurred, he was present at some distance wherefrom he could see the spot but he could not witness the accused giving the blow of 'tabal' to the wife of Puttu (PW-1) and reached at the spot on hearing the alarm (cries). He had seen the accused Ram Chandra running away from the place of the incident but could not tell as to what was there in his hand as he went quite far away. He further stated that he saw the injuries of wife of Puttu (deceased) when he reached the spot. He then stated that he was not cutting the grass but he was in Khandhar of the village and reached at the place of the incident on hearing cries. This witness had been declared hostile at this stage and was permitted to be cross-examined by the prosecution.

In his incomplete cross recorded on the first day, i.e. 2.5.1989, PW-2 admitted that there existed a Neem tree in the field of Raja Ram and the same was also existing at the time of the incident and was also existing at the time of his deposition. Smt. Laraiti, the deceased used to collect 'Nimouri' and on the date of the incident, she also went there for the same purpose. Chhote, Badri and Krishna Pal were also present on the spot. On another question, PW-2 stated that the Investigating Officer had interrogated him but he did not give the statement that he was present in the field of Raja Ram for grazing his cattle. He also denied his previous statement that accused Ram Chandra killed deceased Laraiti from 'tabal'. PW-2 further stated that though he went to identify accused Ram Chandra in jail but he knew him from before. He had denied having witnessed the accused hitting the deceased from 'tabal' and that he was making a wrong statement to save the accused. It is noted that the record indicates that the cross-examination of this witness was resumed on oath on 2.5.1989 after lunch but it was not completed. It is evident that without completion of the cross-examination of this witness, the statement of PW-3 was recorded and concluded.

On recall for cross-examination on 20.7.1989, this witness had retracted from his previous deposition in the Court and stated that he did not see the assailant who was running away from the place of

the incident, inasmuch as, that person was running towards the North-East direction and he (PW-2) was coming from the South-West direction, that means they were on the opposite sides. He further stated that the person who was running away from the place of the incident was at a distance of about 100 yards from him and he could see only his back and not the front. At that time, sun had already been set.

Further, this witness (PW-2) also retracted from his previous statement about identification of accused Ram Chandra and stated that the complete identity of the accused was disclosed to him by the Investigating Officer and then he was simply asked to put his hand on the same person who was pointed out by the Investigating Officer.

15. PW-3 Chhote son of Maiku whose examination-in-chief and cross was completed on 2.5.1989 itself had completely denied his presence near the place of the incident or witnessing the incident. In cross, he retracted from his previous statement under Section 161 Cr.P.C. by stating that the Investigating Officer did not interrogate him and as to how his statement was written was not known to him. He (PW-3) then stated that he identified the accused as he knew him prior to the incident. In cross for the accused, PW-3 stated that the Investigating Officer had disclosed the identity of the accused such as construction of his face and height to him prior to the identification parade but had denied that he identified the accused on the asking of the Investigating Officer and that he did not know the accused from before the incident.

16. To assail the judgment of conviction, it is argued by the learned counsel for the appellant that the incident had occurred in the dead of night and no one had seen the same. For this reason, the inquest was conducted on the next day, i.e. 26.7.1987 at about 8:30 AM.

17. It was argued that there are material contradictions in the statement of the prosecution witnesses about the time of lodging of the FIR and the dead body having been taken for the postmortem. The first informant (PW-1), the husband of deceased had falsely implicated the appellant on account of enmity as stated by him. The motive for false implication of the accused in a blind murder is evident from the record. No one had supported the case of the prosecution and the independent witnesses had turned hostile. Even the testimony of PW-1 could not be completed as he had died before completion of his cross-examination. It is urged that the cross-examination is the most important tool in the testimony of a witness to know the truth which can be culled out only in his cross. The evidence of PW-1, thus, would not be admissible. The first informant (PW-1) being a related and partison witness, he cannot be said to be a wholly reliable witness. There is, thus, no evidence of implication of the accused in the criminal case. The trial court had committed a grave error of law in recording conviction based on the testimony of PW-1.

18. Reliance is placed on the decision of the Lucknow Bench of this Court in **Jodhi @ Ayodhya vs. State of U.P.1** decided on 13th August, 2014 to assert that uncorroborated part of the testimony of PW-1 on account of non-completion of his cross-examination, has to be thrown away. The result is that the prosecution has not succeeded in proving its case by definite evidence that the deceased Laraiti was killed by the accused Ram Chandra.

19. Learned AGA, on the other hand, submitted that in a case where cross-examination of a witness could not be completed, his testimony cannot be thrown away in toto. Reliance is placed on the decision of the Apex Court in **Rajesh Yadav & another etc. vs. State of U.P.2** to assert that the issue of admissibility of evidence in a case where the cross-examination of a witness is not over has been addressed by the Apex Court and it was held therein that in a given case it has to be decided by the Court as to admissibility of evidence of the witness whose cross-examination was not over.

As per the submissions of the learned AGA though the cross-examination of PW-1 could not be completed but his deposition in the Court on 2.5.1989 in the examination-in-chief and cross cannot be thrown away in totality rather if his evidence is read alongwith the evidence of the hostile witness PW-2, coupled with the fact of lodging of a prompt first information report, it is proved that the murder of deceased Laraiti was committed by accused-appellant Ram Chandra at about 6:00 PM in the field of Raja Ram.

20. Heard learned counsels for the parties and perused the record. Before entering into the factual aspect of the case, we find it apt to discuss the law relating to appreciation of testimony of a hostile witness.

21. It is settled law that the testimony of a witness who though produced by the prosecution in the witness-box but turned to depose in favour of the opposite party, is not to be discarded as a whole. There are two categories of hostile witness, one who may depose in favour of the parties 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. The second category is where a witness does not support the case of the party starting from chief examination. This classification has to be borne in mind by the Court while analysing the testimony of a hostile witness. Reference be made to the decision of the Apex Court in **Rajesh Yadav** (supra) (Para 21) emphasis added.

22. We may note that, in the instant case, PW-2 who has been declared hostile falls in the first category as he supported the case of the prosecution to some extent in chief examination and then became hostile, whereas PW-3 would fall in the second category as he did not support the case of the prosecution from the beginning, i.e. in the chief examination itself.

With respect to the first category in which PW-2 falls, it is settled that the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. It was observed in **Rajesh Yadav** (supra) that 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 held therein that it is well within the powers of the Court to make an assessment in a matter before it and come to the correct conclusion.

The decision in **C. Muniappan v. State of T.N.3** of the Apex Court was noted therein to reiterate that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution choose 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.

23. It is settled from a catena of decisions of the Apex Court that the 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 the defence can be relied upon. The law that can be summarised from the above noted decisions is 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. [Reference **State of U.P. vs. Ramesh Prasad Misra and another4 and Subbu Singh v. State by Public Prosecutor5]**

24. Analyzing the testimony of the prosecution witnesses of fact, we may record, at the out set, that nothing could be elicited in favour of the prosecution case from the statement of PW-3 who had turned hostile and completely retracted from his previous statement. His testimony also cannot be read in favour of the defence as he had completely denied his presence at or near the place of the incident and also admitted that he knew accused before the incident and for this reason he had identified him in the identification parade conducted by the police.

25. We then proceed to analyze the testimony of another hostile witness, PW-2, in light of the above discussed legal position stated by the Apex Court to appreciate the testimony of a hostile witness.

Analyzing the testimony of PW-2, we may note that he had fixed the place, time and date of the incident, which is in corroboration with the case of the prosecution. From the testimony of PW-2, it is proved that the incident had occurred in the field of Raja Ram at about 6:00 PM when deceased Smt. Laraiti was collecting 'Nimouri' near the Neem tree. PW-2 also proved his presence at a place wherefrom he could witness the place of the incident and that he had reached at the place of the incident on hearing the cries and also seen the accused Raja Chandra running away from the said place. PW-2 also stated in chief that when he went at the spot he had seen the injuries of the deceased.

From the above statement of PW-2 in chief, it is evident that he had only denied having seen accused Ram Chandra hitting the deceased with 'tabal' at the place of the incident and stated that he did not see any weapon in the hands of accused Ram Chandra while he was running away from the spot of the incident.

26. For this reason only this witness was declared hostile by the prosecution and in his incomplete cross-examination on the first date, i.e. 2.5.1989, PW-2 also fixed the presence of other witnesses namely Chhote, Badri and Krishna Pal at the place of the incident which is in line with the statement in the written report lodged by PW-1 as also the statement of PW-1 before the Court. PW-2 also admitted, in cross, that he was interrogated by the Investigating Officer though he had retracted from the

contents of his statement. PW-2 also admitted that he went to identify accused Ram Chandra and he knew him before the incident. PW-2, on recall, when examined on 20.7.1989, after a period of two months, after the death of PW-1 the first informant, retracted even from his previous version in the Court made on 2.5.1989 to the extent that he had seen accused Ram Chandra running away from the spot and that he had identified the accused before the police on his own. From the testimony of PW-2, at least, it is proved that the deceased was attacked in the field of Raja Ram near the Neem tree where she used to go to collect 'Nimouri' on the fateful day at about 6:00 PM. The date, time and place of the incident, thus, had been proved by PW-2.

27. The star witness of the prosecution is PW-1, who was husband of the deceased and the first informant. In his deposition in the Court, PW-1 proved his version in the FIR with regard to the place, date, time and the manner of the incident and the presence of the eye-witnesses on the spot. He also proved the written report lodged by him at about 10:15 PM as Exhibit Ka-1. PW-1 also proved the enmity with the accused, which according to him was the motive of causing the murder of his wife. He also proved that he took his injured wife from the field of Raja Ram to his house wherein she had succumbed to her injuries. The inquest was conducted on the next day, i.e. 26.7.1989 in the house of the first informant.

28. It was, thus, proved by the prosecution witnesses that the homicidal death of the deceased Smt. Laraiti was caused outside her house and she was taken to her house by PW-1 (her husband) after she received injuries in the field of Raja Ram.

All the above facts could not be disputed by the learned counsel for the appellant in his arguments.

Further, PW-1 was consistent in his testimony, which could not be completed on account of his death. His testimony is clear to the extent that he was the eye-witness of the incident and he had seen the accused-appellant causing injuries to his wife by a sharp edged weapon (tabal) which had resulted in her death. The motive for the offence committed by accused-appellant has also been proved by PW-1 in his examination-in-chief. From the perusal of the testimony of PW-1, it is evident that he proved the written report (Exhibit Ka-1) and its content and the fact that he went to the police station alongwith the village Chaukidar to lodge the first report and the Investigating Officer reached the spot after getting the said information. The inquest was conducted and the body was sent for postmortem. The narration of fact by PW-1 with regard to the lodging of the first information report by giving a written report as also the inquest conducted in his house is corroborated from the documentary evidences on record.

The issue which has been raised by the learned counsel for the appellant is that since the cross-examination of PW-1 could not be completed, his testimony cannot be relied to convict the appellant. The contention is that the corroboration of an oral testimony is required by cross-examination of the witness, which is an important tool to cull out falsity in the version of the witness in his examination-in-chief. The testimony of PW-1 on account of his death, remained uncorroborated and hence the trial court had committed a grave error of law in

relying upon his version to convict the accused-appellant.

29. To deal with this submission, we may first go through the authoritative pronouncements of the Apex Court, wherein the guidelines to deal with such a situation has been laid down.

30. However, before appreciation of the legal position, we would like to record our assessment of the circumstances indicating the reasons behind the subsequent statement of PW-2 dated 20.7.1989, wherein he had retracted from his previous statement in-chief and cross, recorded on 2.5.1989.

31. We may record that the manner in which the trial court, in the instant case, had proceeded to examine the witnesses cannot be approved of.

We may also note that the trial Judge while recording his finding had also expressed his dissatisfaction in the manner in which his predecessor trial Judge had recorded the statements of the prosecution witnesses of fact. The record reflects that three prosecution witnesses of facts were examined on the same day, i.e. on 2.5.1989, but not in the correct order of examination. We are not able to understand as to why the trial court had proceeded to record the statements of PW-2 and PW-3 without completing the cross-examination of PW-1 on 2.5.1989. We are also astonished with pain to note that even deposition of PW-2 Ashiq Ali was not completed on 2.9.1989 and when his cross-examination had continued after lunch, this witness (PW-2) though was administered oath but his cross-examination was not proceeded, for the reasons best known to the Presiding Officer concerned. It is not understandable nor acceptable that the trial Judge had proceeded to record the statement of PW-3 without completing the testimony of PW-1 and PW-2 in the chronological order.

32. Surprisingly enough, the deposition of PW-3 was completed on the same day, i.e. 2.5.1989 and the cross-examination of PW-1 and PW-2 could not be resumed before 20.7.1989, for about two months. The explanation for delay in the cross-examination of PW-1 and PW-2 and their non-examination on the date of their appearance, obviously, could not be given by the prosecution on the query made by the Court. However, it is evident from the record that a report dated 22.6.1989 was received on summoning of PW-1 and PW-2 Ashiq Ali for cross-examination that PW-1, Puttu had died about a month before. The reasons for retraction of PW-2 from his previous version in the Court recorded on 2.5.1989 after death of PW-1, the husband of deceased, are not far to seek.

33. It seems from the record of the instant case that the defence had succeeded in manipulating the trial Judge who had recorded statements of the witnesses of fact and in order to frustrate the case of the prosecution, the testimony of PW-1 and PW-2 was not completed on the first date, i.e. 2.5.1989. Nothing could be discerned about the role of the prosecuting officer after such a long time as we are deciding the case of the year 1989 in the year 2022. However, this much can be concluded that the trial Judge who had recorded the statements of the prosecution witnesses of fact (PW-1 to PW-3) did not act fairly. The right of the parties, whether defence or the prosecution, for a fair trial has been seriously hampered in the present case.

34. Coming to the argument of the learned counsel for the appellant that the testimony of PW-1 cannot be read in

evidence and has to be discarded in toto as his cross-examination could not be completed, we may gain benefit from the decision of the Apex Court in **Rajesh Yadav** (supra), wherein while dealing with the Section 3 of the Evidence Act, 1872, the Apex Court had discussed the methods for analysing the matters before the Court, i.e. the evidence in proving the existence of a fact. It was observed that the entire enactment (the Evidence Act) is meant to facilitate the Court to come to an appropriate conclusion in proving a fact. There are two methods by which the court is expected to come to such a decision. (i) the Court can come to a conclusion on the existence of a fact by merely considering the matters before it, in forming an opinion that it does exist. This belief of the Court is based upon the assessment of the matters before it. (ii) Alternatively, the Court can consider the said existence as probable from the perspective of a prudent man who might act on the supposition that it exists.

The question as to the choice of the options is best left to the Court to decide. The said decision might impinge upon the quality of the matters before it.

It was observed that a judge has to transform into a prudent man and assess the existence of a fact after considering the matters through that lens instead of a judge. It is only after undertaking the said exercise can he resume his role as a judge to proceed further in the case.

It was further noted that the provision in Section 3 of the Evidence Act indicates that the court is concerned with the existence of a fact both in issue and relevant, as against a whole testimony. Thus, the concentration is on the proof of a fact for which a witness is required. Therefore, a court can appreciate and accept the testimony of a witness on a particular issue while rejecting it on others since it focuses on an issue of fact to be proved. However, the evidence of a witness as whole is a matter for the court to decide on the probability of proving a fact which is inclusive of the credibility of the witness. Whether an issue is concluded or not is also a Court's domain.

It was further noted that evidence of a witness can be divided into three categories broadly, namely, (i) wholly reliable; (ii) wholly unreliable; and (iii) neither wholly reliable nor wholly unreliable. The manner in which the testimony of a witness would be appreciated depends upon the category in which it was considered by the Court.

As to the law relating to appreciation of the testimony of a hostile witness, we would like to refer to the foregoing paragraphs of this judgment to note that the evidence of a hostile witness is not to be rejected as a whole.

As noted in **Rajesh Yadav** (supra), the Court can also assess the circumstance in which a witness had turned hostile, as discussed above.

35. We may further note that the Apex Court in **Rajesh Yadav** (supra) while expressing deep anguish over to manner in which long adjournments had been granted by the trial Judge therein permitting an act of manoeuvring, had referred to its earlier decision in **Vinod Kumar v. State of Punjab6.** It was reiterated that in **Vinod Kumar** (supra) the Apex Court while dealing with the situation where a witness after rendering testimony in line with the prosecution's version, completely

abandoned it, in view of the long adjournments given by the trial court had observed that a fair trial is to be fair both to the defence and the prosecution as well as to the victim. The appropriate course on the part of the trial Judge was to finish the cross-examination on the day the said witness was examined. It was noted that no reason in the said case was assigned to defer the cross-examination and then recording it after a delay of 20 months, giving room for the witness to be gained over. While appreciating the testimony of a hostile witness therein, it was held by the Apex Court in **Vinod Kumar** (supra) that the evidence in entirety of the prosecution witness cannot be brushed aside. The delay in cross-examination had resulted in his prevarication from the examination-in-chief but the part of his testimony, which supported the case of the prosecution was relied upon.

Having noted the relevant paragraphs of the decision in **Vinod Kumar** (supra), the Apex Court in **Rajesh Yadav** (supra) while referring to Section 33 of the Evidence Act has held in paragraph '24' as under:-

"24. Section 33 is an exception to the general rule which mandates adequate facility for cross examining a witness. However, in a case where a witness after the completion of the chief examination and while subjecting him to a substantial and rigorous cross examination, did not choose to get into the witness box on purpose, it is for the court to utilize the said evidence appropriately. The issues over which the evidence is completed could be treated as such by the court and then proceed. Resultantly, the issues for which the cross examination is not over would make the entire examination as inadmissible. Ultimately, it is for the court to decide the aforesaid aspect. "

Having noted the law laid down by the Apex Court in **Vinod Kumar** (supra) and **Rajesh Yadav** (supra), it is settled that the part of the testimony of a witness whose cross-examination is not over, would not make the entire examination as inadmissible. The evidence of the hostile witness who after examination-in-chief had abandoned the case of the prosecution because of the long delay in completing his testimony, cannot be read in favour of the defence or against the prosecution. It is for the Court to utilize the said evidence appropriately and decide that the issues over which the evidence is completed could be read in evidence and the issues for which the cross-examination is not over, as inadmissible. As has been held in **Rajesh Yadav** (supra) ultimately it is for the court to decide the aforesaid aspect.

36. In light of the above, having noticed the circumstances in which the cross-examination of PW-1, the first informant, could not be completed, we find that it is not one of those cases where non-completion of cross-examination of the witness would result in rejection of the whole testimony of PW-1, the eye-witness.

37. On due consideration of the law discussed above, in the facts of the present case, we find that PW-1 in his examination-in-chief proved the mode and manner of occurrence and that the murder had been caused by the accused. He proved his presence on the spot as also the place of the occurrence and the presence of other witnesses on the spot who later turned hostile. In the cross-examination of PW-1, the first informant, which commenced on 2.5.1989, he proved the factum of lodging

of the written report as Exhibit Ka-1 at the date and the time indicated in the Check report i.e. 25.7.1987 at about 10:15 PM. He also proved that he went alongwith the village Chaukidar to lodge the first information report and after lodging of the same, the police came on the spot, conducted the inquest and took the body for the postmortem. The place of the incident being the field of Raja Ram was also proved by this witness namely PW-1 in his cross-examination. Nothing contrary could be found from the record with this part of testimony of PW-1 which stood proved from his incomplete cross-examination. The above noted part of the testimony of PW-1, therefore, is to be appreciated alongwith the surrounding circumstances of the case, i.e. the other evidence on record.

38. From the record, it is proved that the first information report of the incident was a prompt report as it was lodged on the same day at about 10:15 PM, when the incident had occurred at about 6:00 PM. PW-1 proved that after injuries were caused to his wife by accused Ram Chandra by 'tabal', he carried his wife to his house and while he was making arrangements to take her to the hospital, she had succumbed to her injuries. He then called the village Chaukidar and got the written report scribed, went to the police station alongwith the village Chaukidar to lodge the report. The time taken by PW-1 in lodging the report stood explained from his testimony and the circumstances on record that the incident had occurred in the open field and the deceased did not die on the spot. The place of the occurrence and the reason why the deceased was present on the said place, as narrated by PW-1, is corroborated from the version of PW-2 in his first examination , both in chief and cross made on 2.5.1989.

39. We may further note that even after PW-2 was declared hostile and further retracted from his previous statement on recall after two months, from his testimony, his presence near the place of incident cannot be disputed. On appreciation of the whole testimony of the PW-2, a hostile witness, it is evident that the incident in question had occurred on 25.7.1987 at about 6:00 PM near the Neem tree existing in the field of Raja Ram where the deceased went to collect 'Nimouri' in her usual way.

It is also proved that PW-2 was present near the place of the incident and reached on hearing the cries of PW-1 (husband of the deceased) and had seen one person running away from the place of the incident as also the injuries of the deceased.

40. On a conjoined reading of the statement of PW-1 and PW-2, the case of the prosecution is found proved as to the mode and manner of occurrence and the involvement of accused Ram Chandra. Other supporting evidence from the record, i.e. medical evidence also corroborates the ocular version of PW-1, the injuries caused on the person of the deceased, which were cause of her death. Both the injuries are of sharp-edged weapon and as per the opinion of the doctor, it could occur from the weapon assigned in the hands of appellant Ram Chandra, which is 'tabal', as per the version in the first information report and the statement of PW-1.

We may further note that 'tabal' is a weapon which is very close to 'Talwar' (sword) which was opined by the doctor being the possible weapon relating to injuries of the deceased. It is also proved that the injuries sustained on the deceased were sufficient to cause her death. The fact

that PW-1, the first informant, could not take his wife to the hospital would be of no consequence.

41. The Investigating Officer (PW-7) proved that after lodging of the first information report, which was entered in the General Diary on the same day, i.e. 25.7.1987, the investigation was conducted by the another Investigating Officer namely I. H. Jafri who prepared the site plan in his handwriting. The site plan 'Exhibit Ka-6' dated 26.7.1987 gives the complete description of the place of the incident and the presence of the witnesses and the accused on the spot.

42. The motive assigned to the accused for causing death of Smt. Laraiti being a civil dispute, had not been disputed by the defence. The presence of motive in a case of eye-witness account is a relevant circumstance which show the evil intent of the accused and becomes relevant to show that the accused who had the motive to commit the crime actually committed it. It is settled that the relevancy of motive would primarily depend upon the facts and circumstances of the given case. In an eye-witness account though motive is not of much of relevance, presence and proof of motive affords a key or pointer to scan the evidence in the case in that perspective and the motive in such a case becomes satisfactory circumstance of corroboration. [Reference **State of U.P. vs. Moti Ram and others7]**

43. In light of the above discussion, considering the attending circumstances of the case and the motive with which the accused-appellant committed the murder of Smt. Laraiti, we are of the firm opinion that there is no infirmity in the decision of the trial court in convicting the accused-appellant for the offence of murder under Section 302 IPC.

The punishment inflicted upon the appellant is minimum. No interference, as such, is required.

The judgment and order dated 11.8.1989 passed by the Special/Additional Sessions Judge, Shahjahanpur in Sessions Trial No. 470 of 1987 (State vs. Ram Chandra) arising out of Case Crime No. 235/1987, under Section 302 IPC, Police Station Jalalabad, District Shahjahanpur is hereby affirmed.

The appeal deserves to be dismissed, accordingly.

44. Before parting with this judgment, we may find it profitable and necessary to note certain observations of the Apex court in Vinod Kumar (supra), wherein the Court had expressed deep anguish in a situation therein wherein the cross-examination of the witness was deferred without any reason.

The relevant paragraphs of the report are noted as under:-

"57. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts:

57.1. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought

for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics.

57.3. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4. In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute.",

We may further note the observations of the Apex Court in Rajesh Yadav (supra) in paragraph '39' as under:-

"39. Before we part with this case, we are constrained to record our anguish on the deliberate attempt to derail the quest for justice. Day in and day out, we are witnessing the sorry state of affairs in which the private witnesses turn hostile for obvious reasons. This Court has already expressed its views on the need for a legislative remedy to curtail such menace. Notwithstanding the above stated directions issued by this court in Vinod Kumar (supra), we take judicial note of the factual scenario that the trial courts are

adjourning the cross examination of the private witnesses after the conclusion of the cross examination without any rhyme or reason, at the drop of a hat. Long adjournments are being given after the completion of the chief examination, which only helps the defense to win them over at times, with the passage of time. Thus, we deem it appropriate to reiterate that the trial courts shall endeavor to complete the examination of the private witnesses both chief and cross on the same day as far as possible. To further curtail this menace, we would expect the trial courts to take up the examination of the private witnesses first, before proceeding with that of the official witnesses. A copy of this judgment shall be circulated to all the trial courts, to be facilitated through the respective High Courts."

The Apex Court while taking judicial notice of the factual scenario in **Rajesh Yadav** (supra) reiterated that the appropriate course for the trial court is to make endeavour to complete the examination of the private witnesses, both chief and cross, on the same day, as far as possible, and also to take up the examination of the private witnesses first, before proceeding with that of the official witnesses. This approach is needed to ensure fair and proper trial which is the duty of the trial Court and also to curb the menace where the private witnesses turned hostile for obvious reasons because of long adjournments, permitting an act of manoeuvring.

45. Though in the instant case, wherein the trial was conducted in the year 1989, nothing much could be said on the conduct of the trial Judge who had recorded the statements of the prosecution witnesses of fact (PW-1 to PW-3), however, as a guidance to conduct the trial in a prudent manner, it is imperative to notify the abovenoted judgment of the Apex Court to the Sessions Court throughout the State of U.P., as a reminder to the caution and directions issued by the Apex Court in **Vinod Kumar** (supra) reiterated in **Rajesh Yadav** (supra).

46. We, therefore, direct that the copy of the judgment and order dated 4th February, 2022 of the Apex Court in **Rajesh Yadav and another etc. vs. State of U.P. (Criminal Appeal Nos. 339-340 of 2014) reported in 2022 (3) ADJ (SC)** be circulated amongst all the trial Judges in the State of U.P. by the Registrar General, High Court, Allahabad.

With the above observations and directions, on merits, the appeal is **dismissed.**

The appellant is in jail.

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

Necessary steps shall be taken by the court below to notify this judgment to all concerned.

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

(2022)06ILR A581
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No.2111 of 1988

Ram Singh & Ors. ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri N.K. Sharma, Sri Anshul Singhal, Sri Mukesh Kumar, Sri S.P.S. Chauhan, Sri Vinod Kumar Singh, Sri Rahul Kumar Sharma

Counsel for the Respondent:
A.G.A., Sri Ravi Prakash Singh

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860- Section 148, 302, 323 read with Section 149 , The Code of Criminal Procedure, 1973 - Sections 133 & 313.

Enimity owing to litigation between the informant, appellant and the informant and residents of his village relating to the pathway - PW-1(informant and brother of deceased) - injured witness - presence on the place of occurrence . **(Para - 44,)**

(B) Criminal Law - Testimony of an injured witness - Testimony of an injured witness is accorded a special status in law - evidence of an injured witness cannot be doubted merely because there is a background of previous dispute or enmity between the parties - evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted - held - testimony of the injured witnesses is absolutely clear and cogent and free from any kind of discrepancies, embellishments and concoctions - in consonance with the medical evidence on record - no grounds for rejection of evidence of PW-1 - unless and until major contradictions and discrepancies in the testimony of injured witnesses. **(Para - 45,46,47,48)**

(c) Criminal Law - delay in lodging FIR - held - Occurrence took place at 5:30 P.M. - F.I.R. was lodged at 21:30 P.M - time gap of four hours in lodging the F.I.R. - cannot be said to be any delay - F.I.R. was prompt.**(Para -52)**

(D) Criminal Law - motive - unlawful assembly - common object - motive does not have major role to play in cases based on eye witness account of the incident - it assumes significance in cases that rest on circumstantial evidence - established from the testimony of the prosecution witnesses - random individual acts done by appellants without meeting of mind - appellants can be held liable only for their individual acts - Deceased stabbed with spear - injured succumbed to the stab injury - No other appellants assaulted deceased with lathi except to other persons (injured) - held - It would be hazardous to hold that there was an unlawful assembly and common object of that assembly (of the appellants) was to commit the murder.**(Para -54,63)**

HELD:- Conviction of each of these appellants under Section 147 & 302 read with Section 149 I.P.C. cannot be said to be just and lawful and sentence to imprisonment for each is, hereby, set aside. Established beyond reasonable doubt that appellants caused injuries which were simple in nature and punishable under Section 323 I. P.C. . Conviction of appellants modified as conviction under Section 323 I.P.C. . **(Para - 63,64)**

Criminal Appeal partly allowed. (E-7)

List of Cases cited:-

1. Brahm Swaroop & anr. Vs St. of U.P., (2011) 6 SCC 288

2. Dalip & ors. Vs St. of Punj. A.I.R. ,(1953) SC 364

3. Masalti Vs St. of U.P. ,(A.I.R.) 1965 SC 202

4. Masalti Vs St. of U.P., A.I.R. 1965 SC 202

5. Rameshwar & ors. Vs St. ,2003 (46) ACC 581

6. Jarnail Singh Vs St. of Punj., (2009) 9 SCC 719

7. Balraje @ Trimbak Vs St. of Mah. ,(2010) 6 SCC 673

8. Abdul Sayed Vs St. of M.P. ,(2010) 10 SCC 259

9. St. of U.P. Vs Naresh & ors., (2011) 4 SCC 324

10. Bhajan Singh Vs St. of Har., (2011) 7 SCC 421

11. Abdul Sayeed Vs St. of M.P., (2010) 10 SCC 259

12. Kailas & ors. Vs St. of Mah., (2011) 1 SCC 793

13. Durbal Vs St. of U.P., (2011) 2 SCC 676

14. St. of U.P. Vs Naresh & ors., (2011) 4 SCC

15. St. of H.P. Vs Jeet Singh ,1999 (38) ACC 550 SC

16. Baitulla & anr. Vs St. of U.P., AIR 1997 SC 3946

17. Rameshwar & ors. Vs St. ,2003 (46) ACC 581

18. St. of Haryana Vs Sher Singh & ors. ,1981 Cr. Ruling 317 SC

19. Lalji & ors. Vs St. of U.P. ,1973 AIR SC 2505

20. Chinu Patel Vs St. of Orissa ,1990 CRLJ 248

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

1. Heard Sri N.K. Sharma learned Advocate assisted by Sri Anshul Kumar Singhal learned Advocate on behalf of the appellant nos.3 & 4; Gajraj and Raghuveer; respectively and Sri Mukesh Kumar, learned counsel on behalf of the appellant no.5- Ram Bahadur.

2. This appeal emanates from the judgment and order dated 14.09.1988 passed by the learned VIIth Additional Session Judge, Aligarh in S.T. No.373/1987 (State vs. Rajveer & others) arising out of Case Crime No.26 of 1987 u/s 148, 302, 323 readwith Section 149 I.P.C., Police Station Sikandrarau, District Aligarh whereby appellant Rajveer has been convicted and sentenced for imprisonment for a period of six months u/s 148; with life imprisonment u/s 302 readwith Section 149 I.P.C; for a period of three months simple imprisonment u/s 323 readwith Section 149 I.P.C; and appellant Ram Singh, Roshan, Gajraj, Raghuveer, Ram Bahadur & Roop Kishore have been convicted and sentenced u/s 147 I.P.C. for a period of three months rigorous imprisonment; u/s 302 readwith Section 149 I.P.C. for life imprisonment; and u/s 323 readwith Section 149 I.P.C. for a period of three months simple imprisonment.

3. Co-appellant Rajveer had died during pendency of this appeal, therefore, appeal on behalf of co-appellant Rajveer stands abated.

4. The prosecution case in brief is that informant Ram Khiladi S/o Surat Singh is R/o Nagla Mahari hamlet of Kachaura, Police Station Sikandrarao. There was enmity owing to litigation between the informant Roshan Singh, Ram Singh and the informant and residents of his village relating to the pathway. As per narration in the F.I.R on 22.01.1987 at about 5:30 P.M., Pandit Bakelal resident of the neighbouring village cried near the Pipal tree in the forest under the fear of ghost on which several people reached there. In the meantime, the informant and his brother Rukumpal were coming back to their house from the field with fodder of babul and passed by the Pipal tree while looking at Bakelal Pandit. When they were near the Shiv Temple, Rajbir, Ram Singh, Roshan Singh, Gajraj, Kishorilal, Raghuveer, Ram Bahadur and Roop Kishore called and asked as to who was there and that who was shouting/crying, on which the informant replied that it was Bakelal Pandit who got scared near the pipal tree. On this, they said to him while abusing that he was not telling the truth. On this, the informant told them

to keep their tongue under control and asked why were they abusing. An altercation was started between them and at which the accused said "maro salon ko inka dimag bahut kharab hai" and they began to beat all of them with lathi and spear.

5. On hearing their screams, his father, brother Ramji Lal, Ramdeen, Dhyan Singh and Krishnaveer ran to save them. They were assaulted as well. Rajveer was equipped with spear and others were carrying lathi. Rajveer pierced with spear in the abdomen of Rukum Pal who fainted and fell down. In the meantime, Netrapal, Sughar Singh and Foran Singh came there and the accused/appellants ran away. It was stated in the report that in defence, the complainant side also wielded lathi which might have caused injuries to some of the persons of the accused party, but all on the side of the complainant were injured. Rukumpal succumbed to the injuries on the way to the hospital Sikandrarao, and then they reached the police station. Written tehrir stating the above noted facts was prepared by the informant and on the basis of it, F.I.R. was lodged at the police station on the same day at about 21:30 P.M.

6. The inquest of deceased Rukum Pal was conducted by S.I. Baljeet Singh on 22.01.1987 on the same day at about 10:40 P.M. at the gate of the police station and the inquest report was prepared in the presence of the witnesses present there. The dead body was sealed, essential papers were prepared and the body was handed over to constables Prempal Singh and Ram Tirath Singh for the post-mortem. Dr. T.N. Goel conducted autopsy of the dead body of Rukampal which was received by him in a sealed bundle, on 23.01.1987 at 4:30 P.M. and the post-mortem report was proved as Exihibit Ka-2. Details of the post-mortem report are as under:-

External Examination

Age of the deceased was about 30 years and the time of death about one day. Average built body. Rigor mortis was present in both upper and lower extremities. Eyes and mouth were closed.

Antemortem Injuries

1. Penetrating wound 1.5 cm x 1 cm x cavity deep on the left side of upper abdomen region. Margins are cleaned.

2. Abrasion 1.5 cm x 1.5 cm on back of the right elbow.

3. Abrasion 1 cm x 0.5 cm on back of the left wrist.

4. Linear abrasion 3 cm on outside middle of the left leg.

Internal Examiantion

Scalp, skull - NAD. Membrane - NAD. Brain - NAD. Base - NAD. Vertebrae - NAD. Spinal Cord - Not opened.

Thorax

Walls, ribs and cartilage - NAD. Pleaura - NAD. Larynx and Trachea - NAD. Right and left lungs - NAD. Pericardium - NAD. Heart - NAD. Weight - 6.5 ounces. Vessels - NAD.

Abdomen

Walls - as described. Peritoneum - punctured left side upper part. Cavity - partly clotted blood present. Buccal cavity, pharynx & oesophagus - NAD. Teeth - 16/16. Stomach - punctured with clotted

blood present 40 ounces food material present mixed with blood. Small intestine - gases and faecal matter. Large intestine - gases faecal matter. Liver and gall bladder - NAD. GB - half full. Pancreas - NAD. Spleen - NAD weight 4.5 ounce. Kidneys - NAD with 7.5 ounce both bladder empty. Generation organs - NAD. Cause of death - due to shock and hemorrhage resulting from injury no.1.

7. On the date of the incident injured Ramji Lal, Ram Khiladi, Suraj Singh, Dhyan Singh, Krishna Singh were also examined by Dr. L.S. Chauhan at PHC Sikandra Rao, Aligarh. The details of injuries found on the person of Ramji Lal are as under:-

(a) abraded contusion 3 cm x 2 cm x muscle deep on forehead 5 cm above the right eyebrow.

(b) abraded contusion 4 cm x 2 cm on the back of left elbow joint. All injuries were simple in nature and caused by some hard and blunt object. Duration fresh.

8. On the body of Ram Khiladi, the following injuries were found :-

(a) abraded contusion 4 cm x 7 cm on the outer part of right upper arm from above the right elbow joint.

(b) Contusion 5 cm x 2 cm on the back of the right forearm 6 cm above the right elbow joint. All injuries were simple in nature, caused by some hard and blunt object. Duration fresh.

9. Injuries found on the body of Suraj Singh are as under :-

(a) Contusion 3 cm x 2 cm on the back of right shoulder oblique in direction.

(b) Contusion 8 cm x 2 cm on the back of right forearm below the elbow joint.

(c) Lacerated wound 1.5 x 5 cm x tissue deep on the back of the right hand just below the wrist joint.

(d) Abraded contusion 4 cm x 2 cm on the left scapula region 3 cm below the shoulder joint. All injuries were simple in nature, caused by some hard and blunt object. Duration fresh.

10. Injuries found on the body of Dhyan Singh are as under :-

(a) Lacerated wound 1 cm x .2 cm x tissue deep on the right side of face just away from the nose.

(b) Contusion 6 cm x 3 cm on the back of left forearm 8 cm blow the left elbow joint oblique in direction.

(c) Contusion 3 cm x 2 cm below the back of right forearm 2 cm above the wrist joint. All injuries were simple in nature, caused by some hard and blunt object. Duration fresh.

11. Injuries found on the body of Krishna are as under :-

(a) Contusion 4 cm x 2 cm on the back of right leg 5 cm above the ankle joint. Injury was simple in nature caused by some hard and blunt object. Fresh in duration.

12. The investigating officer visited the place of the occurrence, collected blood stained and plain soil in separate boxes, sealed them and prepared fard Ex Ka- 12. Two bundles of fodder of babul were taken into possession and given in supurdagi and

fard supurdaginama Ex Ka-13 was prepared.

13. Search of the house of accused Rajveer was made on 29.01.1987 from where blood stained spear was recovered at the instance of the appellant Ram Singh and taken into custody and fard Ex Ka- 15 was prepared.

14. After inspection of the place of occurrence at the instance of the informant,site plan Ex Ka- 11 was prepared on 23.01.1987 by the Investigating Officer and the site plan Ex Ka-23 relating to recovery of spear from the house of co-appellant Rajveer was also prepared on 29.01.1987. The Investigating Officer had also recorded the statements of witnesses conversant to the facts of the case. He concluded the investigation and found a case prima facie made out u/s 147, 148, 149, 323, 302 I.P.C. against the appellants and after preparing the charge-sheet, he submitted it to the court concerned.

15. Cognizance of the offences was taken by the learned C.J.M., who provided copies of prosecution papers to the appellants in compliance of Section 207 Cr.P.C. and committed the case to the court of sessions for trial.

16. Learned trial court framed the charges u/s 147, 148, 302, 323 readwith Section 149 I.P.C. on the basis of the material on record after giving opportunity of hearing to the appellants. Charges were readover and explained to them. They pleaded not guilty but denied the charges and claimed for trial, consequently case was fixed for prosecution evidence.

17. The prosecution examined PW-1 Ram Khiladi, PW-2 Sughar Singh, PW-3 Netrapal, PW-4 Sri Krishana Veer as witnesses of fact. PW-5 Dr. T. N. Goel is the doctor who conducted the post-mortem of the body of deceased Rukampal and prepared post-mortem report. PW-6 Dr. L.S. Chauhan had examined the injuries on the person of Ramji Lal, Ram Khiladi, Suraj Singh, Dhyan Singh and Krishan Singh and prepared injury report. PW-7 H.C. Sri Krishna prepared the check F.I.R. on the basis of tehrir and entered the detail in the G.D. PW-8 S.I. Mahaveer Singh Yadav conducted the investigation of the case after S.S.I. Kailash and Inspector Baljeet Singh and submitted the charge-sheet. PW-9 Constable Ram Tirath brought the dead body to the mortuary for the post-mortem. PW-10 Lakhan Singh is a witness of recovery of spear from the house of appellant Rajveer. PW-11 Inspector Baljeet Singh recorded the statement of witnesses and prepared the inquest report and after visiting the place of the incident prepared the site plan.

18. After conclusion of prosecution evidence, the statements of appellants under Section 313 Cr.P.C were recorded wherein they negated the statements made by the witnesses before the court and stated that witnesses had falsely implicated them due to enmity. Co-appellant Rajveer had also negated the recovery of spear from his house. All the appellants had made similar statements.

19. Appellants were given an opportunity for defence evidence wherein they examined Layak Singh as DW-1 in their support.

20. Learned trial court heard the arguments for the prosecution as well as appellants, passed the judgment and order dated 14.09.1988 wherein he found the

appellant Rajveer guilty under Sections 148, 302, 323 read with Section 149 I.P.C. Appellants Ram Singh, Roshan, Gajraj, Raghuveer, Ram Bahadur and Roop Kishore were found guilty u/s 147, 302, 323 readwith Section 149 I.P.C. and sentenced as aforesaid against which this appeal has been preferred.

21. Learned counsel for the appellants submits that the judgment of the learned trial court is against the evidence available on record. It is bad in the eyes of law and based on the testimony of interested witnesses those who were related to the deceased. No independent witness had been examined though the occurrence took place on a public place. The prosecution failed to establish the motive for committing the offence. As a result, no offence can be said to be made out against the appellants under Sections 302, 323 read with Section 149 I.P.C. Appellant Rajveer who had been assigned the role of stabbing spear had already died. There was no evidence of unlawful assembly and common object, therefore, conviction under Section 302 with the help of Section 149 I.P.C. against all the appellants cannot be sustained. The learned trial court on misappropriation of the evidence has convicted and sentenced all the appellants with the aid of Section 149 I.P.C. which is bad in law. There was no common object in the minds of the appellants to murder the deceased. There was an altercation between the appellants and the deceased due to which the incident took place wherein people from both the sides received injuries. This fact is clear from the F.I.R. wherein the informant has mentioned that in defence people on their side also wielded lathi causing injuries to some people on the accused side. In this way, from the evidence on record, it transpires that the appellants had not committed the act in prosecution of their common object so they cannot be held guilty for the overt act committed singly by appellant Rajveer for stabbing with spear to the deceased. Even if it is accepted that there was a common object it may be to the extent of causing injuries only but not to commit the murder. Therefore, the case, at the worst, would fall within the limits of Section 323 I.P.C. and the appeal deserves to be allowed.

22. Learned A.G.A. opposed the submissions made by the learned counsel for the appellants and urged that, in this case, the appellants caused injuries to the deceased with lathi and spear and also to other injured persons with lathi. All the appellants formed an unlawful assembly and in prosecution of the common object of the assembly they committed the murder of Rukampal and caused injuries to others. It was argued that it is not necessary that an assembly may be unlawful since the beginning but it may become unlawful subsequently and in this regard the argument made by the learned counsel for the appellants is not tenable. The witnesses had sustained injuries on their person so their presence cannot be disputed and their testimony is wholly reliable. There are no material contradictions in their statements. They are natural witnesses of the incident so their testimony cannot be said to be unreliable and untrustworthy. Learned trial court has convicted the appellants on the basis of the evidence on record. There is no illegality in the judgment in question and the appeal being devoid of merit is liable to be dismissed.

23. From the submissions and perusal of the record,the following questions emerged for consideration by this Court (i) as to whether there was any unlawful

assembly and common object in prosecution of which the offence was committed or the incident took place only at the spur of the moment without any prior meeting of mind. (ii) Further whether it was only to the extent of committing marpit for which liability of all the appellants cannot be fixed with the help of Section 149 I.P.C.,constructively, but it may be fastened individually on the appellant Rajbeer who did overt act in causing injury to Rukampal with spear resulting into his death, and that the offence committed by the appellants goes to the extent of Section 323 I.P.C. since appellant Rajbeer who stabbed the deceased with spear had already died and this appeal on his behalf stood abated.

24. Before we deal with the contentions raised by the learned counsel for the appellant, it would be convenient to take note of the witnesses account as adduced by the prosecution.

25. PW-1 Ram Khiladi,the informant and brother of the deceased Rukampal deposed that he is resident of Nagla Surat Singh. Appellant Rajbeer and Gajraj are residents of Nagla Beni Ram. Other appellants Roshan, Ram Singh, Ram Bahadur, Kishori, Roop Kishor and Raghuveer are residents of Nagla Kaka which is 200 meters away in the South direction. Nagla Beni Ram is located in the Western direction at the distance of 350 meters. Appellants Rajbeer and Gajraj are uncle and nephew, Roop Kishor and Kishori are cousins. Ram Singh and Ram Bahadur are also uncle and nephew, likewise Kishori and Rajbeer are also cousins.The informant moved an application u/s 133 Cr.P.C. before the S.D.M. against Roshan and Ram Singh for removing the obstruction in the pathway in front of his house which was withdrawn by him under the pressure of both the appellants. That pathway was still closed regarding. Earlier also an application was moved before the S.D.M whereupon order was passed to remove the obstruction and open the way due to which they became inimical with him. He further reiterated the averments in the FIR about the occurrence.It is stated by PW 1 that he wrote a tehrir by taking a piece of paper from the compounder of the hospital and lodged the report at the police station Sikandrarao.He proved the written tehrir being in his writing and signature as Ex Ka - 1. It was further stated that all the injured persons were sent to Sikandrarau hospital for medical examination where they were medically examined and the dead body of Rukampal was kept in front of the police station.

This witness was subjected to a lengthy cross-examination by the learned counsel for the appellants wherein the witness had not disclosed any such fact which weakens his testimony. He had assigned the role of stabbing with spear to the appellant Rajbeer and marpit by lathi by other appellants.

26. PW-2 Sughar Singh deposed that on the date of the incident, at about 5:30 P.M.,he was coming from the side of the village and when reached near the temple outside the village,he heard the noise of abuses. Hearing the noise,he reached to the boundary line of the field of Kedari, where Sobran Singh and Netrapal Singh were also present. He saw that Rukampal, Ram Khiladi, Suraj Singh, Dhyanveer Singh, Krishnaveer Singh and Ramji Lal were being beaten by Rajveer, Gajraj, Roshan, Raghuveer, Kishori, Roop Kishor, Ram Singh and Ram Bahadur. Rajveer stabbed

Rukampal with spear in his stomach, as a result, he fell down.Other accused persons beaten Rukampal, Dhyan Singh, Suraj Singh, Ramji Lal, Ram Khiladi and Krishnaveer with lathi. All these persons sustained injuries of lathi. After beating, accused persons went away towards the East direction. Rukampal became unconscious and was taken to his house on a cot.

This witness was also subjected to grueling cross-examination by the learned counsel for the appellants but even during the cross-examination he again asserted the account of the incident as committed by the appellants. No such statement was made by him as to indicate that this witness was not present at the place of occurrence or he could not identify the assailants.

27. PW-3 Netrapal Singh had deposed that the time of murder of Rukampal was 5:30 P.M. He was at the temple and heard noise coming from the field of Kedari. The boundary line of the field of Kedari and the temple was same. Hearing the noise he went to the filed of Kedari where Ram Khiladi, Ramji Lal, Rukum Pal, Kishanveer, Ramdin, Surajpal, Sugar Sigh & Sobran Singh were present. Rajbir was equipped with spear (Bhala), Gajraj Singh, Kishori Lal, Roopkishor, Ram Singh, Ram Bahadur, Roshan Singh and Raghuveer were equipped with lathi. These people started beating Ram Khiladi and others. Rajbir stabbed Rukampal with spear who fell on the ground. PW 3 stated that he interrupted and said why did you beat them,whether you would kill them. In addition to Rukam Pal, Ramji Lal, Ram Khilari, Ramdin, Kishan Veer and Suraj Pal also sustained injuries. After beating, the accused persons ran away towards East.

This witness faced lengthy cross-examination but he reiterated the detail of the incident categorically without any deviation.

28. PW-4 Krishnaveer also stated that his brother Rukam Pal was murdered at about 5:30 P.M. He was at home at that time. His father, brother Ramji Lal, Ramdin and Dhyan Singh were also at home. Hearing the noise from near the temple, they went to the field of Kedari (near the temple) where Rajbir, Gajraj, Ram Bahadur, Ram Singh, Roshan Lal, Kishan Lal and Roop Singh were present. They were beating his brothers Ram Khiladi and Rukam Pal. Rajbir had spear and others were equipped with lathi and all the accused were beating the complainant side. When they tried to save the injured, the accused Rajbir and others also beaten them and caused injuries, Rajbir stabbed with spear in the stomach of his brother Rukam Pal before him, with the stab wound Rukam Pal fell down. He,(P.W. 4) Ram Khiladi, Ramji Lal, Dhyan Singh and his father Sooraj Singh also sustained injuries. After committing marpit, accused persons went away towards the East. Rukum Pal was brought to his house by them, then to the police station by tractor. While they were taking him to the hospital at Sikandra Rao he succumbed to his injuries.

This witness was also cross-examined by the learned counsel for the appellant at length but during cross-examination the witness had asserted the details of the incident clearly without deviating from the actual facts relating to the occurrence.

29. PW-5 Dr. T.N. Goel had deposed that on 23.01.1987 he was posted at Malkhan Singh Hospital and conducted the

post-mortem of the dead body of Rukam Pal at about 4:35 O'clock. Dead body was brought by the constables Prem Pal and Ram Tirath. He had proved the injuries found on the person of deceased and also the post-mortem report, having being prepared in his hand writing and signature as Ex Ka- 2. He opined that the death of deceased Rukam Pal was possible in the evening at about 8:30 P.M. on 22.01.1987 and injury no.1 could be inflicted with spear and others with lathi and danda.

30. PW-6 Dr. L.S. Chauhan had deposed that on 22.1.1987 he was posted at P.H.C. Sikandrarau as Medical Officer. On that day, he examined injuries on the person of Ramji Lal at 11 O'clock in the night, Ram Khiladi at 11:15 P.M., Sooraj Singh at 11:30 P.M., Dhyan Singh at 11:45 P.M. and Kishan Singh at 12:00 P.M. He proved the injuries found on the person of injured and also injury report prepared by him in his hand writing and signature. He proved them as Ex Ka- 3 to 7.

31. PW-7 Shri Krishan, H.C. Police Station, Sikandrarau deposed that he prepared check report of this case in his hand writing and signature and proved it as Ex Ka- 8. Further stated that the entry of F.I.R. was made as report no.41 in G.D. in his hand writing and signature and proved the carbon copy of G.D. by comparing it with the original, as Ex Ka- 9.

32. PW-8 S.I. Mahaveer Singh Yadav stated that he was handed over the investigation of this case after S.S.I. Kailash Bhusan and Inspector Bajeet Singh. He recorded the statements of witnesses Ramdin, Netrapal, Sughar Singh and all the accused persons. He prepared the charge-sheet in his hand writing and signature which he proved as Ex Ka-10.

33. PW-9 Constable Ram Tirath, stated that on 22.01.1987 at about 12:00 O'clock in the night he was handed over the dead body of deceased Rukam Pal and brought it to post-mortem house, Aligarh with relevant papers. Constable Prem Pal was also with him at that time.

34. PW-10 Lakhan Singh is a witness of recovery of spear at the instance of Rajbir and proved the recovery as Ex-1.

35. PW-11 Inspector, Baljeet Singh had investigated the case prior to S.S.I. Mahaveer Singh. He proved the investigation done by him and also the inquest report which was got prepared by S.I., K.P. Sharma and the site plan of the place where two bundles of babul fodder were lying as Ex Ka-11. He also proved fard relating to collection of blood stained and plain soil from the place of occurrence as Ex Ka-12, supurdaginama relating to two bundles of babul fodder as Ex Ka-13 and search memo of the house of accused Rajbir as Ex Ka-14. Thereafter,he was transferred. Further he proved the fard recovery of the spear in the hand writing of S.I., K.B. Singh as Ex Ka-15, the inquest report of deceased Rukam Pal in the hand writing and signature of Sri K.P. Sharma as Ex Ka-16, other relevant papers relating thereto as Ex Ka-17 to Ex Ka-22 and the site plan relating to the place of recovery as Ex Ka-23.

36. PW-1 to PW-4 are witnesses of fact. All these witnesses remained intact during their gruelling examination. No such contradictions are visible in their statements which can make their testimony unreliable and unnatural. Minor contradictions are there but they are of cosmetic nature and not likely to affect the credibility of their testimony. In the instant

case, both informant, injured persons and the appellants belong to the adjacent locality. There cannot be any dispute about the identification of the appellants. Though the appellants have stated in their statements recorded u/s 313 Cr.P.C. that they had been implicated falsely on account of enmity but there was no suggestion of enmity during cross-examination of any of the witnesses which might have adversely affected their reliability and become an excuse for implicating the accused falsely while absolving real culprits. It is to note that PW-1 Ram Khilari, informant has stated that he moved an application u/s 133 Cr.P.C. before the S.D.M. against Roshan and Ram Singh for removing obstructions in the pathway in front of his house which was withdrawn by him. Thereafter, pathway was still closed and he filed another application before the S.D.M. to remove the obstructions owing to which they became inimical with him. It infers that there was dispute relating to obstruction in the way of the informant between appellants Roshan and Ram Singh but not with other appellants. It can also not be said that on account of such a dispute informant would implicate appellants falsely leaving the real assailants. On the ground of enmity the testimony of ocular witnesses those have sustained injuries in the incident cannot be said to be unreliable because they are natural witnesses of the incident. On the other hand, enmity is said to be with appellant Roshan and Ram Singh whereas other appellants Gajraj, Ram Singh, Ram Bahadur and Roop Kishor were not inimical to the informant. Therefore, the testimony relating to their involvement also can not be disbelieved.

37. There is not even an iota of evidence on record which could suggest that PW-1 to PW-4 had any other grudge against the appellants in any case to implicate them falsely.

38. From PW-1 to 4, all are related to each other and also to the deceased Rukumpal regarding which argument had been made that all these witnesses being relative and highly interested, are not reliable and lack of account of independent witnesses in support of the case is fatal no the prosecution story. No doubt the prosecution witnesses from PW-1 to 4 relating to the fact, as examined in the case, are members of the same family as uncle and nephew and also related to the deceased. But the relationship itself is not a ground to reject the testimony of witnesses, rather a family member would be last to leave the real culprit and falsely implicate any other person.

39. In the case of **Brahm Swaroop and another vs. State of U.P. (2011) 6 SCC 288** the Apex Court in Para No.21 has observed as under

"merely because the witnesses were related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the real culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

40. The Court also referred cases of ***Dalip and others vs. State of Punjab A.I.R. (1953) SC 364; Masalti vs. State of U.P. (A.I.R.) 1965 SC 202.***

41. In ***Masalti vs. State of U.P. A.I.R. 1965 SC 202,*** the Apex Court observed in Para No.14

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

42. It is common knowledge that village (mohalla) life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that wholly independent witnesses are seldom available or are otherwise not inclined to come forth. Lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot be a ground to discard their testimony. There is no reason to suppose the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that witnesses would screen the real culprits and substitute the appellants for them.

43. This Court has also made such observations in Para No.14 of ***Rameshwar and others vs. State 2003 (46) ACC 581.***

44. It is pertinent to note that PW-1 Ram Khilari is an injured witness and his presence on the place of occurrence cannot be denied and it can also not be said that he would conceal the name of real assailants and implicate the false one.

45. It is settled law that the testimony of an injured witness is considered to be very reliable and is accorded a special status in law. In the case of Bhajan Singh Vs. State of Haryana (2011) 7 SCC 421, where it was held as follows: " The evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailants in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built in guarantee of his presence at the scene of crime and is unlikely to spare his actual assailants in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness. (vide Jarnail Singh v. State of Punjab (2009) 9 SCC 719; Balraje @ Trimbak v. State of Maharashtra (2010) 6 SCC 673; Abdul Sayed v. State of Madhya Pradesh (2010) 10 SCC 259)".

46. In the case of State of U.P. v. Naresh & Ors. (2011) 4 SCC 324, it was held that evidence of an injured witness cannot be doubted merely because there is a background of previous dispute or enmity between the parties because this could well be the motive of giving assault by the accused on injured witnesses. The evidence of an injured witness has to be appreciated keeping in view that ordinarily a person,

who has been assaulted by someone would not allow him to go Scot free and falsely implicate persons other than those who actually assaulted him. The evidence of an injured witness stand on different pedestal as compared to any other witness cited by the prosecution as eye witness, who claims to have seen the incident. Where an injured witness clearly named the person and the assault made on him by those persons which is broadly corroborated with what has been found in the medical report, even though there may not be any mathematical precision with regard to the manner of assault, the evidence of an injured eye witness cannot be lightly thrown aside only on certain minor contradictions and omissions. It cannot be a case of some exaggeration or it could even be some discrepancy in recollecting the whole incident with exactitude and certainty but on certain minor discrepancy disbelieving altogether the testimony of injured eye witness, would be against the settled principle of appreciation of evidence.

47. In the case of ***Bhajan Singh Vs. State of Haryana (2011) 7 SCC 42***1 it was observed that in Para No.21 :-

21. The evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide: Abdul Sayeed v. State of Madhya Pradesh (2010) 10 SCC 259; Kailas & Ors. v. State of Maharashtra (2011) 1 SCC 793; Durbal v. State of Uttar Pradesh, (2011) 2 SCC 676; and State of U.P. v. Naresh & Ors., (2011) 4 SCC.

48. Therefore, in the light of law reproduced as above and applying the same to the facts of the present case, it can be held that the testimony of the injured witnesses, in the present case, is absolutely clear and cogent and free from any kind of discrepancies, embellishments and concoctions. Thus, no ground is made out for brushing aside the testimony of the injured witnesses. There are no grounds for rejection of the evidence of PW-1 and, as discussed above, unless and until there are major contradictions and discrepancies in the testimony of injured witnesses,there arises no reason for either doubting their presence at the spot of the incident or for that matter questioning the injuries suffered by them. Moreover, in the case in hand, the testimony of PW-1 is not only firm, cogent and convincing but is also in consonance with the medical evidence on record.

49. Injuries on the person of deceased Rukumpal were caused by spear, lathi and danda as stated by PW-1 to 5. Ex Ka-2 is the post mortem report in which penetrated wound and abrasion were found on the body of deceased Rukumpal and PW-5 Dr. T. N. Goel has proved the injuries and

stated that injury no.1 was possible to be inflicted with spear and others with lathi and danda though in cross-examination he stated that injury no.2 & 3 could occur by falling and injury no.4 by friction and also opined that the death of the deceased Rukumpal was possible in the evening at about 8:30 P.M. on 22.01.1987. In this way, injuries found on the body of deceased Rukumpal are proved to have been caused with spear, in the evening on 22.01.1987 and it also corroborates the manner of causing injuries resulting into death as stated by PW-1 to PW-4. In this regard, the eye-witness account finds support with the medical evidence available on record.

50. Likewise, injuries found on the person of Ram Khilari and Krishan Veer are in the nature of contusions and lacerated wounds which were said to have been caused by the appellants with lathi and danda. Ex Ka-3 to 7 are the injury reports relating to the injured persons. PW-6 Dr. L. S. Chauhan had proved the injuries and stated that they were caused by hard and blunt object like lathi and danda and could occur in the evening on 22.01.1987. Injuries were fresh in nature. In this regard, the testimony of prosecution witnesses relating to the injury caused by the appellants with lathi and danda gets corroboration from the medical evidence on record and the opinion given by the doctor who conducted the medical examination. In this way, the manner of causing injuries and the time when they were caused are well established.

51. The place of occurrence is said to be on the way to the home of the informant passing by the Pipal tree near the Shiv Temple. PW-1 to PW-4 stated that the incident took place at the aforesaid place. In the site plan Ex Ka-11, the place of occurrence had been shown on the North West corner of the field of Kedari where the crop of mustard was grown and found damaged and two bundles of babul twigs with leaves were found lying. Blood was also found there. The Shiv Temple was also situated near that place. Pw-11 Inspector Baljeet Singh had proved the site plan and no question relating to the place of occurrence had been asked to him during his cross-examination except the distance of village Nagla Surat from the place of occurrence which he had disclosed as 250 mtrs. Whereas he mentioned it in the site plan as 200 mtrs. and explained that it was only a guess work. Blood stained and plain soil was collected from that place by I.O. Pw-1 Ramkhilari had also deposed that he reached to the Southern corner of the Shiv temple where appellants surrounded him. In the meantime, he reached to the North-East corner of the field of Kedari. There was mustard crop in the field. During cross-examination also, he stated that pipal tree was 400 mtrs. from the Shiv temple on the Northern side from where he along with his brother was coming and was surrounded by the appellants in the field of Kedari. PW-2 had also stated the place of occurrence being the field of Kedari in his chief-examination and even asserted it during his cross-examination. Likewise, PW-3 & 4 had also deposed the same. Thus the place of occurrence in the field of Kedari stands proved.

52. There is no delay in lodging of the F.I.R. Occurrence took place at 5:30 P.M. and F.I.R. was lodged at 21:30 P.M. after four hours. The distance between the place of occurrence and the police station was 11 kms. PW-1 stated that after the incident,he brought Rukumpal to his home, from there while they were bringing the deceased to

Sikandrarao by tractor, on the way he died and then they went to the Hospital Sikandrarao where compounder told them that Rukumpal was dead. He then wrote the application and brought the deceased to the police station with other injured persons. In this way, the time gap of four hours in lodging the F.I.R. stood explained and there cannot be said to be any delay much less inordinate delay. It is proved that the F.I.R. was prompt.

53. Further the attention of this Court has also been drawn towards the absence of motive to commit the murder. The learned counsel urged that the prosecution had failed to prove motive on the part of the appellants to commit the crime.

54. In this regard, it is fairly well settled that while motive does not have major role to play in cases based on eye witness account of the incident, it assumes significance in cases that rest on circumstantial evidence. There is no such principle or rule of law that where the prosecution fails to prove motive for commission of the crime, it must necessarily result in acquittal of the accused where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved.

55. In ***State of Himachal Pradesh Vs. Jeet Singh 1999 (38) ACC 550 SC***, it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but it's corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it as it is almost an impossibility for the prosecution to unravel full dimension of the mental deposition of an offender towards the person whom he offended.

56. In the case of ***Baitulla and another Vs. State of U.P. AIR 1997 SC 3946*** where occurrence took place in the broad day light and spoken to by the eye-witness and the same was supported by Medical Report, it will not be necessary to investigate the motive behind such commission of offence.

57. This Court has also made such observations in the case of ***Rameshwar and others vs. State 2003 (46) ACC 581*** that when there is direct evidence, the motive was not important. Likewise in the case of **State of Haryana vs. Sher Singh and others 1981 Cr. Ruling 317 SC** it has been held that the prosecution is not bound to prove the motive, more so, when crime is proved by direct evidence.

58. Lastly it was argued that there was no unlawful assembly and there is no evidence of common object of it to cause the murder of Rukumpal but the incident was a result of altercation between the appellants and the informant along with the deceased at the spur of the moment. Further the death of Rukumpal was caused with the stab wound of spear which was caused by Rajbir as his individual overt act and other appellants caused simple injuries only to other persons and as such they cannot be held liable for the overt act of Rajbir.

59. It is evident from Ex Ka-1 tehrir that the incident took place at the spur of moment when the deceased and informant were returning to their home with babul fodder and on the way near the Pipal tree Pt. Bankalal was shrieking from where they passed by. In the meantime, appellants also

came there on the way and made querry about shrieking and also asked as to who they were. On their reply, that Pt. Bankelal got scared under the Pipal tree, appellants did not believe but while abusing uttered that they (deceased and informant) were not telling the truth. On this, the appellants were confronted by the informant and were hold not to abuse. At this, altercation among them was commenced when the accused uttered that - maro salo ko, inka dimag bahut kharab hai' and they started assaulting them with lathi and spear. PW-1 informant who is the injured witness and with whom the incident took place also stated in his examination-in -chief that Roshan said, "salo ko mar lo".

60. From the words uttered by the appellants, as above noted,it can be inferred that they meant to beat the informant and deceased Rukumpal on account of the dispute that arose amongst them relating to query about shrieking of Pt. Bankelal under the Pipal tree. The immediate cause of the dispute was shrieking of Pt. Bankelal. There are four injuries on the person of the deceased. Injury no.1 is penetrating wound and others are in the form of abrasion and linear abrasion on the back of right elbow, back of left ankle and outside middle of the left leg. PW-5 Dr. T. N. Goel has opined during his cross examination that injury no.2 & 3 could be sustained by falling and injury no.4 with friction. Thus, it cannot be concluded that these appellants were the person who authored these injuries on the person of the deceased.In the course of altercation Rajbir stabbed spear to Rukumpal which pierced his stomach and he died. This was his individual act. Other injured were assaulted with lathi by other appellants and after assault, the appellants ran away. No other injured had received grievous injury. All the injuries of the injured were in the nature of abrasions/contusions except two lacerated wounds on the back of hand and face which were simple.

61. It is also to be noted that as per the F.I.R. version of the informant, the complainant side also assaulted accused party with lathi. In his cross-examination also, the informant had deposed that he made statement before the I.O. that he had also wielded lathi in defence. PW-3 Netrapal had also made such a statement before I.O. but during his cross-examination he had denied making such a statement though admitted that Ramdin also attacked with danda. PW-4 Krishnaveer had also admitted that Ramdin had danda and he went to the place of the incident after hearing the noise of quarrel. It reveals that there was a quarrel and fight wherein both the parties assaulted each other. Further, it is also evident from the statement of PW-1 Ram Khilari that appellant Rajbir and Ram Singh asked him as to who were they. Likewise PW-2 Sughar Singh had also stated in the cross-examination that when he came at the field of Kedari, two persons on the complainant side and four other persons on the accused side came running from the village. This fact further establishes that in the beginning there were only two accused persons Rajbir and Ram Singh and afterwards, four other persons joined in from the village who also participated in the incident of maarpeet. In such a situation of facts, it cannot be said that the appellants had planned to kill the deceased or to beat the injured but it was a result of sudden quarrel and fight between both sides. There was no such common object of the appellants as well.

61. In the case of ***Lalji and others vs. State of U.P. 1973 AIR SC 2505*** where

during the course of quarrel relating to digging the earth and extending the frontage of hut one of the accused persons assaulted the deceased Pancham with spear on his abdomen as a result he died and other accused persons caused injuries to other injured persons with lathi causing simple injuries, it was observed therein that there was remonstrance and counter remonstrance which resulted in a fight which was a sudden affair and was the result of heated passion. It was held that the case does not show that the appellants formed a common object as there was no per-meditation and the occurrence was a sudden affair, each of the appellants, in our opinion, should be held to be liable for his individual act and not vicariously liable for the acts of others. Further, it was held therein that Lalji gave the spear blow on the abdomen of the deceased Pancham and his conviction should therefore, be maintained u/s 304(1) I.P.C. As regards the other appellants their conviction for the offence u/s 323 I.P.C. was maintained and sentence of imprisonment u/s 323 I.P.C. was reduced to the period already undergone.

61. In the case of Chinu Patel vs. State of Orrisa 1990 CRLJ 248, where accused persons demanded for the return of the chair and as the deceased refused to return the same, a quarrel ensued which ultimately resulted in a free fight between the parties during the course of which both sides were injured and one of them died. It was held that in such a situation as there is no scope for a pre-planned attack by the accused, the question of accused persons forming an unlawful assembly having a common object to do any act mentioned in the five clauses of Section 141 I.P.C. does not arise for consideration. The view taken by the Apex Court in aforesaid case of ***Lalji vs. State of U.P.*** was followed therein.

63. In so far as the question whether the appellants had formed an unlawful assembly and had common object of committing the murder, we have given our earnest consideration to this aspect. Taking a general picture of the case and after the close scrutiny of the evidence in its entirety, we find that in the course of altercation between the injured Rukumpal, Ram Khilari and appellants, in the heat of passion,Rukumpal was stabbed with spear by Rajbir (now dead) and the injured succumbed to the stab injury. No other appellants assaulted Rukumpal with lathi except to other persons (injured).Under these circumstances, it would be hazardous to hold that there was an unlawful assembly and common object of that assembly (of the appellants) was to commit the murder. It is established from the testimony of the prosecution witnesses that there was random individual acts done by the appellants without meeting of mind and, in our view, the appellants can be held liable only for their individual acts. Therefore, it is established beyond reasonable doubt that the appellants caused injuries which were simple in nature and punishable under Section 323 I.P.C. In the result, the conviction in respect of each of these appellants under Section 147 & 302 readwith Section 149 I.P.C. can not be said to be just and lawful and sentence to imprisonment for life to each is, hereby, set aside.

64. The conviction of the appellants under Section 147, 302 readwith Section 149 I.P.C. is modified as conviction under Section 323 I.P.C. and they are sentenced to undergo imprisonment to the period already undergone.

65. The appeal is ***partly allowed*** to the extent indicated above. The appellants are on bail. Their bail bonds are cancelled. The sureties shall stand discharged. They need not to surrender.

66. Certify this judgment to the court below for necessary intimation and compliance. The compliance report be submitted to this Court through the Registrar General, High Court, Allahabad.

(2022)06ILR A598
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.06.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No.2262 of 2009

Bhagwati Singh @ Pappu
...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Piyush Asthana

Counsel for the Respondent:
G.A., Sri Shreesh Chandra Counsel for the C.B.I.

(A) Criminal Law – Appeal against conviction - Indian Penal Code, 1860 - Sections 302/34 ,120-B & 212 - The Code of criminal procedure, 1973 - Section 227, Arms Act, 1959 - Section 5,25/27 - conviction can be made on the basis of testimony of a single witness, if the Court finds the testimony reliable - if direct evidence is there then motive loses its importance because nobody can peep into the mind of a miscreant to know for what purpose he/she has committed the offence.(Para - 22,25)

Miscreants silenced life of an eight time National Badminton Champion (deceased) - FIR lodged against unknown persons by complainant - who was Regional Sports Officer in the Stadium - deceased used to come to play badminton - complainant was informed about the incident by P.W.9 (eyewitness) - Most of witnesses of facts turned hostile - P.W.1 (complainant) is not an eye witness - lodged FIR of incident upon information given by PW9 - carried injured deceased along with two police personnel to medical college - declared brought dead **-** recovery memo pistol proved by independent witness - PW9 identified convict/appellant in jail during test identification parade - finally identified convict/appellant before trial court.**(Para - 2,7,20,32)**

(B) Evidence Law - The Indian Evidence Act, 1872 - Section 134 - No particular number of witnesses shall in any case be required for the proof of any fact - quality of the evidence that matters and not the quantity - If the evidence of a single witness is cogent with ring of truth and the Court considers that reliable and trustworthy then conviction can be made on the basis of testimony of that witness alone.(Para - 24)

(C) Evidence Law - The Indian Evidence Act, 1872 – Section118 - all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body, of mind or any other cause of the same kind.(Para - 27)

(D) Criminal Law - The Code of criminal procedure, 1973 - section 313 – power to examine the accused - convict/appellant accepted that P.W.9 (most important witness & conviction rests on his evidence) had identified him correctly - witness answered - not at the spot - did not dispute the place of occurrence – trial court committed no error in relying upon the testimony of P.W. 9 supported with medical testimony and the testimony of formal witnesses for holding the convict guilty of killing the deceased. **(Para - 31)**

HELD:- Evidence available on record establishes that deceased was killed by firing made by convict/appellant alongwith one

another accused by using fire arm in contravention of Section 5 of the Arms Act, which is punishable under Section 27 of the Arms Act. Conviction and sentence of the convict/appellant awarded by the trial court punishable under Section 302/34 of I.P.C. and under Section 27 of the Arms Act confirmed and upheld.**(Para -33)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Mohanlal Gangaram Gehani Vs St. of Mah., 1982 SCC (Cri.) 334

2. Wakil Singh & ors. Vs St. of Bihar, 1981 SCC (Cri.) 634

3. Dana Yadav @ Dahur & ors. Vs St. of Bihar, 2002 SCC Online SC 867

4. Sanjeev Kumar etc. Vs St. of H.P., 1999 SCC Online SC 65

5. Hasib Vs St. of Bihar, 1972 (4) SCC 773

6. Shaikh Umar Ahmad Shaikh & anr. Vs St. of Mah., 1998 SCC (Cri.) 1276.

7. Chaman Vs St. of U.P., 1993 SCC (Cri.) 212

8. Manzoor Vs St. of U.P, 1982 SCC (Cri.) 356

9. Suleman Vs St. of U.P.

10. Nathwa & ors. Vs St., AIR 1951 Alld. 452

11. Mohd. Anwar Vs St. of Delhi, 2000 SCC (Cri.) 279

12. Tasleem Vs St. of NCT Delhi

13. St. (Delhi Admn.) Vs V.C. Shukla & anr.. 1980 (2) SCC 665

14. Chander Pal Vs St. of Har., 2002 SCC Online SC 196

15. Mahendra Pratap Singh Vs St. of U.P., 2009 SCC Online SC 426

16. Prakash Kumar Vs St. of Guj., 2005 (2) SCC 409

17. Puran Singh Vs St. of Uttaranchal, 2008 SCC Online SC 94

18. Dilip & ors. Vs St. of M.P., 2007 (1) SCC (Cri.) 377

19. Ganga Tiwari & anr. Vs St. of U.P., 2008 SCC Online All. 1889

20. St. of M.P. Vs Ramji Lal Sharma & anr., 2022 SCC Online SC 282

21. Subed Ali & ors. Vs St. of Assam, 2020 SCC Online SC 794

22. Gulam Sarwar Vs St. of Bihar, 2014 (2) SCC (Cri.) 195

23. St. of U.P. Vs Krishna Master, 2010 SCC Online SC 832

24. Raja Vs St. by Inspector Police, (2020) 4 SCC (Cri.) 115

25. Mulla & anr. Vs St. of U.P., 2010 SCC Online SC 264

26. St. of U.P. Vs Kishanpal & ors., (2008) 16 Supreme Court Cases 73

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Appeal has been filed by the convict/appellant Bhagwati Singh @ Pappu against the judgment and order dated 22.08.2009 passed by Additional Sessions Judge Court No.1, Lucknow in Sessions Trial No.293 of 1989 State Vs. Bhagwati Singh alias Pappu and another, arising out of Case Crime No.302/34 Indian Penal Code, 1860 (in short I.P.C.) and Sections 25/27 of the Arms Act, Police Station Hazratganj, District Lucknow whereby the trial court convicted and sentenced the convict/appellant under Section 302/34 of I.P.C., with life imprisonment coupled with a fine of Rs.40,000/- and in default of payment of fine further rigorous

imprisonment of three months. The trial court further convicted and sentenced the convict/appellant under Section 27 of the Arms Act with five years rigorous imprisonment coupled with a fine of Rs.10,000/- and in default of payment of fine further imprisonment of one month.

2. This appeal relates to a very unfortunate and despicable crime, wherein the miscreants silenced the life of an eight time National Badminton Champion Syed Modi, who represented India in various international championships. The facts necessary for disposal of this appeal in short are as under:-

(i) A First Information Report (in short FIR) was lodged by the complainant-Nirmal Singh Saini, Regional Sports Officer, K.D. Singh Babu, Stadium Lucknow on 28.07.1988 presenting a written report Exhibit Ka-1, wherein it was stated that on 28.07.1988 Mr. Syed Modi came to play badminton in the badminton hall at about 4:30 P.M. He (complainant) was also present in the stadium. After playing, at about 7:45 P.M. he was going back on his scooter, somebody fired upon him with an intention to kill him, at the north gate of stadium. One Prem Chand Yadav who was working in the canteen on the gate, came to him raising alarm and told that two persons were running in a white colour Maruti Car after firing upon Syed Modi. The complainant, his colleague Mr. K.H. Jackey, many other players of the stadium and two police personnel who were on duty at the time, came out, but by that time the miscreants had fled away by white Maruti Car. The miscreants were seen while firing upon Syed Modi by Prem Chandra Yadav, Smt. Quaiser (Panwali), Rickshaw Puller and many other persons sitting in the canteen, in the electric light who were present on the spot. He (complainant), Ravi Verma and two police personnel carried Syed Modi in injured condition to Medical College where doctor declared him dead.

(ii) The FIR was registered on 28.07.1988 at about 20:50 hours against two unknown assailants. The investigation of the case started and initially Sri Rajveer Singh Tyagi incharge of Police Station Hazratganj started investigation, conducted the inquest of the dead body of Syed Modi and prepared the necessary papers including the 'Panchayatnama' and sent the dead body to the mortuary of Medical College, Lucknow alongwith a letter to the C.M.O. for conducting the postmortem examination of the corpse.

(iii) The postmortem was conducted on 29.07.1988 at 10:15 AM by a panel of three doctors and they prepared the postmortem report. While the investigation of the case was going on, the State Government recommended that investigation be made by the Central Bureau of Investigation (in short CBI). The Department of Personnel and Training, Government of India vide notification No.228/23/88-AVD. II dated 02.8.88 handed over the investigation of the case to the CBI. The CBI registered it as Crime No.RC-2(S)/88 SIV.V/SIC. II/SIU.V. After investigation CBI came to the conclusion that Sanjay Singh, Ameeta Kulkarni Modi, Akhilesh Singh, Amar Bahadur Singh, Bhagwati Singh alias Pappu, Jitendra Singh alias Tinku and Balai Singh were the miscreants who were behind the commission of murder of Syed Modi. The CBI submitted chargesheet against all these persons under Section 120-B I.P.C. and Section 120-B read with Section 302 of I.P.C., against Sanjay Singh, Ameeta

Kulkarni Modi, Akhilesh Singh, Amar Bahadur Singh, Jitendra Singh alias Tinku and Balai Singh for the offences punishable under Section 302 read with Section 34 of I.P.C., against the accused Amar Bahadur Singh, Bhagwati Singh alias Pappu, Jintendra Singh alias Tinku and Balai Singh and for the offences punishable under Section 25/27 of the Arms Act against the accused Amar Bahadur Singh and for offences punishable under Section 27 of the Arms Act against Bhagwati Singh alias Pappu and for offence punishable under Section 25 of the Arms Act against accused Balai Singh. The required sanction for prosecution under Arms Act of accused persons Amar Bahadur Singh and Balai Singh was taken by the Investigating Officer from District Magistrate, Lucknow.

(iv) The CBI after collecting the oral and documentary evidence submitted the Chargesheet No.2 of 1988, Exhibit Ka-5, wherein the Investigating Officer Mr. D.P. Singh, Deputy Superintendent of Police SIC-II CBI/SP New Delhi noted as under:-

"A case Crime No.722/88 was registered at Police Station Hazratganj, Lucknow on 28.07.1988 regarding the murder of Syed Modi near the gate of K.D. Singh Babu, Stadium Lucknow. The investigation of this case was transferred to the Central Bureau of Investigation (DSPE) by the Central Government vide Notification No.228/23/AVD. II dated 2.8.1988 of the Department of Personnel & Training, Government of India New Delhi on the the request of the Government of U.P. It was entrusted to the undersigned. The following facts and circumstances have emerged during the course of investigation:-

Shri Syed Modi, the deceased belonged the lower middle class family of Sardar Nagar, Gorakhpur, (U.P).. His father expired when he was a child. He was brought up by his elder brothers his family did not own any landed property. He joined N.E. Railways as a Welfare Inspector in the year 1979. His appointment was out of the sports quota. He was National Badminton Champion for eight years and represented India in various International Championships. He was promoted as Sports Superintendent in 1984 at Lucknow and was subsequently promoted as Senior Welfare Superintendent in NE, Railways, Lucknow, the post which he was holding at the time of his murder on 28.07.1988.

Sanjay Singh is the adopted son of late Shri Rananjay Singh, former Raja of Amethi, District Sultanpur (U.P.). He was elected to U.P. Assembly from the Amethi constituency in the elections held in 1980 and 1985. He was Minister in U.P. Government from 22.07.1982 to 22.08.1987 for Forests, Diary, Fisheries, Yuva Kalyan, Transport etc. The portfolio of sports was also allotted to him, from 09.02.1984 to 12.03.1985. He was the Chairman of Pradeshik Co-operative Dairy Federation Ltd. (PCDF), Lucknow during the period July 1984 to August, 1987, except for a brief period of five days in July, 1985.

Ameeta Kulkarni Modi, is the daughter of Shri M.V.Kulkarni, General Manager (Technical), Maharashtra State Textiles Corporation, Bombay. Her mother Smt. Pushplata Kulkarni was a Lecturer in Junior College level in Wilson College, Bombay. Ameeta Kulkarni was brought up and educated in Bombay upto B.A. Part-I and then she did her B.A. Final privately as a teacher candidate from Lucknow University in the year 1983-84, although she was already in Government Service in

Clerical Grade in the Railways at Bombay during that period. She joined the Central Railways, Bombay as Sr. Clerk and later on worked as Head Clerk in the Pay-Scale of Rs.425-700 from Sept. 1981 till 31.03.1985. She came to Lucknow in Feb. 1984 for appearing in B.A. Examination of Lucknow University and since then continues to stay at Lucknow. She gave one month's notice vide her letter dated 16.03.1985 to the Central Railway, Bombay. Her resignation was accepted with effect from 01.04.1985. She was earlier interviewed on 09.03.1985 for the post of Manager Grade-III in PCDF Lucknow. She was subsequently appointed as Marketing Manager, Grade-III in PCDF, Lucknow w.e.f. 9.4.1985 in the Pay Scale of Rs.1250-2050 against a post in the sports quota created for the first time in PCDF at the behest of Sanjay Singh.

Akhilesh Singh is the son of Late Ravindra Nath Singh @ Dhunni Singh R/o village Lalupur Chauhan, District Rae Bareli. Ravindra Nath Singh had been a big landlord and contractor. Akhilesh Singh has a criminal record and is presently involved in a number of crimes along with other members of his gang, some of whom are co-accused in this crime. Previously, he too had business interest in various constructions firms owned/controlled by members of his family. His interest has been transferred in the name of his wife of late. A number of vehicles have remained at his disposal from time to time.

Amar Bahadur Singh, S/o Chand Ram R/o Pindari Khurd, District Rae Bareli, Bhagwati Singh @ Pappu S/O Sukhpal Singh, R/O Paharpur Kason, District Rae Bareli, Jitender Singh @ Tinku S/o Bajrang Bahadur Singh, R/o Kodras Buzrag, District Rae Bareli and Balai Singh, S/o Nankau Singh, R/o House No.566/28, Jai Prakash Nagar, Alambagh Area, PS Krishna Nagar, Lucknow, permanent address: Village Jhaua Sarkhi, P.S. Harchandpur, District Rae Bareli, all come from average agriculturist families. All the four have criminal history. They all are associated with Akhilesh Singh, accused.

Syed Modi, the deceased, came into contact with Ameeta Kulkarni when both had gone to Beijing (China) for participating in the 3rd Interntional Asian Invitation Chairmanship in the year 1978. Ameeta Kulkarni was engaged to Syed Modi in the year 1982. Sanjay Singh came into contact with Ameeta Kukkarni in the year 1983, when she had come to Lucknow.

During investigation, it has transpired that Ameeta Kulkarni started having positive leanings toward accused Sanjay Singh from the beginning of 1984 inspite of her engagement with Syed Modi The friendship of Ameeta Kulkarni with Sanjay Singh developed into infatuation with each other and it caused so much alarm to Syed Modi that he was continuously perturbed. Smt. Pushplata Kulkarni, mother of accused Ameeta advised her and Sanjay Singh, accused to gain the confidence of Modi to such an extent that is should make him trust Ameeta even to the extent that her relationship with Sanjay Singh be acceptable to him. She further advised Sanjay Singh and Ameeta Modi to learn and use a certain amount of restraint, and check on their emotions. She pointed out that Sanjay Singh wants to be the Chief Minister and he may have many women in his life but he must not allow his image to be tarnished. He should not shun womankind but should be careful, was her advice to Ameeta and Sanjay Singh. She

advised Ameeta Kulkarni to teach Modi to accept her as she was.

Marriage of Syed Modi and Ameeta Kulkarni took place on 14.05.1984 at the residence of Sanjay Singh. Sanjay Singh and his PRO Mohd Alam appended their signatures on the concerned application dated 14.5.1984 as witnesses to the effect that marriage has been solemnized in their presence.

During investigation, it transpired that Sanjay Singh and Ameeta Kulkarni Modi soon after developed and continued extra-marital relations. He got various properties and amenities made available to Modi. Infatuation of Sanjay Singh for Ameeta increased as time passed. Within Lucknow he would ring her up some time ten times a day; coming to Ameeta often twice at night to seek sexual gratification with her consent. He would ring her up when she was at Patiala, Delhi, Bombay etc. from Lucknow and also ring her from outside Lucknow times out of number when she would be in Lucknow. Sanjay Singh spent thousands of rupees to phone Ameeta from all over India. Syed Modi, the deceased resented this relationship. he suspected the infatuation of Sanjay Singh for his wife Ameeta and her most willing participation. They had frequent quarrels over this issue. Ameeta Modi wrote passionate love letters to Sanjay Singh. She wrote that " I am only yours as far as I am concerned mentally though physically I may be someone elses'.....life is going to be tough for me, its gonna to be some test. I only hope and pray that God gives me strength, to remain yours come what way." In another letter, she wrote, "I love you but there are many many restrictions in this blind love of mine. I can never forget the fact, however, hard I try, that we are both married to two different individuals and our first duties are towards them. It is all easy to say but I know, we can't leave them, however, we might want to be one. I guess we will have to find a via-media to this." Then again, "please tell me can you wait even if it means a year or more?. Let me also prepare myself because if I have to be shattered the sooner the better."

Ameeta Kulkarni Modi gave birth to a daughter on 4.02.1988 at Command Hospital, Lucknow. She was got admitted to the Command Hospital, Lucknow through the influence of Sanjay Singh. She had conceived two times earlier but both times she aborted. Syed Modi had suspected that the conception of Ameeta Modi in 1986 was by Sanjay Singh. The facts and circumstances in the case that Syed Modi had repeatedly asked Ameeta to give up Sanjay Singh. He himself was so much in love with Ameeta that inspite of her infidelity and Sanjay's infatuation for her, he never desired separation though he anticipated his own death, if Ameeta continued to carry on her affairs with Sanjay Singh. When Sanjay Singh found that Syed Modi was finally becoming a stumbling *block to continuance of his sexual relations with Ameeta, he disclosed his intentions to silence Syed Modi in his own way.*

Sanjay Singh, Smt. Ameet Kulkarni Modi, Akhilesh Singh, Amar Bahadur Singh, Bhagwati Singh @ Pappu, Jitendra Singh @ Tinku and Balai Singh, some time between June, 1988 and 28th July, 1988 were party to a criminal conspiracy, the object of which was to commit the murder of Syed Modi. In pursuance of the said criminal conspiracy, the following acts of commissions and

omissions were committed by the accused persons:-

Sanjay Singh and Akhilesh Singh were together in Yatrik Hotel Allahabad in mid June 1988 where Sanjay Singh asked Akhilesh to arrange for the murder of Syed Modi. Thereafter on 20.07.1988 Sanjay Singh met Bhagwati Singh @ Pappu in this regard. This meeting was arranged by Akhilesh Singh at Sanjay Singh's residence. Here Sanjay Singh entrusted the task of killing Syed Modi to Bhagwati Singh alias Pappu. Sanjay Singh then left Lucknow in the night of 20.07.1988 by train and reached Delhi in the morning of 21.07.1988. Sanjay Singh left Delhi in the night of 23.07.1988 and reached Lucknow by train in the morning of 24.07.1988. Sanjay Singh again left Lucknow by train in the night of 25.07.1988 and reached Dehli in the morning of 26.07.1988. He left Delhi by train in night of 28.07.1988 and reached Lucknow in the morning of 29.07.1988. He again left for Delhi on 31.07.1988 and reached Delhi on 01.08.1988 and returned to Lucknow on 03.08.1988.

Akhilesh Singh introduced Bhagwati Singh @ Pappu to Sanjay Singh at the latter's residence on 20.07.1988. He obtained Maruti Van No. HYG 1959 from Abdul Khalik, brother of Sri Abdul Malik on 20.07.1988 at Lucknow stating that he required it for some important work. He thereafter used it to facilitate the movement of Amar Bahadur Singh, Bhagwati Singh @ Pappu, Jitendra Singh @ Tinku and balai Singh and himself before and after the crime. Efforts were made from telephone number 33745 & 48134 of Sanjay Singh to contact telephone number 2378 at the residence of Akhilesh Singh at village Lalupur Chauhan, district Rae Bareli and also at telephone number 2694 installed at residence of his uncle, Devendra Nath Singh on 25.07.1988. Akhilesh Singh brought his aforesaid men in Maruti Van no. HYG 1959 to Lucknow on 26.07.1988 and arranged for their lodging at 13, Royal Hotel, Lucknow where he used to stay frequently. Akhilesh Singh also provided Enfield .38 revolver no. J 8050 to Amar Bahadur Singh. Akhilesh Singh left Lucknow on 27.07.1988 morning by train to Delhi and reached Delhi the same day. He contacted accused Sanjay Singh on 27.07.1988 at Karnataka Bhavan. He left Delhi on 28.07.1988 and reached Haridwar the same day in the evening. Ashwani Kumar and others had accompanied him. Akhilesh Singh stayed at the house of Ashwani Kumar in Haridwar. Akhilesh Singh tried to contact from phone no. 125 of Ashwani Kumar to telephone number 33745 of Sanjay Singh at Lucknow on 29th, 30th and 31st July, 1988. Akhilesh Singh had a dip in the holy Ganga at Haridwar on hearing of the murder of Syed Modi. He left Haridwar on 31.07.1988 and reached Meerut on the same day. He reached Delhi on 01.08.1988 and reached Lucknow in the night of 02.08.1988 by air. He stayed in Hotel Clark Awadh, Lucknow till 03.08.1988 morning under a false address.

On 28.07.1988 Amar Bahadur Singh accompanied by Bhagwati Singh @ Pappu and Balai Singh went in Maruti Van No.HYG 1959 driven by Jitendra Singh alias Tinku to K.D.Singh Babu, Stadium Lucknow Amar Bahadur Singh @ Pappu took position outside the Northern Gate (near mini swiming pool) of K.D. Singh Babu, Stadium Lucknow with the intention to kill Syed Modi. At about 7:45 PM when Syed Modi came out of the stadium on his scooter, he was fired at by them, as a result of which Syed Modi fell down. Amar

Bahadur Singh and Bhagwati Singh ran away from the scene of crime and escaped after getting into the aforesaid Maruti Van which was parked nearby and waiting for them to facilitate their escape.

Jitendra Singh alias Tinku facilitated the movements of accused Bhagwati Singh, Amar Bahadur Singh and Balai Singh by driving Maruti Van No.HYG 1959, as a result of which they were taken to the scene of crime and promptly fled away from the commission of crime.

Balai Singh remained associated before, during and after the commission of crime with the aforesaid associates.

Balai Singh in the company of accused Bhagwati Singh @ Pappu, Amar Bahadur Singh and Jitendra Singh @ Tinku was seen alongwith the said Maruti Van, just after murder at Paschim Gaon, District Rae Bareli at about 9:00 PM.

Ameeta Kulkarni Modi exhibited unnatural and abnormal conduct before and after the commission of crime, in as much as that she faked illness and on 28.07.1988 did not accompany Syed Modi to the Stadium for practice. On receiving the message about the "accident" of Modi, instead of inquiring about his condition and rushing to hospital, she tried to inform Sanjay Singh over phone. He was then at Delhi. Thereafter, she visited the residence of Sanjay Singh and only thereafter went to the hospital. On the day of burial of Syed Modi, she did not stay with her inlaws but instead stayed in Hotel Marina, Gorakhpur where Sanjay Singh also stayed. She did not attend the "Majlis" Ceremony held on 31.07.1988 at Sardar Nagar, Gorakhpur, at the house of Sri Pyare Bhai Modi's brother. On 02.08.1988 she returned from Gorakhpur to Lucknow and cautioned Abid Hyder, brother of Modi not to divulge anything about her relations with Sanjay Singh to the Investigating Agency. During the mourning period she went about withdrawing very heavy amounts from Banks held in the joint names of Modi and herself, submitting claim papers to LIC, getting LDA plot, measuring about 800 Sq./mts. allotted to Syed Modi, transferred in her name, obtaining compensation and other dues due to Shri Modi amounting to more than Rs.70,000/-.

Syed Modi after falling down as a result of injury sustained by bullets fired at him was rushed to hospital in a passing Car by Ravi Verma, a Judo Player, Jamal Khan, a handball player, Nirmal Singh Saini, Regional Sports Officer, K.D. Singh Babu Statium and H.C. Mohd. Yjnis and constable Shiv Charan Mishra.

Dr. G.B.S. Kalra, Casualty Officer of the K.G.M.C. Hospital, Lucknow declared Modi dead on examining him in the hospital. Postmortem was conducted on his body which confirmed his death to be due to shock and hemorrhage caused by fire arms injury. The postmortem conducted reveal that five bullets entered into the body of Syed Modi, out of which 3 bullets passed through and 2 remained embedded which were extracted during the postmortem conducted on the dead body of Syed Modi in K.G.M.C. Hospital, Lucknow on 29.07.1988. Earlier two lead bullets had been recovered by police on 28.07.1988 from the scene of crime.

Akhilesh Singh, Amar Bahadur Singh, Bhagwati Singh alias Pappu and Jitendra Singh alias Tinku were arrested on 16.08.1988, Ameeta Kulkarni Modi was arrested on 21.08.1988, Balai Singh was

arrested on 22.08.1988 and Sanjay Singh was arrested on 03.09.1988.

After the arrest, Amar Bahadur Singh, on 16.08.1988 made disclosure statement to the effect that the .38 revolver used in the commission of the crime was hidden by him in a room at 566/28, Jai Prakash Nagar, Lucknow which was used by Balai Singh. As as result of his disclosure recovery of .38 bore revolver No.J8050 was made under Section 27 of the Indian Evidence Act. On 23.08.1988, Balai Singh while in police custody made a disclosure statement to the effect that one 9 MM Pistol, which was carried by Bhagwati Singh @ Pappu at the time of commission of crime was hidden by him and at his instane the smae bearing No.110872 was recovered on 23.08.1988 from a Mango Grove of Ravindra Nath Singh @ Dhunni Singh, father of accused Akhilesh Singh at village Lalupur Chauhan, District Rae Bareli. This pistol has been found to have been used in the commission of crime registered as Case Crime No.318 of 1987, P.S. Mohanlalganj, Lucknow under Seciton 147, 148, 149, 302, 201 I.P.C.

During the course of investigation, it transpired that the aforesaid .38 revolver was traced to be of defence origin and 9 MM pistol was stolen one from the then Havaldar Babu Ram of ST HQ COY.56 APO on 27.10.1982 at Dehradun for which FIR No.74/82 dated 27.10.1982 was lodged with GRP Dehradun.

During the course of investigation, Akhilesh Singh and Jitendera Singh alias Tinku were put to polygraphic test at CFSL, New Delhi and they admitted their acts of commission and omission and also disclosed about the facts of commission and omission of Amar Bahadur Singh, Bhagwati Singh @ Pappu, Balai Singh and Sanjay Singh.

During the course of investigation the bullets recovered as above i.e. two form the scene of crime and two extracted from the body of Syed Modi during postmortem were sent to ballistic expert alongwith the recovered .38 revolver No.J8050 for expert opinion. The ballistic expert opined that the bullets in question have been fired from the said .38 revolver. The ballistic expert has also opined that the holes in the t-shrit worn by Modi at the time of murder are corresponding to the wounds described in the postmortem report of deceased Syed Modi and could have been caused by the passage of .38 bullets. It is also opined that the blackening and tattooing observed in the postmortem examination on the five injury wounds indicate close range of firing. 9 MM pistol, which was recovered at the instance of Balai, too were send to the Ballistic expert who on examination found the same in serviceable condition.

After the arrest of accused Amar Bahadur Singh and Bhagwati Singh alias Pappu, they were produced "Baparda" before the Competent Court having jurisdiction in Lucknow and were remanded "Baparda' to the judicial custody where they were put to the test of identification parade before a Magistrate and were identified by Sri Prem Chand, an eye witness to be the assailants who fired at Syed Modi on 28.07.1988.

Akhilesh Singh, Amar Bahadur Singh, Bhagwati Singh @ Pappu, Jitendra Singh @ Tinku and Balai Singh all have past criminal history. Akhilesh Singh and Balai Singh had been/are involved

jointly/singly in nearly 20 cases of murder, attempt to murder, extortion, criminal trespass, kidnapping/ abduction, criminal intimidation, Arms Act, U.P. Gangster Act, Exercise Act, U.P. Goonda Control Act etc. Accused Amar Bahadur Singh is involved in a case of attempt to murder and Bhagwati Singh @ Pappu is facing prosecution under Section 25 of Arms Act. Jitendra Singh @ Tinku is involved in a case of criminal intimidation.

During the course of investigation, the searches were conducted at the residence of Ameeta Kulkarni Modi at A-8, Park Road Colony, Lucknow, her parental house at Bombay and at residence of Sanjay Singh at 19 Vikramaditya Marg, Lucknow. As as result of these searches, a diary of 1986, letters written from Patiyala and Lucknow by Ameeta Kulkarni Modi to Sanjay Singh, photographs of Sanjay Singh, Ameeta and her daughter, letters of Syed Modi and letters of Smt. Pushplata Kulkarni were, inter alia, recovered from the residence of Ameeta and her parents. These documents have been referred to the Government Examiner of questioned documents and his opinion is awaited. A letter of Mrs. Garima Singh, telephone diaries, trunk call register etc., were recovered from the residence of Sanjay Singh at Lucknow.

During the course of investigation, besides the above documents, more documents were collected and statement of witnesses were recorded which prove the complicity of the aforesaid accused.

The above facts and circumstances disclose the commission of offences punishable under Section 120 (B) of I.P.C. and under Section 120(B) r/w Section 302 of I.P.C. by Sanjay Singh, Ameeta Kulkarni Modi, Akhilesh Singh, Amar Bahadur Singh, Bhagwati Singh alias Pappu, Jitendra Singh alias Tinku and Balai Singh, offences punishable under Section 302 r/w 34 of I.P.C. by accused Amar Bahadur Singh, Bhagwati Singh alias Pappu, Jitendra Singh @ Tinku and Balai Singh and offences punishable under Section 25/27 of Arms Act by accused Amar Bahadur Singh, offences punishable under Section 27 of Arms Act by accused Bhagwati Singh alias Pappu and offences punishable under Section 25 of Arms Act against accused Balai Singh.

Orders of sanction issued by District Magistrates, Lucknow and Rae Bareli for prosecution of accused Amar Bahadur Singh and that of Balai Singh under Section 25 of Arms Act respectively are enclosed.

Sanjay Singh, Ameeta Kuklarni Modi and Akhilesh Singh are on bail and the remaining accused Amar Bahadur Singh, Bhagwati Singh @ Pappu, Jitendra Singh @ Tinku and Balai Singh are in judicial custody. It the requested that the aforesaid accused person may be tried according to the provisions of law. "

(v) On the above chargesheet submitted by CBI, the Special Judicial Magistrate,(CBI) Lucknow took cognizance and committed the case to the Court of Sessions for trial on 13.07.1989. The Court of Sessions discharged the accused Sanjay Singh and Ameeta Kulkarni Modi on the application moved under Section 227 of Code of Criminal Procedure, 1973 (in short Cr.P.C.) vide a detailed order dated 17.09.1990 and that order of discharge of Sanjay Singh and Ameeta Kulkarni Modi was upheld first by

the High Court and thereafter by the Hon'ble Supreme Court. The accused Akhilesh Singh filed a writ petition under Section 482 Cr.P.C. bearing Criminal Misc. Case No.37 of 1995 (Akhilesh Singh Vs. State of U.P.) to quash the order of framing charge against him, before the High Court and the High Court vide its order dated 19.08.1986 allowed the petition and the order of framing charge against him by the Sessions Judge, was quashed and the accused Akhilesh Singh was discharged. The order passed in this Misc. Writ Petition under Section 482 Cr.P.C. filed by Akhilesh Singh was not disturbed by the Hon'ble Supreme Court.

(vi) Accused Balai Singh was murdered during the pendency of trial and the trial stood abated against him vide order dated 10.06.1996. The accused Amar Bahadur Singh was also murdered on 28.07.1994 and the case against him also stood abated. Thus only two accused persons were left to be tried before the trial court namely Bhagwati Singh alias Pappu and Jitendra Singh alias Tinku.

(vii) The Sessions Court framed charges against Bhagwati Singh alias Pappu under Section 120-B of I.P.C. and Section 302 of I.P.C. read with Section 34 of I.P.C.. The charge under Section 27 of the Arms Act, 1959 was also framed against Bhagwati and against accused Jitendra Singh alias Tinku charge under Section 120-B, 302 of I.P.C. read with Section 34 of I.P.C. and Section 212 of I.P.C. were framed. Both the accused persons denied the crime and claimed to be tried.

(viii) The prosecution in order to prove the charges framed against the convict/appellant examined the following witnesses:-

1. P.W. 1 Nirmal Singh Saini, informant.

2. P.W. 2 Dr. B.K. Srivastava, the medical officer conducting the postmortem of the body of deceased Syed Modi.

3. P.W.3 Roop Singh, Retired Principal & Scientific Officer & Head of Ballistics Division, CFSL/CBI, New Delhi.

4. P.W. 4 Kishore Chaturvedi, Head Clerk, NER, DRM Office, Lucknow.

5. P.W. 5 Kishan Bahadur, eye witness.

6. P.W. 6 Amol Kumar Saxena, The other doctor who joined P.W.2 in conducting the postmortem.

7. P.W.7 Rajendra Kumar Girdhar, Sr. Manager, Central Bank of India, Defence Colony, New Delhi.

8. P.W.8 Rakesh Kumar Rawat, Deputy General Manager, Allahabad Bank, Divisional Office, Calcutta.

9. P.W.9 Prem Chand Yadav, eye witness.

10. P.W. 10 Mahendra Singh.

11. P.W. 11 Bhagwan Bux Singh.

12. P.W. 12 Mohd. Tahseen Khan, Trust Assistant posted in the office of District Magistrate, Lucknow.

13. P.W. 13 Babu Ram, Retired Army Official.

14. P.W. 14 P.N. Shekar, Inspector in the office of I.G., Zone, Lucknow.

15. P.W. 15 M. K. Bhatt. S.P. CBI, New Delhi.

16. P.W. 16 Smt. Sanjana Gupta, Accountant, NER, Lucknow.

17. P.W. 17 Ashok Singh.

18. P.W. 18 Abdul Khaliq, Owner of Maruti Van No.HYG/1959, said to have been used by the assailants.

19. P.W. 19 Raj Kumar.

20. P.W. 20 Abid Hyder, Elder brother of deceased Syed Modi.

21. P.W. 21 Chetan Ram, Office Superintendent, Personnel Deputy. Head quarter, Central Railway, Bombay.

22. P.W. 22 Ajay Singh

23. P.W. Ram Kesh Yadav.

24. P.W. 24 Surendra Pratap Tiwari, P.A.C. personnel posted in 35th Battalion, Mahanagar, Lucknow.

25. P.W. 25 Jitendra Mohan Srivastava.

26. P.W. 26 B.L.P. Azad, Retired S.P., CBI, New Delhi.

27. P.W. 27 R.S. Dhankar, S.P. CBI, S.C. III, New Delhi.

28. P.W. 28 Vishram Singh Yadav, Retired Inspector, Civil Police.

29. P.W. 29 Dharm Pal Singh Yadav, Retired Superintendent of Police.

(ix) Apart from above oral evidence necessary relevant documents were also proved and exhibited by the prosecution.

(x) Thereafter the statements of the convict/appellant was recorded under Section 313 of Cr.P.C., wherein the convict/appellant denied all the evidence against him and stated that he was not on the spot. He has also stated that he was identified by witness Prem Chand Yadav during identification parade, at the indication made by Deputy Jailer, Sanjay Sharma. He has admitted the fact that he was rightly recognized by Prem Chand Yadav P.W.9 in the court. He showed unawareness about many facts and stated that witnesses have deposed due to the fact that they were in the custody of CBI, he has also stated that he has been implicated falsely.

(xi) Additional statement under Section 313 Cr.P.C. was also recorded on 22 July, 2009 after recording of evidence again of P.W.9. wherein the convict stated that the witness has deposed falsely.

(xii) Convict/appellant did not adduce any evidence in defence though the opportunity was given.

(xiii) The learned trial court after hearing the evidence of both the sides on the basis of evidence available on record came to the conclusion that P.W.9 Prem Chand Yadav an eyewitness has identified the convict/appellant and the Court found the testimony of P.W.9 Prem Chand Yadav, reliable who had seen the convict/appellant firing upon the deceased Syed Modi and he

has no reason to implicate the convict/appellant falsely, in the crime. Since the facts regarding the conspiracy i.e. offence under Section 120-B of I.P.C. was not found proved because two accused persons namely Sanjay Singh and Ameeta Kulkarni Modi were discharged and the order of framing the charge against Akhilesh Singh was also quashed by the High Court in a writ petition filed under Section 482 Cr.P.C. and two other accused persons Amar Bahadur Singh and Balai Singh died/murdered during the pendency of trial. The convict/appellant was identified by the eyewitness P.W.9 Prem Chand Yadav and in the opinion of the trial court i.e. P.W.9 was found trustworthy as regards the commission of murder of deceased Syed Modi by firing upon him alongwith one another person.

(xiv) The learned trial court also concluded that the charge under section 27 of the Arms Act against convict/appellant has also been proved by the prosecution as the disclosure statement of co-accused Balai Singh coupled with the statement of P.W.9 is sufficient to establish that the pistol recovered at the pointing out of Balai Singh was used by the convict Bhagwati Singh alias Pappu in the commission of crime.

(xv) The trial court has observed that even presuming that the bullets fired by this pistol were not recovered, the case of the prosecution that accused Bhagwati Singh fired at Syed Modi who sustained injuries by such shots cannot be rejected merely on this ground, hence the trial court found and held the convict/appellant guilty under Section 302/34 of I.P.C. and under Section 27 of the Arms Act and punished in the manner as noted herein above in para No.1.

(xvi) Being aggrieved of this conviction and sentence this appeal has been filed.

(3.) Heard Mr. Piyush Asthana, learned counsel for the appellant and Mr. Shreesh Chandra, learned counsel for the C.B.I.

(4.) Learned counsel for the convict/appellant argued that there is no evidence against the convict/appellant. The convict was not named in the FIR, his name allegedly surfaced on the basis of statement of Prem Chand Yadav who after about one month identified the convict in the jail during test identification parade. In fact the witness has identified the convict falsely. There is no motive for the convict/appellant to commit the murder of the deceased. There are contradictions in the statement of witness about the car, as at some places it has been stated that Maruti Car was used while at some places it has been stated that Maruti Van was used. The car was found belonging to one Mr. Akhilesh Singh against whom charges were framed, but the High Court quashed the charges vide order passed in a writ petition filed under Section 482 Cr.P.C.. The P.W.9 Prem Chand Yadav has said in his examination- in-chief that he came out after hearing the sound of firing, thus it is clear that he did not see who fired upon the deceased. The learned counsel for the appellant has also submitted that the site plan prepared of the spot has not been exhibited. The weapon of the crime was not recovered from the possession of the convict/appellant. The learned trial court has convicted the convict/appellant only on the basis of evidence of a single witness. The convict has been identified only by one witness. Smt. Kaiser Bai (Paanwali) and Rickshaw Puller who were closure to the site of crime

were not produced in the evidence and for test identification parade. The learned trial court has committed illegality in not considering the point that P.W.2 Roop Singh, ballistic expert had opined that the bullets said to have been recovered from the spot of occurrence were not found fired by the recovered pistol. Hence the impugned judgment and order should be set-aside. Learned counsel for the convict/appellant relied on following case laws:-

1. Mohanlal Gangaram Gehani Vs. State of Maharashtra. 1982 SCC (Cri.) 334.

2. Wakil Singh and others Vs. State of Bihar. 1981 SCC (Cri.) 634

3. Dana Yadav alias Dahur and others Vs. State of Bihar. 2002 SCC Online SC 867.

4. Sanjeev Kumar etc. Vs. State of Himachal Pradesh. 1999 SCC Online SC 65.

5. Hasib Vs. State of Bihar. 1972 (4) SCC 773.

6. Shaikh Umar Ahmad Shaikh and another Vs. State of Maharashtra. 1998 SCC (Cri.) 1276.

7. Chaman Vs. State of U.P. 1993 SCC (Cri.) 212

8. Manzoor Vs. State of U.P. 1982 SCC (Cri.) 356 and Suleman Vs. State of U.P.

9. Nathwa and others Vs. State AIR 1951 Alld. 452

10. Mohd. Anwar Vs. State of Delhi 2000 SCC (Cri.) 279 and Tasleem Vs. State of NCT Delhi.

11. State (Delhi Admn.) Vs. V.C. Shukla and another. 1980 (2) SCC 665.

12. Chander Pal Vs. State of Haryana. 2002 SCC Online SC 196.

13.Mahendra Pratap Singh Vs. State of U.P. 2009 SCC Online SC 426.

14. Prakash Kumar Vs. State of Gujarat. 2005 (2) SCC 409.

15. Puran Singh Vs. State of Uttaranchal. 2008 SCC Online SC 94.

16.Dilip and others Vs. State of M.P. 2007 (1) SCC (Cri.) 377

17.Ganga Tiwari & Another Vs. State of U.P. 2008 SCC Online All. 1889.

5. Contrary to it, learned counsel appearing for the C.B.I. Mr. Shreesh Chandra, submitted that the deceased was fired upon by the convict/appellant alongwith one another shooter. The convict/appellant was identified by P.W.9 Prem Chandra Yadav, who was the first person who informed the complainant Nirmal Singh Saini about the incident. He knew and recognized the convict/appellant prior to the incident, though not by name but by appearance, as the convict/appellant used to come in the stadium occasionally. He further submitted that there is no dent in the evidence of P.W. 9 made before the trial court about the identification of the convict/appellant and the firing made by him on the deceased. He further submitted that as far as the motive is concerned it looses its

importance when there is direct evidence of firing. The weapon used in the crime, though not recovered at the pointing out of the convict/appellant, but at the pointing out of co-accused Balai Singh (murdered during the pendency of trial) who told to the Investigating Officer that the weapon was given to him by Bhagwati Singh, the convict for hiding and he hid the same and the same was recovered at the pointing out of Balai Singh in the presence of witnesses and that recovery has been duly proved by P.W.4 as well as by other witnesses. He further submitted that as far as the site plan is concerned, it was prepared by the Investigating Officer, no question about the site plan was asked on behalf of the convict/appellant in the trial court. As far as testimony of single witness is concerned, conviction can be made on the basis of sole testimony if the court finds the witness reliable.

6. Learned counsel for the C.B.I. relied upon the following case laws:-

1. State of M.P. Vs. Ramji Lal Sharma and another 2022 SCC Online SC 282

2. Subed Ali and others Vs. State of Assam 2020 SCC Online SC 794

3. Gulam Sarwar Vs. State of Bihar 2014 (2) SCC (Cri.) 195

4. State of U.P. Vs. Krishna Master 2010 SCC Online SC 832

5. Raja Vs. State by Inspector Police (2020) 4 SCC (Cri.) 115

6. Mulla & another Vs. State of U.P. 2010 SCC Online SC 264

6. Considered the rival submissions and perused the original record as well as the record of the appeal and gone through the case laws cited.

7. In the present case the FIR was lodged against unknown persons by the complainant- Nirmal Singh Saini, who was Regional Sports Officer in the Stadium, where the deceased used to come to play badminton. The incident occurred outside the north gate of Stadium. In the FIR it has been mentioned that complainant was informed about the incident by Prem Chand who has been examined as P.W.9. At the time of incident P.W. 9 Prem Chand used to work in the Canteen situated at the gate of the stadium and at the time of incident he was on work there. Most of the witnesses of facts have turned hostile. P.W.1 the complainant is not an eye witness, he simply lodged the FIR of the incident upon the information given by Prem Chand PW9 and also carried the injured deceased alongwith others including two police personnel to the medical college, where he was declared brought dead.

8. P.W. 9 Prem Chand Yadav is the most important witness of this case and the conviction rests on his evidence. At the time of incident he was working in the canteen situated at the gate of the stadium near the place of incident. This witness has identified the convict/appellant during the test identification parade conducted inside the jail and also before the trial court at the time of giving evidence. The statement of this witness was also recorded by the Investigating Officer who initially investigated the case and subsequently the investigation was handed over to the CBI. The learned trial court has found this witness trust worthy and relied on his

statement to hold guilty the convict/appellant. This witness has stated in his examination in chief before the Court recorded on 21.10.2005 that the incident took place about 17/18 years ahead at about 7:00 O'Clock in the evening, P.W.9 was in the tea shop and serving boys were cleaning utensils there. When Modi after playing came out of stadium from the gate then he heard the sound of firing and saw that two persons were firing on Modi, he saw and recognized both the miscreants. The miscreants after firing ran away in a white Maruti Car towards Shahnazaf (road) there was some darkness on the spot, but there was visibility of a 'big light' (street light). He (witness) rushed inside the stadium and informed to Mr. Saini there. Two police personnel were also there. He called them, thereafter Mr. Saini and police personnel and some other players carried Mr. Modi to hospital in a Maruti Car. He further deposed before the trial court that after one month CBI persons took him inside the jail for identification, there he identified two accused persons and those were Bhagwati Singh alias Pappu and Jitendra Singh alias Tinku, this witnesses has identified Bhagwati Singh in the trial Court during the evidence rightly. This witness has also identified the signature on the documents which was prepared at the time of test identification parade in the jail and proved as exhibit Ka-15. This witness has further submitted that he saw the accused at the time of incident and thereafter in jail at the time of test identification parade and for the third time he has identified the accused Bhagwati Singh in the Court. On the date when examination in chief was recorded i.e. 21.10.2005 the counsel for the accused Bhagwati Singh did not cross examine the witness, the Court closed the evidence, thereafter again on the request of the accused Bhagwati Singh the witness was recalled and cross examined by the counsel of accused Bhagwati Singh on 01.07.2009. It is pertinent to mention here that the trial court has observed at the end of the statement of witness as follows:-

"The witness is unable to see and his right foot is amputated till the heel. Having regard to the fact that witness was not able to stand independently and move with aid. I directed that the pairokar who brought the witness to stand with him without interfering in the Court's proceedings".

9. This observation of the Court shows that when the witness was called again for cross-examination on 01.10.2009 i.e. about four years gap he was not in a condition to see. He stated in the cross examination that his name is Prem Chandra Yadav, he would not be able to recognize the accused now. If his eyesight would recover, then he would be able to recognize. He deposed truly on the prior date. The name of his father is Binda Yadav. The incident about which he has come to depose occurred in the year 1988. Since many years had passed, so he would not be able to tell the date month and day. It was summer. At the time of incident he was in the canteen where he used to work. He used to work in the canteen since 6 O'clock in the morning up to 8:30 PM in the night. He knew the badminton players of the stadium. He also knew the chaukidars of the stadium, he knew the officers of the stadium and coach Mr. Saini, the badminton player Mohd. Syed Modi Bhandari. When the incident occurred he was inside the canteen and arranging the glasses after washing them. The incident occurred outside the stadium, one another person belonging to the canteen was also

there who ran away immediately. The distance of the place of occurrence was 10 paces away from the canteen. There was no door in the canteen where the incident took place. One Rickshaw puller Krishna Bahadur was also there. One lady 'Paanwali' was also there who used to sell 'Paan' outside the stadium. First of all he told about the incident to Mr. Saini and two police personnel. At the time of incident he heard the sound of firing and he immediately went to Mr. Saini and told him about the incident. He has also stated that after the incident police personnel of Hazratganj Police Station took his statement, they carried him in a jeep. When he used to work in the canteen he used to sleep there in the canteen itself, after having meals. In the police station old photographs of the accused persons were shown to him, he went to jail to identify the accused persons and he rightly identified the accused persons in the jail because he saw them at the time of committing murder. When he deposed in the Court previously he deposed truly and identified the accused standing in the dock who was tall and of dark complexion. He rightly identified him. He has further deposed that Bhagwati Singh used to come stadium prior to the incident. He admitted that on the previous date he told in the Court that he saw Bhagwati Singh first time while firing, second time in jail and third time in the Court. He has further stated that the truth is that he saw Bhagwati Singh prior to the incident also. When Bhagwati Singh used to come in the stadium he doubted that Bhagwati Singh was not a player but he did not complain any where about this fact. Since he saw Bhagwati Singh two-three times earlier, so he rightly identified him in the jail. On the asking of the Court this witness has confirmed that he himself saw the persons who killed the deceased by his own eyes. This witness has denied the suggestion made on behalf of the convict that he has identified Bhagwati Singh only on the basis of doubt and on the basis of photograph shown.

10. The perusal of the evidence of PW9 Prem Chand Yadav recorded in the Court shows that this witness remained resolute and undettered. While most of the witnesses of facts turned hostile he remained unswayed even in the condition when he was recalled on 01.07.2009 after a gap of about four years of recording of his examination-in-chief that too in a condition when he became blind and one of his foot was amputated upto the heel. This witness has again and again reaffirmed that he saw the convict alongwith one another person firing upon the deceased Syed Modi. Nothing could be brought in his evidence by the defence counsel in cross-examination so as to create doubt on his testimony. This witness stood during his examination-in-chief and also cross examination unswayed, unyielded, and unbended. The direct evidence of this witness is sufficient enough to hold the convict/appellant guilty of committing the murder of Syed Modi.

11. Learned counsel for the convict/appellant drew the attention of this Court towards the case law in Mohanlal Gangaram Gehani Vs. State of Maharashtra (supra), but that case law is of no help because the facts and circumstances are different in the case in hand, the witness knew the convict prior to the incident, though not by his name but by his appearance because he had seen him earlier coming to and going from stadium, so he recognized him while committing the crime.

12. The case law Wakil Singh and others Vs. State of Bihar (supra) is also of

no help to the appellant because the cited case was a case where the trial court acquitted the accused finding the single identification witness not fit, but here in this case the trial court convicted the convict finding the evidence of P.W.9 reliable. Hon'ble Apex Court in Raja Vs. State by Inspector Police(supra) has held as under :

" 20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

13. The case law Dana Yadav alias Dahur and others Vs. State of Bihar (supra) is also has no application to the facts and circumstances of this case because in that case the witness identified the accused for the first time in Court- belatedly, but herein is not such a situation. The witness saw the miscreants while committing the crime and identified inside the jail and also before the Court.

14. The case law of Sanjeev Kumar etc. Vs. State of Himachal Pradesh (supra) is also of no help due to the difference of facts and circumstances of the case, because in the cited case law miscreants was paraded open in the market, but in the present case it is not so.

15. The case law of Hasib Vs. State of Bihar (supra) is also of no help because in that case decoits were identified by the Police Inspector, but in the case in hand the independent witness whose presence was very natural at the spot identified the miscreant/convict. Likewise the other case laws cited on this point are also of no help to the convict for the difference in facts and circumstances of the case.

16. In the case law of Raja Vs. State by Inspector Police (supra) the Hon'ble Apex Court has held as under:-

"15. It has been accepted by this Court that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap between the date of the incident and the actual examination of the witnesses. If the accused or the suspects were known to the witnesses from before and their identity was never in

doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may arise about the correctness of the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the Court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case."

17. The Hon'ble Apex Court in the above case further held as under:-

"21. Lastly in Malkhansingh v. State of M.P. (AIR 2003 SC 2669) a three-Judge Bench of this Court of which one of us (B.P. Singh, J.) was a member, after considering various decisions of this Court observed thus:

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

18. In the case of **Mulla and another Vs. State of U.P**. (supra) the Hon'ble Apex Court has held as under:-

" 22. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the

time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution."

19. The Hon'ble Apex Court in the above case has further held as under:-

"31. The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two- fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

32) Therefore, the following principles regarding identification parade emerge: (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses; (2) this condition can be revoked if proper explanation justifying the delay is provided; and, (3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses."

20. In light of the above principles laid down by the Hon'ble Apex Court we considered the identification of convict/appellant by P.W. 9. From the evidence of P.W.9 it is clear that PW9 knew the convict prior to the incident by appearance but not by name because he used to come in the stadium occasionally. He was the first person who informed the Officer working in the stadium about the incident after witnessing the incident. Thereafter he identified the convict/appellant in jail during the test identification parade, finally he identified the convict/appellant before the trial court while deposing in the case.

21. The counsel for the defence asked again and again about the identification, but the witness remained unyielded, unswayed and unbended. While a question was put by the Court he confirmed that he saw the killer with his own eyes. No motive could be put forward by the defence against this witness, for falsely deposing against the convict.

22. Learned counsel for the convict/appellant vehemently argued that the learned trial court has committed error in holding guilty and sentencing the convict on the basis of testimony of P.W.9 alone.

This argument of the defence counsel is not tenable, because it is settled law that conviction can be made on the basis of testimony of a single witness, if the Court finds the testimony reliable.

23. In the case law of Gulam Sarbar Vs. State of Bihar (supra) the Hon'ble Apex Court has held as under:-

"14. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence. (Vide: Vadivelu Thevar & Anr. v. State of Madras; AIR 1957 SC 614; Kunju @ Balachandran v. State of Tamil Nadu, AIR 2008 SC 1381; Bipin Kumar Mondal v. State of West Bengal AIR 2010 SC 3638; Mahesh & Anr. v. State of Madhya Pradesh (2011) 9 SCC 626; Prithipal Singh & Ors. v. State of Punjab & Anr., (2012) 1 SCC 10; and Kishan Chand v. State of Haryana JT 2013(1) SC 222)."

24. Section 134 of the Indian Evidence Act, 1872 (in short Evidence Act) lays down that " No particular number of witnesses shall in any case be required for the proof of any fact". It is the quality of the evidence that matters and not the quantity. If the evidence of a single witness is cogent with ring of truth and the Court considers that reliable and trustworthy then conviction can be made on the basis of testimony of that witness alone.

25. Learned counsel for the convict/appellant further argued that there was no motive to commit the crime for the convict/appellant. This argument of the learned counsel is also feeble because if direct evidence is there then motive loses its importance because nobody can peep into the mind of a miscreant to know for what purpose he/she has committed the offence.

26. In the case of ***State of Uttar Pradesh Vs. Kishanpal and others (2008) 16 Supreme Court Cases 73*** the Hon'ble Apex Court held as under: -

"The motive may be considered as 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 looses all its importance in a case where direct evidence of eye-witnesses 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 eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of eye-witnesses is clear and

reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

27. Section 118 of the Evidence Act lays down that " all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body, of mind or any other cause of the same kind."

28. The learned counsel for convict/appellant argued that during the cross-examination the witness has stated that due to the blindness he is unable to identify the convict present in the dock, so the identification made by the witness during his examination in chief loses importance, but this argument of the defence does not carry any weight because the witness identified the convict in the jail during the test identification parade, thereafter in the Court during his examination-in-chief. The cross-examination of the witness was not made by the counsel of the convict on that date, thereafter the witness was called again after a gap of about four years. The witness on that day too, in his cross-examination told that he is unable to see due the blindness (as the observation made by the Court in the end of the statement shows). In spite of his inability to see the witness stressed that he correctly identified the convict during his previous statement made in the Court and also confirmed that he saw the killers of Syed Modi by his own eyes.

The testimony of P.W.9 is corroborated by the medical evidence. The P.W. 9 has stated that he saw two persons firing upon the deceased. The panel of doctors who conducted the postmortem has reported as follows:-

"The body is of strong built and nutrition. Postmortem straining is present in the posterior aspect of the body. Rigor-mortis is present all over the body, bleeding present from mouth and nostrils, its direction is on the right as well as left side of face suggesting that the person was bleeding in lying position after sustaining injuries. Mud is adherent to the clothes and the body at several places suggesting that it could be a bit kachcha wet land where the body had been lying. The body is cold and is kept in ice slab as it was received from ice slab in our presence. The body bearing blood stained sports shirt, white sports nickers and one white underwear. There is no evidemce of struggles on clothes. Buttons and respective wholes were intact in the shirt. There are eight holes in the shirt, six in the back portion and two in the front of the shirt. In the front one hole relates to the injury, but the second hole which is situated just adjacent to the first hole, is not related to any injury. A probable diagram of the injuries was also prepared.

The panel of doctors found the following ante-mortem injuries on the dead body :-

(1) Firearm wound of entry, 0.4 cm x 0.8 cm x cavity deep, slightly oval situated on the right side of chest, 11cm above right nipple 7cm medial from apex of axilla, 7cm below mid part of right collar bone. Abraded collar ring is present around wound margins. Blackning and tattooing present around the wound and around the corresponding hole of the shirt. Margins inverted, blood is adherent to the

margins of the wound. The wound is directly corresponding to injury no.2.

(2) Firearm wound of exit 0.8cm x 0.8cm in size situated 22cm below C-7 spine on left side of back of chest, 16.5cm lateral from mid vertebral line. The bullet tract thus formed is directly obliquely downward, backward on the left side. The bullet has pierced through 3rd inter cortical space, in front, with pleurae and then spleen. Margins of the wound are averted and blackening and tattooing is not present around the wound and corresponding hole in the shirt.

(3) Firearm wound of entry 1.5cm x 0.7cm x muscle deep, situated 12cm below C-7 spine on the back of chest, on right side in its upper part, 8cm away from mid-vertebral line. Abraded collar ring present around the wound. Margins are inverted, blackening and tattooing is present around the wound and also upon the corresponding hole of the shirt. This wound is directly communicating to injury no.4.

(4) Firearm wound of exit 0.7cm x 0.8cm in size, oval in shape, 4cm lateral to mid vertebral line, 15cm below C-7 spine on the back of chest on right side in its upper part, 5cm below and medial to injury no.3. Margins are averted and irregular. Blackening and tattooing is not present around this wound and corresponding hole of shirt. Bullet tract thus formed is full of haematoma and acchymosis is present around the tissues.

(5) Firearm wound of entry 0.7cm x 0.7cm x cavity deep, rounded in shape, situated on right side of back of chest, in the lower region, 33cm below C-7 spine on right side, 12 cm away from the vertebral line, 21cm below and lateral to the wound no.4. Margins of the wound are inverted and collar abrasion is present around the margins. Blackening and tattooing is present around the wound and around the corresponding hole in the shirt. This wound is directly communicating to injury no.6.

(6) Firearm wound of exit 1.4cm x 0.5cm in size situated on right side of chest in front pf mid lower portion, 19cm below anterior axillary fold 24cm anterior superior iliac spine. Margins are averted. Corresponding hole on the shirt is not present, suggesting the portion of cloth was away from the seat of injury at the time of sustaining it. Thus the direction of the bullet tract thus formed is anteriorly. Liver was found pierced by the bullet.

(7) Firearm wound of entry 0.7 cm x 0.5 cm x cavity deep, situated on the right side back of chest, with lower portion 38 cm below C-7 spine, 5 cm away from mid vertebral line, 8.5 cm below the medial from injury no.5. Collar abrasions present around the wound margins. Blackening and tatooing is not present around this wound and corresponding hold of shirt. Margins inverted. Direction of the wound is upward and Blackening and tatooing is not present around this wound & corresponding hole of shirt. The bullet tract thus formed has pierced the intestine, and bullet was found lodged in the anterior abdominal wall from where it was recoverd.

8. Firearm wound of entry 0.7 cm x 0.7 cm in size x cavity deep, situated on left side back of chest within its lower portion, 33 cm below C-7 spine, 19 cm away from mijdd verebral line and 11 cm below injury No.2. Collar abrasion present around the wound and corresponding hole on the shirt. Spleen and intestine was found pierced by the bullets, which got lodged

near to the other bullet in the same area. Therefore, fatty tissues of epigastric were found ecchymosed."

29. This postmortem report has been proved as Exhibit Ka-3.

30. Learned counsel for the defence also argued that the site plan has not been proved and exhibited, so the place of occurrence cannot be deemed as proved. This argument of the defence is also of no importance because the place of occurrence has not been disputed by the defence during the trial and no such defence was put forward by the convict/appellant even in his statement recorded under Section 313 of Cr.P.C.

31. In the statement under Section 313 of Cr.P.C. the convict/appellant has accepted in the answer of question No.11 that P.W. 9 Prem Chandra Yadav had identified him correctly. In the answer of question No.6 this witness has answered that he was not at the spot and he did not dispute the place of occurrence. Thus to sum up in the light of above analysis it is proved that the trial court has committed no error in relying upon the testimony of P.W. 9 supported with medical testimony and the testimony of formal witnesses for holding the convict guilty of killing the deceased Syed Modi.

32. Now comes for consideration the conviction of the convict/appellant under Section 27 of the Arms Act. Learned counsel for the convict/appellant submitted that the recovery of the alleged fire arm was not made at the pointing out of the convict/appellant, but it was allegedly made at the pointing out of co-accused Balai Singh (now dead). Therefore the conviction of the convict/appellant cannot be made on the basis of that evidence. The evidence available on record shows that co-accused Balai Singh who died during the trial made disclosure statement Exhibit Ka-10 in the presence of independent witness that the pistol used in the murder of Syed Modi alongwith cartridges given to him by Bhagwati Singh, he might get recovered that pistol alongwith cartridges, hidden under earth under a chhapri in a grove of Mango near Purwa of Bhagat Singh. He can point out that. This disclosure statement has also been proved by an independent witness Kishore Chaturvedi, Senior Clerk Welfare Section DRM(P) North East Railway, Lucknow. The recovery memo of the concerned pistol has also been proved by independent witness Kishore Chaturvedi as well as P.W.26 Sri B.L.P. Azad retired Superintendent of Police (CBI). Hence there is no error and discrepancy in the conclusion reached by the trial court in this regard also.

33. Thus to sum up the evidence available on record establishes that the deceased Syed Modi was killed by firing made by convict/appellant alongwith one another accused by using fire arm in contravention of Section 5 of the Arms Act, which is punishable under Section 27 of the Arms Act. Hence, the conviction and sentence of the convict/appellant awarded by the trial court punishable under Section 302/34 of I.P.C. and under Section 27 of the Arms Act is hereby confirmed and upheld.

34. The appeal is ***dismissed*** accordingly.

35. The appellant is stated to be in jail. He shall serve out the sentence awarded by the trial court.

36. Office is directed to send a copy of this judgement alongwith the lower court record to trial Court concerned for

necessary information and compliance forthwith.

(2022)06ILR A622
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No.2368 of 1989

Chander & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri P. C. Srivastava, Sri Manoj Kumar Mishra, Sri Santosh Kumar Upadhyay, Sri Vinod Kumar Upadhyay

Counsel for the Respondent:
D.G.A.

Criminal Law- Indian Evidence Act, 1872 - Section 3 - Indian Penal Code, 1860 - Section – 97- No Explanation of Injuries of Accused- Exercise of Right of Private Defence by First Informant's side- It is admitted by PW-4, the first informant at the very first instance, i.e. in the first information report that they also wielded Lathi in defence. In the examination-in-chief, PW-4 reiterated that he wielded Lathi in defence though he had denied, in cross, that he did not know as to whether the accused persons sustained injuries or not as he was busy in saving the injured. This version of the PW-4 cannot be said to be a denial of the injuries sustained by two accused persons. Rather the version of PW-4 in narrating that he also wielded Lathi in defence while the accused persons were causing injuries to his mother and brother is a truthful explanation of the simple injuries caused on the person of the accused-In comparison to the injuries of the complainant (prosecution) side, amongst whom the injuries on the person of Shanti were on vital parts with that of the injuries of the accused (defence) side, it is difficult to accept that six persons on the complainant side had suffered injuries as the accused persons wielded Lathis in their defence. The gravity of the injuries on the person of the deceased Soma, his mother Shanti and other four injured persons on the complainant (prosecution) side makes the defence story improbable. The version of PW-4 that he wielded Lathi in defence is acceptable being more probable and trustworthy.

Where the prosecution witness admits that he acted in Private Defence to save the lives of his relatives as a result of which the accused sustained only simple injuries in comparison to the fatal and serious injuries suffered by the complainant's side, then it cannot be said that either the prosecution had denied the injuries of the accused or that it was the defence side that had exercised it's right of private defence.

Code of Criminal Procedure, 1973- Section 313 Cr.P.C. - No positive evidence has been brought by the accused persons to prove that the prosecution witnesses on the complainant side were the aggressor of the crime.

Where the accused have failed to adopt the plea of right of exercise of private defence in their statements recorded under Section 3131 of the CrPC, and have also failed to establish the same by leading any positive evidence, then the subsequently adopted plea of exercise of right of private defence is unacceptable. (Para 29, 30, 34, 35)

Criminal Appeal rejected. (E-3)

Judgements/ Case Law relied upon:-

1. St. of Guj. Vs. Bai Fatima, AIR 1975 SC 1478

2. Lakshmi Singh & Ors. Vs. St. of Bih, AIR 1976 SC 2263

3. Subhash Kumar Vs. St. of UK, (2009) 6 SCC 641

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

1. Heard Sri Vinod Kumar Upadhyay learned Advocate for the appellant no.2 Dharm Pal and appellant no. 6 Jagpal. Sri Patanjali Mishra learned AGA has argued on behalf of the State respondent.

2. This appeal is directed against the judgment and order dated 14.12.1989 passed by the IVth Additional District & Sessions Judge, Saharanpur in Sessions Trial No. 597 of 1987 (State vs. Chandra), under Section 147, 148, 302/149 and 323/149 IPC, Police Station Laksar, District Saharanpur, whereby eight appellants namely Chander, Dharm Pal, Mohar Singh, Ram Pal, Sewa, Jagpal, Palla and Om Pal were convicted of the offences under Sections 147, 302/149 and 323/149 IPC and have been sentenced for life imprisonment for the offence under Section 302/149; for one year rigorous imprisonment each for the offence under Section 147 and for one year rigorous imprisonment each for the offence under Section 323/149 IPC. The trial court has not imposed fine on any of the accused-appellant. All the sentences are to run concurrently.

3. At the outset, it is pertinent to note that the present appeal has been filed by eight accused persons, out of whom only two survive and they are appellant no. 2 Dharm Pal and appellant no. 6 Jagpal. This appeal filed on behalf of other six appellants has been abated.

4. The first information report of the incident was lodged by Omi son of Chohal Harijan, brother of the deceased. In the incident occurred on 23.6.1987 at about 9:10 PM, six persons were injured, out of whom, one Soma, brother of the first informant, had died. The first information report was lodged on 23.6.1987 itself at about 10:35 PM.

5. As per the written report lodged by the first informant/PW-4, there was a dispute over encroachment of 'Nali' of the 'Village Well' made by accused appellant no. 1 Chander son of Paltu Harijan. The allegation in the written report is that Chander son of Paltu had constructed the door of his house covering the drain of the Well, he was confronted by the villagers and though he assured that he would not make the construction but did not accede to the request actually. On 23.6.1987 at about 9:00 PM, eight accused persons named in the FIR (appellants in this appeal) went to the house of the first informant and started beating his brother Soma son of Chohal and one Jhandu son of Chhittar, other four injured persons intervened and tried to save them who were also beaten by the accused by Lathi.

It is stated in the written report that the complainant side also wielded Lathi in their defence and on hearing their cries, other villagers named in the written report came on the spot who saved them. Six injured persons on the complainant side were taken to the Laksar hospital because of the grievous injuries sustained by them, but amongst whom Soma, the brother of the first informant, had died on the way to the hospital.

The inquest of the dead body was conducted on 24.6.1987 at about 9:00 AM.

6. On the lodging of the first information report, Check FIR was prepared which was proved by PW-7, the police officer posted in the police station concerned. PW-7 proved that the Check

report and GD entry were prepared in his presence in the police station concerned by Head Moharrir Balveer Singh whose writing and signatures were identified by him. The carbon copy of the GD filed on the record was tallied with the original GD brought in the Court. The Check FIR and the carbon copy of GD were proved as Exhibit Ka-8 and Exhibit Ka-9.

PW-7 further stated that the investigation of the case was made by him and after copying the FIR and the GD in the Case Diary, he went to the Hospital PHC Laksar and saw the dead body. However, it being dark, inquest could not be conducted. The police personnel were posted for safety of the dead body and he (PW-7) went to the site of the incident in the night itself. He remained at the site throughout the night and on 24.6.1987, the statement of the first informant Omi was recorded and he again went to PHC Luksar. The inquest report prepared in his handwriting and signature was proved by PW-7 as Exhibit Ka-10 and other related papers as Exhibits 11 to 13. PW-7 stated that he again went to the site of the incident, prepared the site plan, collected blood stained and plain earth, prepared the recovery memo and proved the said documents as Exhibits Ka-14 and Ka-15, being in his handwriting and signature. The blood stained and plain earth produced in the Court were proved as Material Exhibits '2' and '3'. The blood stained clothes of the deceased Soma collected during the inquest was documented in a recovery memo proved and marked as Exhibit Ka-16, being in the handwriting and signature of PW-7. It was stated that on 25.6.1987, four accused persons namely Chander, Mohar Singh, Sewa Ram and Ram Pal were arrested and on their pointing out, recovery of Lathis were made which were proved as Material Exhibits 4, 5, 6 and 7. Thereafter, PW-7 was transferred and the investigation was handed over to PW-9 namely P.C. Panth, on 24.7.1987.

In cross, PW-7 stated that a cross case was also registered in relation to the incident and the investigation of the same was also conducted by him and the charge sheet was submitted in the said case. With regard to the spot of the incident, PW-7 stated that he had seen Panchayati Well (public Well) on the spot and it was found to be a dry Well (being filled) and no drain could be seen by him. He had also seen a 'pakka' platform of appellant Chander towards the west side of the Well in front of which there was an East facing 'Varanadah' with three openings. He could not find any plinth of the old construction on the spot. PW-7 further stated, in cross, that the recovery of Lathis at the instance of appellant no. 1 Chander was made from the sugarcane field and that he did not see blood on the Lathis. He recorded statements of four accused persons on whose disclosure statements, recovery of Lathis was made but there was no public witness of the same. PW-7 had denied the suggestion of false recovery of Lathis made by him.

7. PW-9, the second Investigating Officer proved that on receipt of the investigation, he recorded statements of the witnesses on 2.9.1987 in village Kheda and also recorded statement of Head Moharrir Balveer Singh and on completion of the investigation, charge sheet was submitted, proved as Exhibit Ka-18, being in his handwriting and signature. On confrontation with the statements of the witnesses recorded under Section 161 Cr.P.C., while looking to the case diary, PW-9 stated that the witness Mange gave

the statement that Chander went to his house and brought Lathi and that Soma got seriously injured and was taken to his house.

8. PW-5 and PW-6 are the doctors who had proved the injury reports of the injured persons, whereas PW-8 is the doctor who proved the postmortem report. PW-5 the radiologist who proved the x-ray reports of the injured.

9. PW-6 stated that he was posted in the PHC Laksar and examined injured Subhash, Mehar Chand, Shanti, Jhandu and Paalu and the injuries which were found on their person were noted in the injury reports, which being in his handwriting and signatures were exhibited as Exhibits Ka-3, Ka-4, Ka-5, Ka-6 and Ka-7. It was noted in the examination-in-chief of PW-6 that genuineness of the injury reports were not challenged by the counsel for the accused.

In cross for all the accused, it was stated by PW-6 that the injuries on the person of Mehar Chand were on his non-vital part and they were traumatic swelling, whereas the injury no. 1 on the person of Smt. Shanti was on her vital part.

With regard to the injuries of the accused-appellant side, it was stated by PW-6 that the injuries of Sewa Ram and Mohar Singh were examined by him and their injuries reports were proved by PW-6 as Exhibits Kha-1 and Kha-2. It was admitted by PW-6 that there might be a difference of six hours in the duration of the injuries. As regards the injuries of injured Mehar Chand, it was stated that it could be planted/created and the injury no. 1 of Smt. Shanti, could occur due to fall. With regard to the injuries of accused-appellant Sewa Ram, it was stated that it could occur due to fall. On the injury report of accused-appellant Mohar Singh, it was stated that injury nos. 2, 3 and 4 were contusions which could be planted/created and Injury no. 1 could occur due to fall.

10. The injuries found on the person of injured Subhash, Shanti, Mehar Chand, Paalu and Jhandu on the complainant side are relevant to be noted hereunder:-

*"**Injuries of Subhash:** (I) A Traumatic Swelling 4cm x 3cm with abrasion 2cm x 1.5cm on the right side of the cheek, 1 cm anterior to the tragus of the right ear - Reddish in colour & soft clot Present in the Abrasion*

(II) An abrasion 3cm x .5cm on the right clavicle - soft clot present.

Opinion: Duration is fresh. Injury No. (I) & (II) are simple in nature, caused by blunt object.

***Injuries of Smt. Shanti**: (I) A lacerated wound 4.5cm x 1cm x bone deep on the forehead, 2cm above from the root of the nose - fresh bleeding was present with soft clot present.*

(II) A lacerated wound 1.5cm x .5cm x muscle deep with swelling on the left cheek, 1cm below the left eye lid - fresh bleeding with soft clot.

Opinion: Duration is fresh. Injury No. (I) & (II) are simple in nature, caused by some hard blunt object.

***Injuries of Mehar Chanda:** (I) A Traumatic Swelling 17cm x 11 cm on the dorsal side of left upper & left forearm (extended from the left supracondylar*

region to the middle of the left forearm - Reddish in colour.

(II) An abrasion 4.5cm x .5cm on dorsal side of lower part of right upper arm 2 cm above the right elbow joint - soft clot present.

(III) Patient complaints pain on the dorsal side of left foot but no evidence of external injury.

Opinion:- (i) Duration is fresh.

(ii) Injury No. (1) its nature can be given after x-ray report of left arm - AP - Lateral view. KUO for expert opinion, caused by blunt object .
(iii) Injury No. (II)is simple in nature, caused by blunt object.

Injuries of Pallu: *(I) A lacerated wound 1cm x 1 cm x muscle deep on the lower part of right leg, 9cm above the right ankle joint - soft clot & fresh bleeding present.*

(II) An abrasion 2 cm x 5 cm on the right foot, 1cm below from the anterior part of right ankle joint - soft clot present.

(III) A lacerated wound 3cm x .5cm x muscle deep on the upper and in between 1st & 2nd right toes - fresh bleeding with soft clot present.

(IV) A contusion 4 cm x 1cm on the right side of the back 13 cm from the lumbar vertebra - Reddish in colour

(V) An abrasion 1.5cm x .5cm on the right side of the chest, 5.5cm below the right clavicle - soft clot present.

Opinion:- (I) Duration is fresh.

(II) All the above injuries are simple in nature, caused by blunt object.

Injuries of Jhandu: *(I) A lacerated wound 3cm x 1cm x muscle deep on the right leg, 21cm below the right Patella - fresh bleeding & soft clot present.*

(II) A lacerated wound 1.5 cm x 1 cm x muscle deep on the lower part of anterior of left thigh - 11 cm from the left Patella - fresh bleeding with soft clot present.

(III) A lacerated wound 1cm x .5cm x muscle deep on the upper part of the left leg, 17cm below from the left Patella - fresh bleeding with soft clot."

Opinion:- (I) Duration is fresh.

(II) All the above injuries are simple in nature, caused by blunt object.

X-ray report of Mehar Chand: *X-ray left lower part of humerus:- In skiagram, There is fracture of ulna bone upper part seen.*

The injuries on the accused side namely Sewa Ram and Mohar Singh as proved by doctor PW-6 in Exhibits Kha-1 and Kha-2, respectively; are also noted as under:-

*" **Injuries of Sewa Ram:** On person of accused Sewa Ram, a lacerated wound 3.5cm x 0.5cm x bone deep right side of head, 13 cm above right ear 13cm above, fresh bleeding. Injury is fresh and simple injuries, caused by hard blunt object."*

*"**Injuries of Mohar Singh** (1) A lacerated wound 5.5cm x 0.5cm x muscle deep right side of head, 14.5 cm above the right ear, fresh bleeding.*

2. Contusion 4.5cm x 3cm on right forearm, 7.5cm above the right wrist.

3. Contusion 20cm x 1.5cm from right to left back of the chest, 3.00 cm. below the right shoulder, reddish in colour.

4. Contusion 5cm x 1cm on abdomen on left and towards the back, 19 cm back side left to the navel, fresh and simple injury, caused by hard blunt object"

PW-8 the doctor who conducted postmortem proved the injuries on the person of the deceased as under:-

"i) Incised wound 2.00cm x 1.00cm x brain cavity deep on right parietal region, 5cm above right ear with depressed fracture of right parietal bone. Margins are clean cut.

ii) Traumatic swelling 5.00 cm x 3.00 cm left side head 3.00 cm above left ear.

iii) Traumatic swelling 3.00 cm x 2 cm. back of head.

iv) Traumatic swelling 4.00 cm x 2.00 cm back of left hand with fracture of left index finger.

v) Abrasion 2.00 cm x 2.00 cm back of left elbow.

vi) Lacerated wound 6.5 cm. x 1.00 cm. x scalp deep ..... Parallel to the scalp on top and back of the head"

11. On internal examination, clotted blood was seen beneath the scalp on the head. Fracture of right Occipital, right Parietal and right temporal bones was seen. Membrance of brain were ruptured. Clotted blood was present on both sides in the brain. There were fractures in the base of brain on posterior fossa and middle fossa on the right side. The cause of death was opined as shock, hemorrhage and coma due to head injuries.

12. As per the doctor, the proximate time of death could be same as the time indicated in the report as on 23.6.1987 at about 9:30 PM. All the injuries were sufficient to cause death in the ordinary course of the business. With regard to the injury no. 1 namely the incised wound, suggestion was given to PW-8 that the said injury could have been caused if a leaf was attached to the Lathi (wooden stick) to which he replied that it could be possible. PW-6, however, opined that all injuries could be caused by 'Lathi-Danda' and proved the postmortem report being in his handwriting and signature as Exhibit Ka-7.

13. The formal witnesses, thus, proved the reports prepared by them which are relied by the prosecution to support its case of commission of the offence by the accused persons.

14. Amongst the witnesses of fact, the first informant was examined as PW-4 who stated on oath that the deceased was his real brother. The incident occurred at about 9:00 PM and on hearing the cries of his brother Soma, he went to the spot and saw that all eight accused persons were beating him. All the accused persons were carrying Lathi and a leaf was attached in the Lathi of accused Chander. The accused persons also caused injuries to all injured and in defence he (PW-4) also wielded Lathi. All the injured were taken to the District Hospital by him (PW-4) and deceased Soma died on the way to the hospital. The report was dictated by him to one Hariram in the

hospital and after dictation it was read over to him and he sent the report to the police station Laksar through two persons namely Sakesh and Hariram.

In cross, it is stated by PW-4 that his house was a distance of 8-10 paces from the house of Soma and in between 2-3 houses existed which include the house of Subhash and Rati Ram. He heard the cries of people "Bachao-Bachao' and a lot of noise was there but he did not have an idea that his brother was being beaten. PW-4 denied the suggestion that when he came out of the house there was a lot of crowd collected outside the house of his brother. He further clarified that there were eight accused persons, injured and children of the house and no one else. He then stated that he went empty hands and Subhash met him on the spot but Rati Ram was not there, whose houses were in between. The incident of "Maarpeet' happened for about 1½ minute and the accused persons were having Lathis till the end and they wielded them. On a suggestion, PW-4 denied that he did not know as to whether the accused also sustained injuries as he was busy in saving all on his side. On further confrontation of PW-4, he stated that he did not notice whether there was blood on the spot. He stated that apart from her mother, no other ladies or children of the house came in between. He further stated that he reached at his house about ½ hours before the incident and as soon as he finished his food, he heard the noise. He did not know anything about the incident prior to the time when he heard the cries and only this much was known to him that a Panchayat was to be held and he was supposed to go there and for that reason he was having his food. On confrontation, PW-4 denied that it was wrong that no incident occurred in front of the house of deceased Soma and that he was making stories to save himself from the cross-case and a false case was lodged by him.

15. PW-3 Mehar Chand is an injured witness who stated on oath that on the fateful day at about 9:00 PM, a Panchayat was held in which he alongwith the injured and other villagers, was present. The place was lit up by the electricity light. One Mangu called accused Chander. Chander came. Mangu confronted him that "you were told by the Panchayat not to open the door on the Panchayati land towards the Well, why did you do so". Chander replied with anger challenging that whoever had guts could come forward to close the door. He then exhorted his brothers that they should be taught a lesson as they were being considered weak. Chander and his brothers Dharm Pal, Mohar Singh, Ram Pal, Sewa, Om Pal, Jagpal and Palla came out with Lathis. Chander wielded Lathi on Mangu, Soma caught his Lathi and then all other accused persons wielded Lathis on deceased Soma. When he, Jhandu and Pallu tried to intervene, the accused persons also beaten them. PW-3 stated that the bone of his hand got broken. Shanti, the mother of deceased Soma intervened so she was also beaten. The people sitting in the Panchayat then intervened. As Soma got injured, he was taken to his house. The eight accused persons then went to the house of the Soma and did Maarpeet there also. Omi (the first informant), i.e. the brother of the deceased came there and he also wielded Lathi in defence. The accused persons then ran away to their house. After 10-15 minutes, the first informant Omi took them to the hospital in a Buggy and Soma had died on the way. PW-3 stated that his injuries were examined by the doctor and he remained admitted for about 40 days in the hospital.

The topography of the place of the incident had been narrated by PW-3 in his cross-examination and it was stated that his house was located at a distance of 80

paces from the Panchayati Well. He further stated that injured Smt. Shanti was her Aunt and his house and that of Smt. Shanti were adjacent. He further stated that there was a hut, earlier, at the place where the accused Chander had built his house. He denied the suggestion that the opening of the hut was in front of the Well and stated that it was towards the hill. He further stated that they had complaint that Chander had constructed his house beyond the drain over the Panchayati Well and that the construction was going on for about 8 days prior to the incident. On confrontation, PW-3 stated that he did not make any complaint to the Gram Pradhan, the villagers made a complaint but the said complaint was not made in his presence. He then admitted that the dispute started as soon as the construction was started. Neither the Gram Pradhan nor any member of the Gram Samaj came on the spot at the time of the incident and confronted Chander. There were Abadi all around the Panchayati Well. PW-3 further stated that another witness PW-2, Singhara came from that Abadi which was located after the rasta, near the place of the incident. He then stated that the dispute was mainly because of the opening of the door and that no one had an idea that the door would be opened towards the Panchayati Well.

On a query made by the Court, PW-3 clarified that the dispute was about construction of the house by encroachment of the land of Panchayati Well and not only about the opening of the door and stated that the door was opened in order to encroach upon the entire public land (Panchayat land).

On confrontation by the counsel, PW-3 further stated that about 30-35 people were collected in the Panchayat. The villagers had decided in the morning that the Panchayat would be held at about 9:00 AM when they collected in the morning at the Panchayati Well and in the evening all of them came on their own at about 9:00 PM. In the morning, only 10-20 people were collected to decide the time of holding of the Panchayat and Chander was not confronted at that time. In the morning, they decided that they would talk to Chander only in the evening. When at about 9:00 PM, people were collected, it was decided to also call Chander on the spot. Chander came only after he was called and when he came out, he was confronted as to why he had opened the door on the Well and did not listen to the Panchayat. Apart from the said confrontation, no other talk with Chander was made and on the said confrontation, Chander exhorted his brothers to show their strength. His brother came with Lathis and Chander also brought Lathi from his house. All of them were empty hands as they did not have any fear that they would be beaten by the accused. Chander and his brothers did not wield Lathis upon the people sitting in the Panchayat immediately after coming out. They first wielded Lathi on Mangu and when Soma caught the Lathi, brothers of Chander started beating Soma.

In cross, PW-3 further stated that the Investigating Officer interrogated him after about one month of the incident. On further confrontation, he stated that the Lathi which was caught by Soma hit in his head. PW-3 had denied the suggestion that the accused wielded Lathis on all the people sitting in the Panchayat and stated that the people in the Panchayat were disbursed when 'Maarpeet' was going on. They were present on the spot but no one came in between. No one in the Panchayat tried to snatch Lathis from the accused

persons and then stated that who would have entered in between the Lathis. When the accused persons were wielding Lathi, Shanti came and no other person came with her. It was reiterated by PW-3 that all on the complainant side were empty hands and no one did any 'Maarpeet'. When they reached at their houses, the accused persons also reached from behind, they again did 'Maarpeet' and Soma was heavily beaten in his house and no person from Panchayat came to their house; only Omi PW-4 came and he was empty hands and he took Lathi from the house of Subhash.

On confrontation PW-3 stated that PW-4 Omi did not disclose the fact of wielding Lathi by him to the Investigating Officer and that he only challenged the accused persons. The suggestion that PW-3 was making a false statement in order to save himself from the cross-case was categorically denied by him.

16. PW-1 and PW-2 are the eye-witnesses of the incident whose names have been mentioned in the first information report as the persons who intervened and defended the complainant side. PW-1 Manga son of Nandu stated on oath that the accused persons were residents of the same village and belong to his community and all the accused belong to one family. Pedigree of the accused persons has then been narrated by PW-1. He further stated that a Panchayati Well (Public Well) existed in between Harijan Abadi and an electric pole was fixed near the Well. The house of PW-2 Singhara was adjacent to the rasta which goes from the public Well towards the hill on the Southern side. The place was lit up by the electricity light and on the Southern side of the Well, house of Ramesh existed. On the Western side of the Well, there existed a drain which was covered by accused Chander to open the door of his house. Earlier there was a hut belonging to Chander, the door of which was opening towards the hill. The accused Chander had changed the direction of the door and opened it towards the Well. The villagers objected to it and instructed Chander not to change the direction of the door of his house. Prior to the incident, the accused Chander though agreed to the objections raised by the villagers and promised to keep the door at the same place but he did not accede to the same and the direction of door was changed to the side of the Well.

17. On the day of the incident, in the morning, it was decided that a Panchayat would be held in the evening to ask Chander as to why he had opened the door of his house towards the Well. At about 9:00 PM, villagers were collected at the Well for the Panchayat. An electricity bulb was lit up. In the said Panchayat, all the injured persons namely Mangu, Hariya, Mahaveer including PW-1 and other villagers were present. Amongst Panchayat people, Mangu called the accused Chander and asked him as to why he had opened the door towards the Well. Getting angered by it, the accused Chander first challenged the Panchayat people and then exhorted his brothers to teach them a lesson. Hearing that brothers of the accused Chander namely other seven accused persons herein came out with their Lathis and Chander started wielding Lathi at Mangu which was caught by Soma and then all the accused persons started beating the deceased Soma. The injured were also beaten by the accused persons when they tried to intervene. The mother of the deceased Soma namely Shanti was also beaten by the accused persons when she intervened. There was blood at the place of the

incident. The injured went to their house, thereafter, and the accused persons also reached at the house of Soma and they also behind them. The accused again beaten the deceased Soma in front of his house and in the meantime, the first informant Omi, the brother of the deceased came. He challenged and then the accused persons ran away. Omi took all the injured to the District Hospital Laksar and Soma had died on the way.

18. It was admitted, in cross, by PW-1 that a cross-case was lodged against the complainant side namely the injured, first informant and other persons of 'Maarpeet' of Sewa Ram and Mohar Singh (two injured on the side of the accused). All the persons on the complainant side who are implicated in the cross-case belonged to an extended family except Singhara (PW-2), being related to each other. A suggestion was given to PW-1 that a relative of deceased Soma named as Jaipal who was posted as Munsif Magistrate in District Muzaffarnagar was instrumental in the lodging the case. In reply, PW-1 stated that he was not aware that Jaipal came in the Pairvi of the case. The suggestion that Panchayati Well was filled about 50 years back was denied by PW-1 and it was stated that it was filled only about 1 or 1-1/2 years ago. It was admitted that there was no tap near the Well and the suggestion that there was no drain near the Well for drainage of water was categorically denied.

19. It was admitted by PW-1 that he had no concern with Gram Sabha and was only a resident of the village. Other accused persons were also not members of the Gram Sabha and not even Mangu. He, however, stated that they made a complaint before the Gram Pradhan. PW-1, however, could not recollect as to whether the Gram Pradhan or the members of the Gram Sabha came at the spot of the incident on the fateful day. PW-1, on confrontation, stated that the door towards the Well was opened by accused Chander on the same day and about one year prior to the incident, he started filling the Well and drain was also closed. About one week prior to the incident, he was instructed not to change the direction of the door for the reason that he had already covered the drain. It was further stated by PW-1 that since there were taps in the village, no one had objected to the act of the accused Chander in filling the Well. He then stated that no body takes interest in the matter of Panchayat and when the accused Chander filled the Well and covered the drain, they did not have any idea that he would also encroach upon the Panchayat land. PW-1 further stated that his statement was recorded by the Investigating Officer. When confronted, he replied that he did not know as to why his correct statement was not recorded. While stating that the villagers were collected in the Panchayat and they were all sitting near the Well, PW-1 stated that all of them were empty hands as they did not have any apprehension of fight. Chander also came empty hands initially, being angered, he went to his house and brought Lathi. Before they could understand anything, he wielded Lathi on the complainant side and all other accused persons also joined him. The Panchayat people had disbursed and no one intervened. PW-1 stated that the house of injured Shanti must be about 70-80 paces from the place of the incident and the suggestion that it was about 200 paces was categorically denied. He then stated that no one stopped Shanti from intervening and the accused persons were not shouting when they went towards the house of Soma. All injured went away quietly after

sustaining injuries and they were not shouting 'Bachao-Bachao'. The deceased Soma went to his house on his own and the accused persons also went behind him. A suggestion that PW-1 belonged to the extended family of deceased Soma was categorically denied by him. The suggestion was given about political rivalry of the accused Chander with other persons including PW-2 Singhara. PW-1, however, denied that accused Chander had won the elections. The suggestions that he did not witness the incident and that he belonged to the family of the deceased were categorically denied by PW-1.

20. PW-2, Singhara, another witness mentioned in the FIR, is a villager whose version is almost the same as narrated by PW-1, PW-3 and PW-4 about the manner and the reason for the occurrence. On confrontation, PW-2 denied that he had also encroached upon the Gram Sabha land and on an application given by Chander, his possession was removed. On the suggestion of political rivalry with the accused Chander, he stated that the said election was held much earlier and it was denied that the injured were on his side in the said election. It was admitted by PW-2 that he was an accused in the cross-case. The statements given by the prosecution witnesses (PW-1, PW-3 and PW-4) that the accused Chander had started filling the Well and that he had earlier agreed not to open the door towards the Well, had been reiterated by PW-2. It was stated by him that all on the complainant side were empty hands. PW-2 was confronted with his statement under Section 161 Cr.P.C. and reiterated that the injured went to their house after sustaining injuries and the accused persons also followed them; 'Maarpeet' had occurred in front of the house of deceased Soma for about 1½ minutes. PW-4 Omi, wielded Lathi on the accused persons. PW-2 admitted the fact that Omi (PW-4) also wielded Lathi was not told to the Investigating Officer and then he stated that the Officer might not have asked him. The suggestion that the injured themselves went to the house of the accused Chander carrying Lathi at about 9:00 PM, on the fateful day, and confronted with accused Chander and Mohar Singh and then started wielded Lathi on them and Sewa Ram who came in between was also beaten by Lathis was denied by PW-2. It was denied that Sewa Ram and Mohar Singh (injured on the accused side) wielded Lathis in their defence. It was also denied that in order to get away from the cross case, a false story was concocted by the witnesses.

21. Placing the above noted oral and documentary evidence on record, learned counsel for the appellants argued that it has come in the evidence of the prosecution witnesses that both sides wielded Lathis though it is sought to be projected that the victim side acted in self-defence. Two accused persons namely Mehar Chand and Sewa Ram had sustained injuries and their injuries were examined by PW-6, the doctor, who had also examined the injured on the complainant side. It is, thus, proved that two persons on the accused side had sustained injuries in the same occurrence. In the said scenario, non-explanation of the injuries of the accused side will be fatal to the prosecution case. The prosecution witnesses who had denied the presence of the injuries on the person of the accused are proved to be liar on the most material point and their evidence is liable to be rejected as untrustworthy. The omission on the part of the prosecution to explain the injuries on the person of the accused assumes greater importance as the prosecution evidence

consisted of interested, inimical and partisan witnesses. The defence version which explains the injuries on the person of the accused, therefore, is to be rendered probable throwing serious doubt on the prosecution case.

It is further contended that the prosecution has suppressed the genesis of the incident. In the first information report, PW-4, the first informant very conveniently suppressed the first place of the incident and the story narrated by him in the FIR as well as his version in the Court was only with respect to the place of the incident being in front of the house of the deceased. Whereas, all other witnesses stated that the incident had started from near the public Well and after deceased Soma got injured by the accused and went to his house, the accused persons reached there and beaten him again.

22. The act of PW-4 Omi in suppressing the first part of the incident as proved by other prosecution witnesses casts a serious doubt on the prosecution story. The defence version that the complainant side came to the house of accused Chander and wielded Lathis on him and two accused-appellants namely Mehar Chand and Sewa Ram got injured when they tried to save accused Chander is more probable and liable to be believed. At least, it is proved that the genesis of the incident has been suppressed by the complainant side. The prosecution witnesses, therefore, cannot be said to be truthful when they have given reason for the occurrence which is that the accused Chander attacked Mangu and deceased Soma was beaten while he was saving Mangu and other injured were beaten when they came to save the deceased Soma. It is proved form the statement of the prosecution witnesses itself that no Gram Sabha member or the Gram Pradhan was present. The assertion by the prosecution witnesses that a Panchayat was called is an utter lie. Six persons were injured on the complainant side whereas only one Mehar Chand had entered in the witness-box and no other witness came to depose in the Court. This shows that the prosecution version about the genesis of the incident is false. There is no recovery from the place of the second incident, i.e. in front of the house of the deceased Soma whereas three Lathis were recovered from Chander, Mohar singh, Ram Pal and Sewa Ram.

23. With the above contentions, it is vehemently submitted by the learned counsel for the appellants that in view of the cross-case lodged by the accused side giving their version of the incident, it is proved in the present case that the prosecution had suppressed the genesis of the incident. The trial court had, thus, committed grave error in convicting the accused persons for the offence of murder under Section 302 readwith Section 149 IPC. The decision of the trial court is liable to be set aside and the appeal deserves to be allowed.

24. Learned AGA, in rebuttal, argued that it is not one of those cases where non-explanation of the injuries of the accused side will create any dent in the prosecution story. It is argued that a perusal of the injury reports of two accused namely Sewa Ram and Mohar Singh, as proved by the doctor PW-6 indicates that their injuries were simple in nature and even the doctor says that such injuries could be self inflicted. The prosecution by cogent, independent and disinterested witnesses proved the entire incident since its inception till the end. Non-explanation of

the injuries in view of the nature of injuries and the evidence of the prosecution witnesses will not affect the prosecution case. The consistent and creditworthy evidence of the prosecution witnesses will not in any way be affected on account of the alleged omission on the part of the prosecution to explain the injuries.

Reliance is placed on the decision of the Apex court in **State of Gujarat vs. Bai Fatima1** as referred in paragraph "11' of the decision in **Lakshmi Singh and others etc. vs. State of Bihar2.**

25. Having considered the submissions of the learned counsels for the parties and perused the record, while analysing the evidence of the prosecution witnesses, we would first like to deal with the arguments of the learned counsel for the appellants that the prosecution had not correctly described the place of the incident and, thus, suppressed the genesis of the incident.

26. To deal with the said argument, we may record that the first information report of the incident was lodged by the brother of deceased Soma, who was examined as PW-4. In the evidence of PW-4 Omi, it has come that his house was at a distance of 8-10 paces from the house of deceased Soma. It was categorically stated by PW-4 that on the fateful day at about 9:00 PM, he was in his house having dinner and he went to the house of his brother Soma on hearing cries of Soma, he then saw that the accused persons (eight in number) were beating him. They all were carrying Lathi and his mother and others were injured. In defence, PW-4 also wielded Lathi. This version of PW-4 in his examination-in-chief is corroborated from his first version in the written report where he narrated the incident occurred in front of the house of deceased Soma. When confronted PW-4 categorically stated that at the time of the incident, he was present in his house and as he could barely finish his food when he heard the noise and before that he only knew that a Panchayat would be held. He was about to go and that is why he was having his food. From the version of PW-4 in the written report lodged by him as also in his deposition before the Court, it is evident that he had only seen one incident which occurred in front of the house of Soma wherein Soma got injured and other witnesses including mother of deceased namely Shanti Devi also suffered injuries. In view of the categorical statement of PW-4 that he was having his food as he was about to go to the Panchayat which was to be held on that day, it is established that he was not present at the first place of the incident, i.e. near the Panchayati Well. Other witnesses who had seen the occurrence near the Panchayati Well did not mention the presence of Omi at the said place. Non-mentioning of the occurrence of the incident from the beginning by PW-4 in the first information report, therefore, is of no consequence. The version of PW-4 in his deposition before the Court cannot be said to be in contradiction to the testimony of other witnesses or in suppression of the correct facts, inasmuch as, PW-4 categorically proved that he was the witness of only the second part of the incident which occurred in front of the house of deceased Soma. Moreover, FIR is not an encyclopedia. [Reference **Subhash Kumar vs. State of Uttarakhand3]**

The observations in para '12' of the said judgment are relevant to be noted hereunder:-.

"12. FIR as is well known is not to be treated to be as an encyclopedia. Although the effect of a statement made in the FIR at the earliest point of time should

be given primacy, it would not probably be proper to accept that all the particulars in regard to commission of offence must be furnished in detail."

27. As regards the first place of the incident, the Panchayati Well in front of the house of accused Chander, from the version of the defence itself, it is admitted fact that an incident of 'Maarpeet' had occurred near the Panchayati Well which was near the house of accused Chander. The first place of the incident, thus, is not disputed by both sides. The dispute is as to who was the aggressor, i.e. whether the accused persons wielded Lathi in their defence. In this regard, a perusal of the site plan indicates that the place "A" therein has been shown as the house of Chander on account of which the dispute arose; place "C" as Panchayati Well. The place shown by "X" is the place from where the blood stained earth was collected by the Investigating Officer. The recovery memo Exhibit-15 was proved by PW-7, the Investigating Officer and the blood stained and plain earth collected by him as material Exhibits '2' and '3'. The fact that the incident had occurred at place "X" is also proved from the statement of the prosecution witnesses namely PW-1 and PW-2 and the injured witness PW-3. Though there is a suggestion of enmity of PW-2 Singhara with the accused Chander but there is no such suggestion against PW-1 Manga son of Nandu who is an independent witness. It is proved by PW-1 that the genesis of incident was the construction raised by the accused Chander. The prosecution witnesses are consistent about the fact that accused Chander had opened the door of his house towards the Well whereas initially the door was on the other side.

It has also come in the evidence of the prosecution witnesses that while opening the door, accused Chander had covered the drain of the Panchayati Well. It is admitted by the witnesses that public Well was not in use as a source of water in the village, however, the villagers had an apprehension that Chander would encroach upon the public land adjacent to the Well by opening the door of his house facing the Well. It is also proved that they confronted accused Chander in that regard and despite assurance given to the villagers, accused Chander opened the door of his house in front of the Well on the date of the incident. As the construction was going on, the villagers decided to hold a meeting to confront him together. The said meeting was convened besides the Well which was close to the house of Chander.

28. At about 9:00 PM, when villagers were collected near the Well, one of them namely Mangu called Chander from his house and confronted as to why he did not accede to the request not to change the side of the door of his house. Upon being confronted by Mangu in the presence of other villagers, accused Chander got angry and exhorted his brothers to teach a lesson to all of them. All eight accused belonging to one family came with their Lathis and accused Chander started beating Mangu who had confronted him. The deceased Soma intervened and caught hold of the Lathi of accused Chander, other accused persons then wielded Lathis on him.

29. It is also proved by the prosecution witnesses that on sustaining injuries, Soma went towards his house and the accused persons followed him. The second incident of 'Marpeet' in consequence of the first occurrence near the Well, had occurred in front of the house of Soma and at that point of time, the first informant Omi brother of the deceased

came from his house. It is admitted by PW-4, the first informant at the very first instance, i.e. in the first information report that they also wielded Lathi in defence. In the examination-in-chief, PW-4 reiterated that he wielded Lathi in defence though he had denied, in cross, that he did not know as to whether the accused persons sustained injuries or not as he was busy in saving the injured. This version of the PW-4 cannot be said to be a denial of the injuries sustained by two accused persons namely Sewa Ram and Mohar Singh. Rather the version of PW-4 in narrating that he also wielded Lathi in defence while the accused persons were causing injuries to his mother and brother is a truthful explanation of the simple injuries caused on the person of the accused namely Sewa Ram and Mohar Singh. Neither there is any inconsistency in the version of prosecution witnesses nor they are at variance about the manner in which the assault had taken place.

30. The contention of the learned counsel for the appellants that since the prosecution had denied the injuries on the person of the accused, it necessarily lead to an inference that the witnesses were lying and the prosecution had suppressed the genesis and the origin of the occurrence and had not presented the true version, therefore, is liable to be rejected.

31. It is, thus, proved that the place of the incident shown as "X" in the site plan near the Well was the first place where accused Chander was confronted and deceased Soma was beaten and the place shown as "H", in front of the house of the deceased Soma is the place of the second incident in sequence where the accused persons again beaten him. Both the incidents were in continuation as is proved from the ocular version of the prosecution witnesses. With the collection of blood stained earth from place "X", it is proved that the place of the inception of the dispute was place "X". Only variance which could be pointed out by the learned counsel for the appellants in the version of three prosecution witnesses namely PW-1, PW-2 and PW-3 and the first informant namely PW-4 is about the place where other injured sustained injuries. It is not clear as to whether they got injured at place "X" (near the Well) or place "H" (near the house of deceased Soma). The statements of the prosecution witnesses PW-1, PW-2 and PW-3 is that other injured sustained injuries at the first place where dispute had commenced whereas the statement of PW-4 is that they were attacked in front of the house of the deceased Soma. In the opinion of the Court, that fact itself is not such which has to be given undue weightage so as to discard the consistent admissible evidence of the prosecution witnesses that all six injured including one deceased got injuries in the same occurrence, whether it was at place "X" or place "H".

32. It is proved that all six injured on the prosecution side were taken to PHC Laksar and they were examined on 23.6.1987 (on the date of the incident) between 10:15 to 11:00 PM. Their injury reports were proved by PW-6 and the injuries sustained by them were of hard and blunt object as is evident from the injury reports. Lacerated wound and swelling on forehead and cheek of injured Shanti; lacerated wound on right and left legs and thighs of injured Jhandu; lacerated wound on legs, toes, foot on the person of the injured Paalu and traumatic swelling on upper arm of injured Chand; traumatic swelling with abrasion on the cheek and right clavicle on the person of the injured Subhash, all injured on the prosecution side

proved that they were attacked and beaten by Lathis, weapons assigned in the hands of eight accused persons.

33. The first information report is a prompt report of the occurrence, lodged within 1-1/2 hours of the incident. The police also reached the spot and the site plan was prepared on the very next day, i.e. 24.6.1987. All injuries on the person of the deceased were also proved to have been caused by Lathi. In the statement of PW-8, the postmortem doctor, it has come that there was traumatic swelling at the back of head of the deceased and on internal examination, right occipital, right parietal, right temporal bone and left parietal and left temporal bone were all broken. It is proved by the doctor that the death was caused due to head injuries.

34. Whereas injuries on the accused (defence) side as proved by PW-6 (doctor) from the injury reports as Exhibit Kha-1 and Kha-2 were minor in nature. Four injuries on the person of accused Mohar Singh were one superficial lacerated wound and three contusions on right hand and abdomen which as opined by the doctor were simple injuries caused by a blunt object like Lathi. Whereas on the person of accused Sewa Ram, one lacerated wound of 3.5cm x 0.5cm bone deep on the right side of head 13cm above right ear was found which was also termed as simple injury by the doctor namely PW-6 and that the said injury could have been caused by a blunt object like Lathi. In comparison to the injuries of the complainant (prosecution) side, amongst whom the injuries on the person of Shanti were on vital parts with that of the injuries of the accused (defence) side, it is difficult to accept that six persons on the complainant side had suffered injuries as the accused persons wielded Lathis in their defence. The gravity of the injuries on the person of the deceased Soma, his mother Shanti and other four injured persons on the complainant (prosecution) side makes the defence story improbable. The version of PW-4 that he wielded Lathi in defence is acceptable being more probable and trustworthy.

35. In their version under Section 313 Cr.P.C., the accused Chander, Sewa, Mohar Singh simply stated that the Panchayati Well was filled (closed) for a long time and there was no drain. The complainant side came to the house of Chander and started abusing him as to why he constructed his house at the land of Panchayat and started beating them. Mohar Singh and Sewa Ram had suffered injuries and the accused also defended them. Apart from this version in Section 313 Cr.P.C., no positive evidence has been brought by the accused persons to prove that the prosecution witnesses on the complainant side were the aggressor of the crime, i.e. 'Marpeet' was started by them and the accused persons wielded Lathi only in defence. Apart from three accused persons namely Chander, Mohar Singh and Sewa Ram, rest of the five accused namely Om Pal, Jagpal, Ram Pal, Paala and Dharm Pal pleaded alibi. But no positive evidence to prove the plea of alibi had been produced by them. It may be noted, at this juncture, that only two appellants namely appellant no. 2 Dharm Pal and appellant no. 6 Jagpal are before us and all other appellants had died. In absence of any positive evidence having been lead by appellant no. 2 Dharm Pal and appellant no. 6 Jagpal to support their plea of alibi, in light of the consistent and creditworthy evidence of the prosecution, the explanation offered by appellant nos. 2 and 6 Dharm Pal and Jagpal, respectively; in their explanation under Section 313 Cr.P.C., is liable to be thrown.

36. In light of the above discussion, it is held that the prosecution has explained the injuries of the defence with the version of PW-4 that he wielded Lathi in defence while his mother and brother were beaten by Lathis by eight accused persons in front of the house of Soma. It is also proved that the dispute started with the confrontation of the accused Chander by the villagers, who were collected near the Well, over the construction raised by Chander. It is also proved that accused Chander started beating one villager Mangu who called Chander to confront him and deceased Soma was beaten when he caught hold of Lathi of Chander.

The accused persons wielded Lathi on deceased Soma in such a manner that he suffered grievous injuries on his vital part (head). Five other persons were also injured in the same transaction when they intervened. The injuries of Shanti mother of deceased Soma and on the person of all other injured could be attributed to the weapon Lathis which were recovered from the accused persons.

37. There is nothing on record to accept the defence version that they wielded Lathi in defence rather comparison of injuries of the prosecution side with that of the defence side proved that the injuries on the person of the accused were caused when PW-4 Omi wielded Lathi in defence. One of the injured Mehar Chand had entered in the witness-box to prove the genesis of the dispute and the nature of the occurrence. It is proved by PW-3 that only the first informant Omi who came from his house in front of the house of the deceased had challenged the accused persons by wielding Lathi. All other on the complainant side were empty hands as is proved by the prosecution witnesses as they were collected near the Well to talk to Chander.

38. In view of the above discussion, the contention of the learned counsel for the appellants that the prosecution had suppressed the genesis and the origin of the occurrence and had, thus, not presented the true version is liable to be rejected. Further submission is that the prosecution had failed to explain the injuries on the person of the accused and, therefore, the defence version is to be rendered probable so as to throw away the prosecution case, is without any substance.

39. In the totality of the facts and circumstances of the present case, we do not find any error in the judgment of the trial court in conviction of the accused-appellants namely appellant no. 2 Dharm Pal and the appellant no. 6 Jagpal whose presence on the spot was proved by all eye-witnesses of the prosecution in a consistent manner. The sentence awarded to the appellant nos. 2 and 6 under Section 302 is with the aid of Section 149 IPC. It is proved by the prosecution that the appellants herein were members of the unlawful assembly and they had committed the offence of murder in prosecution of the common object of that assembly.

39. For the offence under Section 323 IPC for causing injuries to five injured persons with the aid of Section 149 IPC, we do not find any error in the judgment of the trial court, inasmuch as, the injuries on the person of the injured were proved by the doctor, who prepared the injury reports and also by the injured Witness PW-3 in his oral testimony.

40. As regards the punishment under Section 147 IPC, once the accused persons

namely appellant nos. 2 and 6 have been found guilty of rioting, their conviction under Section 147 IPC cannot be said to suffer from any error of law. The sentence awarded to the appellants herein for the offences under Sections 147 and 323 is appropriate in view of the gravity of the offence. The sentence awarded under Section 302 IPC is minimum.

41. For the above discussion, no interference is required in the judgment and order dated 14.12.1989 passed by the IVth Additional District & Sessions Judge, Saharanpur in Sessions Trial No. 597 of 1987 (State vs. Chandra), under Section 147, 148, 302/149 and 323/149 IPC, Police Station Laksar, District Saharanpur which is hereby affirmed.

The appeal is **dismissed**, accordingly.

Both the appellants Dharm Pal and Jagpal are in jail.

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

Necessary steps shall be taken by the Court below to notify this judgment to all concerned.

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

(2022)06ILR A639
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No.2682 of 1982

Aman Singh & Ors. ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri G.S.Hajela, Sri A.N. Misra, Sri Anuj Bajpayee, Sri Dinesh Kumar Sony, Sri K.R.Yadav, Sri R.K. Singh Rajput, Sri Zafar Abbas , Sri Satyendra Kumar Mishra, Sri Sanjay Kumar Dubey, Sri Neeraj Mishra

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Section 302/149, 147, 148 , The Code of criminal procedure, 1973 - Section 161,164 - Indian Evidence Act, 1872 – Section 134 – Number of witnesses – conviction can be based on the evidence of sole witness in a criminal trial as quality of evidence matters not the quantity. (Para -63)

Five accused - unlawful assembly alongwith another associate - agricultural field - common object to commit murder of deceased (brother of the first informant) - committed offence of rioting - intentionally causing death on the relevant date and time of the incident on the spot of the incident - attempted to commit murder of first informant - firing at him in pursuance of common object - committed dacoity - allegedly snatched licensed gun alongwith 25 cartridges and automatic wrist watch - armed with deadly weapons namely axes and sickle at the time of committing the offence of rioting - committed theft of the gun alongwith 25 cartridges and automatic wrist watch - committed killing of deceased .**(Para -4)**

(B) Criminal Law - Indian Evidence Act, 1872 – Section 8 – Motive , preparation and previous or subsequent conduct - suspicion of accused persons over deceased of having murdered their family members is, proved by the witness P.W.1 - motive as

setforth in the written information and the first information report is, thus, proved and is a relevant fact .**(Para - 18)**

(C) Criminal Law - Relevant date and time of the incident - no enmity between first informant (P.W.1) and accused appellants - planting of dead body on spot of incident by informant (P.W.1) is not acceptable - when spot of incident is proved satisfactorily by all witnesses of fact as well as formal witnesses. **(Para - 19)**

(D) Criminal Law - About witnesses - prosecution witnesses of fact are rustic villagers, not highly educated, even illiterate or simply literate - incident of murder in a rural area where the witnesses to the case were rustic - their behavioural pattern perceptive and un-perceptive habits have to be judged as such. **(Para - 24,25)**

(E) Criminal Law - evidentiary value of the statement of the hostile witnesses, with regard to the facts deposed by them and the effect of the portion of their statement not supporting the prosecution case - in a criminal trial, evidence of a hostile witnesses can form the basis of conviction - In the matter of appreciation of evidence of witnesses - it is not the number of witnesses but the quality of their evidence matters. **(Para -26,27)**

(F) Criminal Law - Reliance on the hostile witnesses - corroborated part of evidence of hostile witness regarding commission of offence is admissible - probability of presence of deceased, with the first informant, P.W.1 on the spot of the incident on the relevant date and time corroborated by the fact that the incident had occurred at the time of the sunset, as stated in the F.I.R.**(Para - 29,33,)**

(G) Criminal Law - Relative witness - spot of the incident – written information and delayed F.I.R. - relationship is not a factor to effect the credibility of a witness - spot of the incident proved to be boundary (med) of the 'jowar' field - written information of the incident given to the police station with reasonable promptness - no extraordinary delay to raise any doubt as to the genuineness of the F.I.R. . **(Para - 47,52,58,)**

(H) Criminal Law – Medical Evidence - Mode and manner of the commission of offence - reliance can be based on the solitary statement of a witness if the court comes to the conclusion that his statement is true and correct version of the case of the prosecution - witnesses turned hostile except P.W.1 as eye witness of incident – death proved by anti mortem injuries – nature of injuries - caused by some sharp edged and pointed weapons - depth of the injuries upto muscle deep or bone deep confirms the weapon assigned to the accused namely axe (Kulhari) and sickle (hasiya).**(Para - 59,60,66)**

(I) Criminal Law - minor contradictions or inconsistency are immaterial, irrelevant details which are not in the capacity in anyway corrode the credibility of witness cannot be labelled as omission or contradictions - evidence as to the presence on the spot of incident at the relevant time and date of the incident proved to be probable and natural, free from contradictions, exaggeration or embellishment. **(Para - 68)**

HELD:- No error in the judgment of conviction and order of sentence passed by the trial court. No intereference is required. **(Para -69)**

Criminal Appeal dismissed. (E-7)

List of Cases cited:-

1. Prabhash Kumar Vs St. of Har., (2013) 82 ACC (SC) 401

2. Iyappa & ors. Vs St. of T.N., (2011) 72 ACC (SC) 988

3. Zahira Habibullah Sheikh & anr. Vs St. of Guj., 2006 3 SCC 374

4. Sheo Shankar Singh Vs St. of Jharkh. & anr., (2011) 3 SCC 654

5. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj., (1983) 3 Supreme Court Cases 217

6. Shivaji Sahab Rao Bobade Vs St. of Mah., (1973) 2 Supreme Court Cases (801)

7. Mrinal Das Vs St. of Tripura, (2011) 9 SCC 479

8. Siddharth Vashisth @ Manu Sharma Vs St. of N.C.T., Delhi, (2010) 69 SCC 833

9. Babu @ Balasubramaniam & arn.. Vs St. of T.N., (2013) 8 SCC 60

10. Ashok Kumar Chaudhary Vs St. of Bihar, (2008) 12 SCC 173

11. Sucha Singh Vs St. of Punj., (2003) 7 SCC 643

12. Vijendra Singh Vs St. of U.P. with Mahendra Singh Vs St. of U.P., (2017) 11 Supreme Court Cases 129

13. Sucha Singh & anr. Vs St. of Punj., (2003) 7 Supreme Court Cases 643

14. Shyam Babu Vs St. of U.P., (2012) 8 Supreme Court Cases 651

15. Lallu Manjhi Vs St. of Jharkhand, AIR 2003 SC 254

16. Veer Singh Vs St. of U.P., (2014) 2 SCC 455

17. Brahm Swaroop & anr. Vs St. of U.P., (2011) 6 Supreme Court Cases 288

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The instant criminal appeal is directed against the judgment of conviction and order of sentence dated 18.10.1988 passed by the Special Judge, Lalitpur in Session Trial No.15 of 1980 (State Vs. Aman Singh, Hallu and Bhaiyan) and Session Trial No.23 of 1980 (State Vs. Kishora), convicting the accused persons under Section 302/149 I.P.C. and sentencing them to suffer imprisonment for life and further convicting the appellant Bhaiyan under Section 147 I.P.C. and sentencing him to undergo rigorous imprisonment for six months. Rest of the appellants namely Aman Singh, Hallu and Kishora have been convicted under Section 148 I.P.C. and sentenced to suffer rigorous imprisonment for a period of one year. All the sentences are to run concurrently.

2. The aforesaid two Sessions Trial Nos. 15 of 1980 and 23 of 1980 were connected by the trial judge as they have arisen from crime case no.53 of 1979, Police Station Saujana, District Lalitpur and the evidences against the accused in both the cases being the same, recorded in the leading Sessions trial No. 15 of 1980.

The accused Karan Singh S/o Majboot Singh Thakur was separately tried as he was absconding in Sessions Trial No.47 of 1983 under Sections 302, 147, 149 I.P.C., Police Station- Saujana, District Lalitpur.

Factual Matrix

3. The prosecution case as emerged from the written information given by the first informant, Kashiram on 22.11.1979 in the Police Station- Saujna, District Lalitpur, the evidence on record both documentary and oral to state briefly as follows:-

The first informant Kashiram alongwith his real brother Ramphal both S/o Motilal R/o Village Agodi, Police Station Saujna, District Lalitpur went to their agricultural field of 'jowar' to take care and protection of the crops. The first informant (Kashiram) handed over his licensed gun no.1516 of 12 bore with 25 cartridges to his brother "Ramphal' and went himself into the field to cut grass. After cutting the grass at about 5:00 p.m. in

the evening, when the day light was still existing, the first informant lift the +bundle of grass and moved on the way to his house with his brother "Ramphal' ahead of him. About ten paces away from their field on the way to their home, when they reached near the agricultural field of Baldu Lodhi, the accused persons Karan Singh S/o Majboot Singh Thakur armed with axe (kulhari), Amaan Singh S/o Majboot Singh Thakur armed with sickle (hasiya), Kishora S/o Kamatua Nai armed with axe (Kulhari), Hallu S/o Kamatua Nai armed with axe, all residents of Agodi Police Station Saujana, District Lalitpur with brother-in-law of Kishora namely "Bhaiyan Nai' R/o Village Rangaon, Police Station Mandwara, District Lalitpur, came out from the crops of 'jowar' in aforesaid field of Baldu Lodhi. They caught hold the informant's brother Ramphal and tossed him on the earth. They inflicted blows of axe (Kulhari) and sickle (Hasiya) on him. Informant's brother Ramphal began to scream and the informant was also raising alarm for help, upon which Pooran, Pragi, Jagan, Sunnu, all residents of Village Agodi rushed to the spot, but after killing Ramphal, all the five assailants fled from the spot snatching the licensed gun, cartridges and the wrist watch from the hands of the deceased. When the witnesses began to gather near the spot of the incident, Kishora Nai made a fire from the licensed gun of the informant. The dead body of Ramphal (deceased), the informant's brother was lying in the agricultural field of Baldu Lodhi and some of the villagers stayed near the dead body.

This written information dated 22.11.1979 was given by the informant in the police station Saujana at about 8:00 a.m. The first information report was lodged accordingly, on the basis of written information under Section 396 I.P.C. The distance of the spot of the incident from the Police Station Saujana is shown as about 13 k.m. in the F.I.R. towards south west from the police station.

After registering the F.I.R., police reached at the spot of the incident and started the proceeding of inquest, prepared site map on the orientation of witnesses, collected the blood stained soil and plain earth soil from the spot of the incident, prepared memo thereof and sent the body for post-mortem. After getting the post mortem report, charge sheet was submitted before the court.

4. All the five accused in above two sessions trial were charged with the offence under Section 147 I.P.C. for having formed an unlawful assembly alongwith another associate namely Karan Singh on 21.11.1979 at about 5:00 p.m. near the agricultural field of one Baldu Lodhi having crops of 'jowar', situated in village Agodi, Police Station- Saujna, District Lalitpur, with a common object whereof to commit the murder of Ramphal (brother of the first informant Kashiram) and in furtherance of their common object of that unlawful assembly, the accused persons allegedly had committed the offence of rioting. They were further charged under Section 302/149 I.P.C. as they committed the murder of Ramphal intentionally causing his death on the relevant date and time of the incident on the spot of the incident in furtherance of the common object of their unlawful assembly. The accused persons were also charged under Section 307/149 I.P.C. for having attempted to commit the murder of Kashiram by firing at him in pursuance of their common object on the relevant date and time on the spot of incident. They were also charged under Section 396 I.P.C. for

having committed dacoity as they allegedly snatched the licensed gun alongwith 25 cartridges and automatic wrist watch and in the course of commission of the dacoity, murder of "Ramphal' was committed by one or some of them. Further, three accused Aman Singh, Hallu and Kishora were charged under Section 148 I.P.C. also for being armed with deadly weapons namely axes and sickle at the time of committing the offence of rioting.

5. Kishora, the accused in Sessions Trial No.23 of 1980 was charged under Section 379 I.P.C. for having committed theft of the gun bearing no. 1516 alongwith 25 cartridges and automatic wrist watch by taking it out from the hands of the deceased Ramphal on the relevant date and time at the spot of incident.

6. The prosecution proposed the following witnesses for oral examination and documents to prove the case before the trial court and documents given herein below in a table for the purpose of easy reference:-

P.W.1, Kashiram (brother of the deceased)	Proved the written report Ex.Ka.1 Ex. Ka.2 Receipt Misil Ex.(i) Vest Ex.(ii) undergarment Ex.(iii) Shirt Ex.(iv) Pen Ex.(v) Kanthi Ex.(vi) Tabeez Ex.(vii) Ring
P.W.2, Jainarayan Dubey, Constable, Police Station Kotwali, District Lalitpur.	Carried the sealed dead body of the deceased for post mortem.
P.W.3, Sunnu	Proved the statement under Section 164 Cr.P.C. of Sunnu as Ex. Ka-11
P.W.4, Dr. Suresh Sakalya	Proved the post-mortem report as Ex.Ka-3
P.W.5, Lal Singh	Proved G.D. report as Ex.Ka.7
P.W.6, Ghanshsyam Das	Proved the deposit of sealed samples of Maalkhana.
P.W.7, Devi Charan Shukla	Proved the sealed samples for examination in hospital.
P.W.8, Jagan	Proved Ex. Ka-8 recovery of blood stained soil and plain earth soil. Ex. Ka-9 recovery of shoes of the deceased from the spot of the incident. Ex. Ka-10 recovery of kanthi and Mala
P.W.9, Pooran	Proved the statement under Section 164 Cr.P.C. of Pooran as Ex.Ka-12
P.W.10, Pragi	Proved the statement under Section 164 Cr.P.C. of Pragi as Ex. Ka-13
P.W.11, Surjan Singh	Proved inquest report as Ex.Ka-14 Ex.Ka-23 statement of Pooran Ex.Ka-25 Statement of Pragi Ex.Ka-28 and 29 Charge sheets against Hallu and Bhaiyan
P.W.12.,	

Peetam Lal	
P.W.13, Bichitra Kumar Gupta, Railawy Magistrate	Proved statement of Kashiram under Section 164 Cr.P.C. as Ex.Ka-30 Ex.Ka-31 statement of Pragi Ex.Ka-11 statement of Sunnu Ex.Ka-32 statement of Jagan

7. Appellant no.1, Aman Singh is still absconding whereas the appellant no.2, Kishora, appellant no.3, Hallu and appellant no.4, Bhaiyan are in jail.

8. Learned counsel Sri Satyendra Kumar Mishra holding brief of Sri A.N. Misra Advocate appeared on behalf of the appellants. Sri Sanjay Kumar Dubey learned Advocate for the appellant no. 2 Kishora also appeared before the court. Sri Patanjali Mishra learned A.G.A. for the State respondents argued the prosecution case.

Arguments of the learned counsels-

9. Learned counsel for the appellants contended that the incident as stated by the prosecution witnesses is not as such and the deceased was killed somewhere else by some anonymous enemies earlier to the alleged date of incident i.e. 21.11.1979. He further submitted that even the presence of P.W.1 (first informant, Kashiram) is doubtful because the first information report had been lodged with extraordinary delay without any plausible explanation. He contended that as alleged in the First Information Report, the incident of killing the deceased "Ramphal' occurred at 5:00 p.m. on 21.11.1979, the spot of incident was 13 k.m. away from the Police Station but the First Information Report was lodged at 8:00 a.m. on the next day i.e. 22.11.1979.

10. The next argument of the learned counsel for the appellant is with regard to impossibility of hiding of accused-appellants allegedly in the field of "jowar', the crops whereof were more or less two feet in height. He further drew the attention towards the statement of P.W.1 who stated that the accused appeared out from the field when the deceased reached near the "med' (boundary) of that field of "jowar', and submits that the informant could see them pouncing on the deceased. According to the learned counsel for the appellant, hiding of the accused between the crops of approximately 2 feet in height was quite impossible.

11. Learned counsel for the appellant further contended that evidence on record reveals that the deceased "Ramphal' was member of a gang of dacoits and he might have been killed in a bit to commit dacoity at some other place or by some other rival gangs or by the villagers. For the reason of enmity, the first informant has taken undue advantage to make false implication against the accused-appellants. It is further argued that when the deceased was having gun with 25 cartridges, no one could muster courage to attack him in the manner as alleged in the F.I.R.

12. The motive is stated by the informant himself in the written information and the First Information report establishes the enmity between the parties to the incident. Learned counsel for the appellant emphasises that the conviction is only based on suspicion, raised by the informant against the accused-appellants that the accused were suspecting the hands of the deceased in the

killing of their family members in an earlier incident. It is argued that the suspicion, however, strong it may be can not take place of the facts established on the evidence.

13. Learned counsel for the appellants lastly argued that the prosecution evidence itself raised doubt as to the killing of deceased on some earlier date from the alleged date of incident 21.11.1979, somewhere else and, thereafter, the dead body was planted on the alleged spot of the incident. The medical evidence (post-mortem report) also corroborates the oldness of the dead body of the deceased alleged to have been killed on 21.11.1979 at about 5:00 p.m. Learned counsel submitted that since the prosecution remained unsuccessful in proving its case beyond all reasonable doubts, therefore, the conviction recorded by the trial judge and the sentence awarded can not be sustained in the eye of law.

14. Learned counsel for the appellant-Kishora, Sri Sanjay Kumar Dubey added that the eye witnesses were planted in the case falsely and for this reason which they had turned hostile and did not support the case of the prosecution. As such, the evidence on record was not sufficient and material for recording the conviction of the present accused-appellants.

15. In rebuttal, it is argued by the learned A.G.A. that the contention of learned counsel for the appellants as to the doubt about the presence of P.W.1 (first informant) is not correct because his presence is admitted by all other prosecution witnesses consistently and without any contradiction. The prosecution case which finds support from the oral evidences of P.W.1 which is un-shaken. Further, he argued that the arguments of the learned counsel with regard to the false implication and concocting a case by the prosecution, is baseless. P.W.1 in his statement has explained satisfactorily about the delay in lodging the F.I.R. He further argued that the entire prosecution case is well supported with the direct evidences of eye witnesses and also the motive setforth in the written information and the prompt F.I.R. is well established.

16. Learned A.G.A. lastly drew the attention towards the statements of the prosecution witnesses who turned hostile and contended that they were not under any coercion, fear or terror while their statements under Section 164 Cr.P.C. was recorded, as such, the statements of such witnesses in the course of their examination in the Court shall not be treated as wholly unworthy. The statement of such witnesses to the extent of lagging support to the prosecution shall be read being reliable as corroboratory evidence. He further submits that the principle of "falsus in uno falsus in omnibus" does not apply in India. He referred on the case laws ***(2013) 82 ACC (SC) 401 Prabhash Kumar Vs. State of Haryana, (2011) 72 ACC (SC) 988 Iyappa & Ors. Vs. State of Tamil Nadu and 2006 3 SCC 374 Zahira Habibullah Sheikh & Anr. Vs. state of Gujarat.***

On the basis of above arguments, learned A.G.A. submitted the impugned judgment of conviction and order of sentence is good in law and deserves to be confirmed, no interference is required in the impugned judgment under appeal, as such the appeal is liable to be dismissed.

Discussion

Motive-

17. In ***Sheo Shankar Singh Vs. State of Jharkhand and Anr.1*** the principles for the proof and relevance of motive in establishing the guilt of the accused and its varying importance in cases based on circumstantial evidence and in those of which are based on the testimony of eye witnesses, has been discussed. Para 15 of the said judgment is being quoted hereunder:-

"15. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of this Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye-witnesses."

18. The suspicion of the accused persons over Ramphal (deceased) of having murdered their family members is, however, proved by the witness P.W.1. In his cross-examination by the defence he stated that a criminal case with regard to the incident of killing of the family members of the accused-appellants was instituted against his brother "Ramphal' (deceased) and father. Police was searching his brother (Ramphal) but he could not be traced by them. Ramphal ultimately surrendered alongwith other "baghis' (dacoits) in District-Chatarpur. He also stated that he does not know about the gang of dacoits to which the deceased "Ramphal' belonged, however, in the murder case he was acquitted by the court concerned.

Witness P.W.8, Jagan has also stated in the cross-examination that the parents of the accused appellants Aman Singh and Karan Singh were murdered and father of the accused-appellants Hallu and Kishora was also murdered. He further stated that deceased "Ramphal' was prosecuted for the above three murders, wherein he was acquitted.

P.W.9, Pooran has also stated in the cross-examination about the murder of parents of accused Karan Singh, Aman Singh and father of Kishora and Hallu in the village. He admitted that the accused persons had a strong suspicion over the deceased "Ramphal' of having committed their murder. This witness then stated that he heard that the Ramphal (deceased) had joined the gang of dacoit of "Moni Ram Sahai' and the people from the village were

witnesses in the murder case against deceased Ramphal.

P.W.10, Pragi stated that when the murder of the parents of the accused-appellants had occurred, they were very young. He himself also young age. As such, all the witnesses Kashiram (P.W.1) Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9), Pragi (P.W.10), even those who did not support the case of the prosecution in toto had supported the fact constituting the motive behind the killing of Ramphal. The motive as setforth in the written information and the first information report is, thus, proved and is a relevant fact under Section 8 of the Indian Evidence Act, 1872.

Relevant date and time of the incident

19. Though it is argued by the learned counsel for the appellant that the evidence on record shows that the deceased might have been killed somewhere else prior to the alleged date of the incident 21.11.1979 and the dead body was planted maliciously by the first informant by reason of enmity with the accused-appellants. We have gone through the evidences of P.W.1 and as discussed above, it may be recorded that there was no enmity between the first informant Kashiram (P.W.1) and the accused appellants. Kashiram (P.W.1), the first informant himself stated that being the villagers of the same village, the accused appellants and he were on normal terms of visiting each other houses and talking to each other. None of the witnesses of the prosecution stated about the "enmity', if any, of Kashiram with the accused-appellants nor any suggestion of enmity had been given to the first informant. So far as enmity of the accused appellants with deceased Ramphal is concerned, it is established by the evidence of the prosecution witnesses that the same was because of the deceased being the accused in the murder case of parents of the accused, who had been acquitted. The arguments of the learned counsel for the appellants of planting of the dead body on the spot of the incident by the informant (P.W.1) is not acceptable. Particularly when the spot of the incident is proved satisfactorily by all the witnesses of fact as well as the formal witnesses.

20. The doctor P.W.4, Dr. Suresh Sakalya had also not been confronted to impeach him about his assessment that the deceased might have died on 21.11.1979 at about 5:00 p.m. in the evening. No questions were put to him by the defence about the condition of the dead body on the date of the post-mortem examination so as to relate the same to the oldness of the dead body and to reach at the proximate time of death prior to the established date and time of the incident, i.e. on 21.11.1979 at about 5:00 p.m., It is needless to discuss on this point.

21. The written information itself reveals that the accused persons are related to each other. The accused Karan Singh and Aman Singh are real brothers, sons of "Majboot Singh Thakur', accused Kishora and Hallu are real brothers, sons of "Kamatua Nai', all residents of Village Agodi where the incident had occurred and the first informant P.W.1 resides. The accused Bhaiyan is related to Kishora and Hallu being their brother-in-law (sister's husband) who is resident of Village Rangaon, Police Station Mandwara, District Lalitpur. P.W.1, in his examination-in-chief, stated that the father of accused Kishora and Hallu was murdered and parents of Karan Singh and Aman Singh were also murdered. They all

were suspecting "Ramphal' to be the perpetrator of the crime and, therefore, hatched enmity with the deceased "Ramphal'. Due to the suspicion, out of vengeance, the accused had killed the deceased Ramphal. In cross examination, this witness stated at the very inception that he is residing in village Agodi and during his lifetime the parents of the accused persons were killed. He further stated that being local resident of the same village, he had conversations eventually with the accused persons also. Accused persons also used to visit the first informant, P.W.1 if need be in connection with some work. As such, P.W.1 established that the accused-appellants had no enmity with him (P.W.1).

About witnesses

22. Kashiram, P.W.1 is the brother of the deceased, Sannu P.W.3, is the eye witness, Jagan, Pooran, and Pragi are also the eye witnesses. P.W.-8, 9 and 10 produced by the prosecution had turned hostile. The witnesses were all residents of the same village Agodi where the spot of the incident situates and the informant of the incident used to reside. They were agriculturists having their fields in the near vicinity of the spot of the incident (the field of Baldu Lodhi).

23. Before going through the statement of the aforesaid witnesses of fact we would like to refer para-5 of the judgment of Apex Court in the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat2*** where Apex Court observed that:-

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

24. In view of the aforesaid circumstances and the witnesses' status, melieu and their normal prudence we think it proper to observe on the basis of evidences that the prosecution witnesses of fact are rustic villagers, not highly educated, even illiterate or simply literate.

25. In the context of the aforesaid observation, we further refer to the judgment of the Apex Court in Shivaji Sahab Rao Bobade Vs. State of Maharashtra3 which deals with an incident of murder in a rural area where the witnesses to the case were rustic and so it was observed that their behavioural pattern perceptive and un-perceptive habits have to be judged as such. The relevant para from the aforesaid judgment is reproduced hereunder:-

"8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

Evidence as to the status, character and profession of the deceased, Ramphal.

26. In the case before us there are five witnesses of fact. They are first informant Kashiram (P.W.1), Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9), pragi (P.W.10).

Alongwith P.W.1 (brother of the deceased), the rest of the witnesses namely Sunnu, Jagan, Pooran and Pragi were all examined as eye witnesses of the incident whose names have been given in the written information also. It is stated in the written report by the first informant that at the time of the incident, hearing the screams of the deceased and alarm raised by the first informant P.W.1, the other witnesses came running on the spot as they were working in the nearby agricultural fields. On being challenged by them, the accused Kishora made a fire towards them and they succeeded in fleeing away from the spot. P.W.1 being the brother of the deceased is a related witness. Learned counsel for the appellant has raised objection as to his credibility and reliability for the reason of his interestedness. Except P.W.1, rest of the witnesses turned hostile as they denied having seen the accused appellants committing the offence. The question, thus, would be as to the evidentiary value of the statement of the hostile witnesses, with regard to the facts deposed by them and the effect of the portion of their statement not supporting the prosecution case.

27. It is well settled that in a criminal trial, evidence of a hostile witnesses can form the basis of conviction. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence matters.

Reliance on the hostile witnesses

28. In the case before us, we have already noticed that the prosecution witnesses Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9), Pragi (P.W.10) were examined as the prosecution witnesses to prove the fact in issue as to whether the accused persons at the relevant date and time committed the killing of the deceased "Ramphal' on the spot of the incident, inflicting blows of lethal weapons like axe, sickle, etc.

29. The Apex Court in the case of Mrinal Das Vs. State of Tripura4 in para 67 has held as under:-

67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

30. In view of the aforesaid guidelines laid down by the Apex Court, the evidence of the prosecution witnesses (declared hostile) is required to be evaluated. In the present case, since the learned counsel have raised

objection as to the credibility and reliability of P.W.1, Kashiram (first informant) also and blamed him to concoct the case for false implication of the accused appellants, we would discuss the evidence of P.W.1 later, after evaluating the evidence of hostile witnesses and finding out which part of their testimony finds corroboration from other proved facts and circumstances and as such is admissible and reliable.

31. In ***Siddharth Vashisth @ Manu Sharma Vs. State of N.C.T., Delhi5*** it is held that if the prosecution witnesses turned hostile, the court may rely upon so much of his testimony which supports the case of prosecution and is corroborated by other evidences.

32. The Apex Court in a series of decision, (one of such is ***Babu @ Balasubramaniam & Arn. Vs. State of Tamil Nadu6)*** held that :- "The doctrine of "falsus in uno falsus in omnibus" not applicable in indian judicial system, the court has to separate grain from chaff and apprise in each case as to what extent the evidence is acceptable. If separation cannot be done, the evidence has to be rejected. The witnesses may be speaking untruth in some respect and it has to be apprised in each case as to what extent the evidence is worthy of acceptance. Merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."

33. In ***Ashok Kumar Chaudhary Vs. State of Bihar7 and Sucha Singh Vs. State of Punjab8***, it was held that, if the testimony of a witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal and natural contradictions have appeared in his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are normal and not material in nature, then the testimony of an eye witness has to be accepted and acted upon. The distinction between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

34. In view of the above legal position, we first of all would like to remind that the spot of the incident is alleged to be the field of "jowar' in village Agodi, belonging to Baldu Lodhi on the boundary (med) of which the deceased Ramphal was about to reach when the accused appellants alleged to have pounced on him coming out from their hiding in the crops of "jowar'. The time of the incident was about 5:00 p.m. in the evening of 21.11.1979. The field of witnesses Sunnu (P.W.3), Jagan, Pooran and Pragi were situated near the spot of the incident. Hearing the noise of screaming of the deceased and alarm raised by the first informant, the witnesses reached there. A fire from the gun was also made after killing the deceased by the accused Kishora towards the witnesses so as to ward off them.

35. In the context of the aforesaid fact stated in the written information, we would go through the statements of witnesses one by one.

36. **P.W.3, Sunnu** S/o Sultan resident of village Agodi who by profession is an agriculturist when appeared before the

court on 16.7.1982 approximately after three years from the incident, stated that the incident occurred about 2 year 8 months ago by the time of the sunset. He went to the field for cutting grass and after that when coming back to his house he and Pooran (P.W.9) heard the alarm raised by Kashiram. In response thereto, he (P.W.3), Pooran (P.W.9), Pragi (P.W.10), and Jagan (P.W.8) reached near the first informant (P.W.1). They heard the sound of the gunshot but did not see anything. At this stage, this witness was declared hostile. He, thus, admitted that the witnesses Sunnu, Pragi and Jagan were present in their fields near the spot of the incident. He also admitted the presence of P.W.1 Kashiram whose alarm he heard and in response thereto alongwith others reached the spot of the incident. During the cross examination by the prosecutor, this witness further admitted that the fire from the gun was made in the field of Baldu Lodhi and hearing the sound of fire, he immediately fled away from the spot. P.W.3 also admitted that the height of 'jowar' crops was about two feet reaching above the head. His agricultural field was situated towards the north near the spot of the incident. Other witnesses met him at a distance of 25 to 30 paces away from the spot of the incident when the fire was made. In the cross examination, this witness further stated that Kashiram, (P.W.1-the first informant) and Ramphal (deceased) were co-sharers in the field of "jowar'. Ramphal usually visited the field and Kashiram used to stay there in the night on his own. He further stated that he heard about the incident of killing of Ramphal in the same evening. This witness, as such, in very clear and unambiguous words has established, "the spot of the incident' and "relevant date and time of the incident'. In his cross examination, he supported the contents of the written report given by Kashiram to the police to the above extent.

37. P.W.-3, Sunnu further admitted that Ramphal and Kashiram being co-sharers of their agricultural field consisting of 'jowar' crops usually in the habit of going to the field daily to take care of the corps. The probability of presence of the deceased, Ramphal with the first informant, P.W.1 (Kashiram) on the spot of the incident on the relevant date and time is also corroborated by the fact that the incident had occurred at the time of the sunset, as stated in the F.I.R.

38. So far as the statement of P.W.-3 to the police about the role of the accused appellants in committing murder of the deceased Ramphal by inflicting blows of axe, sickle in their hands, this witness retracted from his statement and turned hostile before the trial judge in the examination-in-chief. He was read over the relevant portion of his statement reduced into writing under Section 161 Cr.P.C. by the Investigating Officer with regard to the involvement of the accused appellants in commission of the offence, he denied giving any such statement to the Investigating Officer. But similar statement as to the involvement of the accused appellants in the commission of the offence of killing the deceased Ramphal and their mode and manner, the weapons used by them was recorded by the Magistrate under Section 164 Cr.P.C., When it was read over to him, he admitted that the said statement had been given by him before the Magistrate and admitted his thumb impression thereupon.

The prosecution has examined the Magistrate, Sri Bichitra Kumar Gupta

(P.W.13) who stated that the statement of witnesses Kashiram and Pooran was recorded by him under Section 164 Cr.P.C. on 15.12.1979. Whatever the witness stated was recorded and reduced into writing which was read over and then he put his thumb impression. The statement under Section 164 Cr.P.C. was proved by the Magistrate whereupon Ex. Ka-12 and Ex.Ka-30 was marked. P.W.-13 further stated that on 17.12.1979 and 15.12.1979, he took the statement of witnesses Pragi, Sunnu and Jagan under Section 164 Cr.P.C. which bear thumb impressions, it was proved as Ex.Ka-31 and Ex.Ka-11. As such the prosecution has successfully established that the witnesses turned hostile retracting their statement made before the investigating officer, purposely and falsely. Their statement as to the involvement of the accused persons, the mode and manner adopted in the killing of the deceased Ramphal and the weapons used by the accused, all supported the case of the prosecution.

39. P.W.8, Jagan has also admitted before the trial judge on 7.4.1982 that the incident occurred approximately three years ago at the time of sunset, however, he did not see the incident of killing OF the deceased Ramphal. He further admitted that the investigating officer came on the spot on the next day, he conducted the inquest, prepared the report whereupon the inquest witnesses put their thumb impressions. He further admitted the collection of blood stained and plain earth soil from the spot of the incident and that he put his thumb impression thereon as witness. The collection of other articles like shoes of the deceased near the dead body, pen and the articles on the person of the dead body, preparation of their memo was proved by P.W.-8. He assertatively stated that the deceased was murdered on the relevant date and time but he himself did not see the incident, as such, this witness in unambiguous words admitted the killing of the deceased "Ramphal' at the spot of the incident given in the written information, on the relevant date and time, i.e. 21.11.1979 at about 5:00 p.m. Like P.W.3, this witness also refused his statement recorded by the Investigating Officer under Section 161 Cr.P.C. with regard to the involvement of the accused appellants in killing of the deceased Ramphal from the weapons assigned to them and the mode and manner adopted by them in killing but when confronted about his statement under Section 164 Cr.P.C., he also admitted that the same was given by him to the Magistrate and it bears his thumb impression. However, this witness in cross examination, has stated that he knew about the dead body of the deceased Ramphal lying on the spot of the incident in the morning. This witness was though examined by the defence but no question was put to him as to the statement of P.W.3 that on the date of the incident on 21.11.1979 at the relevant time about 5:00 p.m. he met with the other witnesses including P.W.8, when the sound of fire was heard by them from the field of Baldu Lodhi (spot of incident). As such, the statement of P.W.3 stood proved as to the presence of P.W.8 on the spot of the incident at the relevant date and time and his conduct in retracting from the statement given to the Investigating Officer, and promptly, thereafter, to the Magistrate under Section 164 Cr.P.C. as to the involvement of the accused appellants, in the commission of the offence of killing the deceased Ramphal, the weapons used by them and the mode and manner adopted in killing of the deceased is suggestive of him being a liar, his testimony, therefore,

cannot be relied in favour of the accused appellants.

40. **P.W.9 Pooran** by profession was an agriculturist, resident of village Agodi, stated before the court when produced as prosecution witnesses on 4.8.1982 has denied seeing the accused appellants committing the murder of the deceased "Ramphal' and also taking away the licensed gun and cartridges and wrist watch from the hands of the deceased. In cross examination, he admitted that the investigating officer had interrogated him but denied from giving any such statement of seeing the accused persons committing the offence. P.W.-9, however, admitted that Ramphal was killed in the field of Baldu Lodhi adjacent to the field of the informant Kashiram. But when asked about his statement recorded by the Magistrate under Section164 Cr.P.C., he admitted that the same was given by him. This witness was also not confronted by the defence, in the cross examination, about his presence alongwith other witnesses on the spot of incident, particularly the statement of P.W.-3 in that regard. The presence of this witness alonwith P.W.3 on the spot, on 21.11.1979 at the relevant time of the commission of offence is proved. His conduct in retracting from his statement under Section 161 Cr.P.C. but admitting the statement and that recorded by the Magistrate under Section 164 Cr.P.C. will be treated as an afterthought and, therefore, a false statement made in the court. This witness has further proved the motive set up by the prosecution that the parents of accused Karan and Aman Singh (real brothers) as well as father of Kishora and Hallu (real brothers) were murdered in the village and the deceased Ramphal was a suspect for committing the said murders and a criminal case lodged against him wherein he was acquitted.

41. **P.W.10, Pragi** like P.W.9 has denied watching the incident. In cross examination though he denied his previous statement that under Section 161 Cr.P.C. to the above extent but admitted under Section 164 Cr.P.C. recorded by the Magistrate. This witness also in a very unambiguous and clear words admitted the spot of the incident being near the agricultural field of Baldu Lodhi adjacent to the agricultural field of Kashiram as stated in the first information report. He has further admitted that when the incident occurred in the evening, he was harvesting the crop of 'jowar' in his field and when he heard the gunshot from the field of Baldu Lodhi, he ran towards the spot but stated that he did not see the accused appellants therein. He further stated that the dead body of Ramphal was lying there, Kashiram was standing near the dead body with other witnesses Sunnu, Pooran and Jagan. In the same breath when this hostile witnesses was cross examined by the defence he stated that Kashiram came later on the spot from his field which was about 2 k.m. far away from the spot of the incident. This statement as to the arrival of Kashiram on the spot of the incident later, in the same course of examination, in view of his statement of the presence of Kashiram alongwith other witnesses near the dead body of the deceased Ramphal before his arrival on the spot of the incident, is self contradictory. Since the earlier part of the cross examination with regard to the presence of witnesses near the dead body of deceased Ramphal on the spot of the incident is consistent with the statement of other witnesses namely Sunnu, Jagan and Pooran, therefore, the

contradictory statement is not being taken into consideration.

42. The witnesses, discussed above, though turned hostile but they all had proved the spot of the incident where deceased Ramphal was killed on the relevant date and time of the incident, i.e. 21.11.1979 at about 5:00 p.m. as also the presence of witnesses namely P.W.1 (Kashiram), P.W.3 (Sunnu), P.W.8 (Jagan), P.W.9 (Pooran) and P.W. 10 (Pragi) at the spot. As such, the statement of these witnesses was correctly taken into account by the trial court and read in favour of the prosecution. We are of the considered opinion that their evidence to the above extent is admissible and to be read accordingly.

43. The Investigating Officer, Sub Inspector Surjan Singh (P.W.11), posted in the Police Station Saujana on the relevant date and time of the incident as S.H.O. when confronted with the statement of the aforesaid hostile witness about denial from their previous statement under Section 161 Cr.P.C., assertingly stated that the statements of witnesses Jagan, Pragi, Sunnu, Pooran etc. were recorded by him in his own hand writing and bear his signature. The original was placed before the court and proved by him whereupon Ex.Ka-23 and Ex.Ka-24, Ex.Ka-25 and Ex.Ka-26 were endorsed. This witness has further stated that since the accused persons were absconding, therefore, the witness were hesitant in giving their statement. They were, therefore, produced before the Magistrate also for recording their statement under Section 164 Cr.P.C. He further stated that even on the date of recording of his statement in the court, one of the accused Karan Singh was still absconding and he was known to be an active member of the dacoit "Gabbar Singh' gang. In the cross examination, he negated the suggestion given by the learned counsel for the defence that the statements of aforesaid witnesses were recorded in the Court of Magistrate under Section 164 Cr.P.C. under threat. The prosecution has also produced the Magistrate Bichitra Kumar Gupta in the witness box. The learned Magistrate P.W.13 proved that he recorded the statement of P.W.1, Kashiram and Pooran (P.W.9) on 15.12.1979 and it was the same as stated before him. The original copy of the statements under Section 164 Cr.P.C. was proved by him before the trial court, identification of the hand writing and signature and thumb impression of Pooran whereof Ex.Ka.12 is endorsed. Likewise he proved the statement of Kashiram dated 15.12.1979 whereupon he identified the signature made by witness Kashiram and the said document is proved as Ex.Ka.13 is endorsed thereupon. Further on 17.12.1979 and 15.12.1979, the statements of Pragi, Sunnu and Jagan were also recorded under Section 164 Cr.P.C. by him and he identified his hand writing upon the statement and thumb impression of the witnesses thereupon. The statement of Pragi is marked as Ex.Ka.31, Sunnu as Ex. Ka-11 and Jagan as Ex.Ka. 31. P.W.13, the Magistrate stated that the statement of all the witnesses were voluntarily made to him and he recorded them on their free will without any pressure. This witness in cross examination, denied the suggestion as to the recording of the statements of the witnesses under pressure. As such, the portion of the statement of Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9) and Pragi (P.W.10) wherein they had retracted from their earlier statements made to the Investigating officer, just after incident in the course, is found to be absolutely false and cannot be read against the prosecution.

Witness P.W. 1

44. Since the presence of P.W.1, Kashiram is admitted by other witness of fact though they turned hostile and his presence is also found to be quite natural and probable in his agricultural field for the standing crop of "jowar', his evidence now has to be evaluated keeping in mind that this witness was present on the spot of the incident and had seen the entire incident as stated in the written report filed by him.

Objection as to P.W.-1 being Relative witness

45. Merely, being relative of the deceased he can not be said to be interested for any otherwise reason to get the accused persons falsely implicated.

46. In ***Vijendra Singh Vs. State of Uttar Pradesh with Mahendra Singh Vs. State of Uttar Pradesh9***, the Apex Court has held in para 31 as under:-

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

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

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

47. In ***Sucha Singh and Another Vs. State of Punjab10,*** it is held that relationship is not a factor to effect the credibility of a witness. It is more often than not that a relation would not conceal the 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. Para 13 of the said judgment is quoted under:-

13. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the 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.

48. In the context of evidences on record, we are of considered opinion that the argument of the learned counsel for the appellant about the witness (P.W.-1) being a close relative is a partisan witness and his evidence should not be relied upon, has no substance. This impression in the mind of any person that relatives are not independent is not correct. In para "14' of th***e Sucha Singh and Another Vs. State of Punjab (Supra)***, the Apex Court has considered it as under:-

"14. In Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1953 Cri LJ 1465] it has been laid down as under : (AIR p. 366, para 26)

"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 relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

49. In this regard, para "22' from the judgment of the Apex Court in the case of ***Shyam Babu Vs. State of U.P.11***, is reproduced hereunder:-

"This Court has repeatedly held that the version of an eye-witness cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc. These principles have been reiterated in Mano Dutt and Another vs. State of Uttar Pradesh, (2012) 4 SCC 79 and Dayal Singh and Others vs. State of Uttaranchal, 2012 (7) Scale 165."

Enmity

50. We have gone through the statement of P.W.-1 "Kashiram' and do not find any prior enmity of Kashiram himself with any of the accused persons. Even Kashiram stated that the accused persons were on the normal terms of visiting and conversing with him, if needed in

connection with any work, as they were residing since a long time in the same village.

51. Learned counsel for the defence could not carve out any fact of complaint of any enmity of Kashiram with any of the accused persons prior to the date of the incident or any civil or criminal litigation pending between them. No question was put to the witness (P.W.-1) "Kashiram' so as to elicit his interestedness in falsely implicating the accused persons for putting them behind the bars.

Spot of the incident.

52. As, already discussed above, from the evidence of prosecution witnesses Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9) and Pragi (P.W.10) that they admitted the place of incident being near the agricultural field of Baldu Lodhi and that their own fields were situated nearby. They have consistently and without any contradiction proved that the dead body was lying on the spot of the incident when they reached there hearing the gunshot. The blood stained soil and plain earth soil were collected by the Investigating Officer from the spot and was proved in the court. The prosecution witnesses had also admitted the collection of aforesaid samples from the spot of the incident by the Investigating Officer. The inquest proceeding was done and proved by the witnesses which also establishes the spot of the incident being the same place. The Investigating Officer (P.W.11, Sub Inspector, Surjan Singh) in his examination-in-chief before the trial court proved that the dead body of the deceased "Ramphal' was lying on the spot of incident, where he made the inquest proceeding. He also proved preparation of the site plan on the orientation of witnesses Kashiram (P.W.1) and Jagan (P.W.8). The site plan Ex. Ka.20, shows the place whereof the dead body of the deceased was lying as "D'. There is a remark that "at its south nearby the vicinity, the crops of "jowar' was found broken and the dead body of the deceased was lying". It also shows that the blood stained soil and plain earth soil was collected from the same place. The agricultural field of informant Kashiram has been shown by letter "C' at about ten paces away from the boundary of the field of Baldu Lodhi where the incident occurred. In the nearby vicinity, the witnesses Jagan and Pooran are shown near the place "C". As such, the spot of the incident as stated by the first informant, Kashiram in the written report submitted to the police was proved to be the boundary (med) of the 'jowar' field of Baldu Lodhi.

Written information and delayed F.I.R.

53. The witness P.W.1 (first informant, Kashiram) submitted the information in writing to the police on 22.11.1979 stating the date of incident 21.11.1979, and time at about 5:00 p.m. and also his presence in connection with the agricultural work of removing grass from his field of 'jowar' situated near the spot of the incident in village Agodi. He further stated the presence of deceased "Ramphal' with him at the time of the incident, who was carrying the bundle of grass also carrying licnesed gun of the informant and that he was leading to the way to their home. The name of the accused-appellants are, respectively Aman Singh, Kishora and Hallu, all the residents of village Agodi and accused Bhaiyan, the brother-in-law of the Kishora and Hallu resident of village Rangao Police Station Mandwara, District Lalitpur. P.W.-1 has also stated that the aforesaid accused

persons were hidden in the field of Baldu Lodhi in the crops of 'jowar', which were about two feet in height and they suddenly came out on the spot of the incident and pounced with their respective arms like axe and sickle. The deceased was caught hold by them and the accused persons injured him seriously by inflicting the blows of their lethal weapons and done him to death on the spot. In the course of the incident, the accused Kishora snatched the licensed gun of Kashiram from the hands of deceased "Ramphal' and made a fire on the witnesses who came towards the spot of the incident on hearing the scream of the deceased and alarm raised by the first informant Kashiram (P.W.1) so as to ward off them. The motive is also stated by the first informant that the accused persons were suspecting that the deceased "Ramphal' had killed their parents much earlier to the present incident.

54. The incident as stated in the written information occurred on 21.11.1979 at about 5:00 p.m. before the sunset, but the first information report was lodged on 22.11.1979 at about 8:00 A.M., on the next morning of the incident. The distance of the spot of the incident from the police station is shown in the F.I.R. 13 K.M.

Learned counsel for accused-appellants vehemently argued that the first information report was lodged with an unreasonable delay which is sufficient to case a doubt as to the genuineness of F.I.R. To deal with this objection, we have gone through the evidence of P.W.-1 (the first informant) and the Investigating Officer (P.W.-11). The first informant (P.W.-1) stated the time of the incident about 4:45 P.M. in the evening before sunset on 21.11.1979. He further stated in the examination in chief that on the very evening of the day of incident he did not go to the police station for lodging the F.I.R. due to the falling of the night and fear of the accused persons. He went to the police station in the morning on the next day i.e. 22.11.1979 for lodging the report, He further stated that the written report of the incident was given in the Police Station who reduced the same into writing and gave him a copy after getting his signature. The written report given by him in the police station was proved as Ex. Ka-1.

55. In the cross examination, this witness stated about the proximate period of the violent fracas committed by the accused persons from 15-20 minutes to half an hour and that after the incident he stayed along with the native villagers near the dead body of his brother throughout the night. He further stated that he left the spot of the incident to go to the police staiton when dawn fell and came back with the Investigating Officer to the village at about 11 a.m. He clarified that for the whole day just from the dawn upto the sunset, the dead body was lying on the spot. He further stated that the inquest proceeding was started at about 11:00 a.m. on the date of the information of the incident.

56. P.W.11, the Investigating Officer Surjan Singh, Sub Inspector stated that on 22.11.1979 he was present in the police station when P.W.1, Kashiram came to him. No question was put to this witness with regard to the information of the incident, if any, received by him on the same evening nor any wilful delay on his part. Even question was not put nor suggestion given to him as to his interestedness or consultation prior to the lodging of F.I.R. on the basis of the written report submitted by P.W.1 to alter the contents of the same. In cross examination,

in answer to the question put by the defence, this witness (P.W.-11) assertingly stated that the first informant came to him at about 8:00 a.m. in the morning of 22.11.1979 to lodge the report. The report was lodged in his presence in the Police Station and he proceeded for the spot of the incident.

57. So far as the delay of more than 12 hours in lodging the F.I.R. is concerned, it is reasonably explained by the P.W.-1, Kashiram that he did not go in the night to lodge the report because of the fear of the accused persons. The evidence of his fear is apparent and can be gathered from the record, the facts as follows; It is reasonably explained by the P.W.1, Kashiram in his examination before the court that he did not travel in the night from his village to the police station by reason of fear of the accused persons. The evidence of his fear is apparent and gathered from the evidences on record as follows;

i) the spot of the incident in the village Agodi was within the territorial limit of District Lalitpur which was declared and notified as a dacoit affected area by the Government,

(ii) carrying a licensed gun even during the agricultural work in the evening in itself is an indication of fear of life to the brothers namely Kashiram and Ramphal (deceased),

(iii) in cross examination of the witnesses, it has come that the deceased "Ramphal' was arraigned with the charge of murders of parents of the accused persons. A criminal case was also lodged.

(iv) the deceased "Ramphal' alongwith some other "baghis' (dacoits) surrendered in District Chhatarpur. He was known to be an active member of the gang of the dacoits, identified as "Moniram Sahai Gang',

(v) One of the accused "Karan Singh' was himself suspected to be an active member of dacoits gang identified as "Gabbar Singh's Gang',

(vi) The way to the police station from the spot of the incident shown to be about 13 k.m. which was in the outskirts of the area not urbanized and populated, it was not easy to travel in the night,

(vii) the mode and manner adopted by the accused persons was not only violent but also brutal and gruesome,

(viii) The assailants after killing the deceased "Ramphal' fled away from the spot of the incident and were roaming free.

58. In view of the above, the fear of the first informant (P.W.-1) was quite natural and probable and no adverse inference can be drawn of his act of not moving instantly after the incident to the police station by travelling 13 k.m. on rough and unpopulated way. This witness P.W.1, Kashiram was also not confronted about availability of the means of transport, the nature and condition of the way causing obstruction, risks in the night, the presence of the villagers and company of the Chaukidar or anyone else to go to the police station in the night for lodging the F.I.R. The witness P.W.1 himself has stated that before sunrise, he left the village for going to the police station, he travelled about 13 k.m. on foot. The statement of P.W.11, Investigating Officer proves arrival of the P.W.1, Kashiram in the Police Station at about 8:00 a.m. As such, the

reason for not lodging the F.I.R. instantly after the incident in the evening and reaching the police station on the next morning stood explained and is believable. The arguments of learned counsel for the accused appellants as to the ingenuineness of the written information and the F.I.R. have no logical footing and thus, liable to be rejected. The written information of the incident was given to the police station with reasonable promptness and there is no extraordinary delay so as to raise any doubt as to the genuineness of the F.I.R.

Mode and manner of the commission of offence

59. The fact of killing of the deceased "Ramphal' on 21.11.1979 at about 5:00 p.m. before sunset is proved by the witnesses Kashiram (P.W.1), Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9) and Pragi (P.W.10) consistently without any contradiction. The spot of the incident is also proved by the evidences of the witnesses consistent with testimony of P.W.-1 and the corroborative evidence of the inquest proceedings, the collection of the blood stained soil and plain earth soil, the recovery of the shoes of the deceased near the spot of the incident. It is noteworthy here that none of the witnesses amongst Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9) and Pragi (P.W.10) contradicted the statement of P.W.1 (the first informant) as to the involvement of the accused-appellants in the offence. The mode and manner adopted by the accused appellants, their involvement in the commission of offence and the weapons used by them though stated by the aforesaid witnesses Sunnu (P.W.3), Jagan (P.W.8), Pooran (P.W.9) and Pragi (P.W.10) to the Investigating Officer in the course of the investigation and, thereafter, before the Magistrate under Section 164 Cr.P.C. but they did not stand on their aforesaid pre-trial statements when produced before the trial court. As discussed at length the fear under which the aforesaid witnesses turned hostile, it is held they have retracted and not truthful. As such, the only witness (P.W.1) as eye witness of the incident remains before us as to the mode and manner of the commission of the offence.

60. It is well known principle of law that reliance can be based on the solitary statement of a witness if the court comes to the conclusion that his statement is true and correct version of the case of the prosecution.

61. Section 134 of the Indian Evidence Act, 1872 for ready reference is quoted hereunder:-

"134. Number of witnesses.--No particular number of witnesses shall in any case be required for the proof of any fact."

62. It is settled that the courts are concerned with the merit of the statement of a particular witness and they are not concerned with the number of witnesses examined by the prosecution. The time honored rule of appreciation of evidence is that it has to be weighed and not counted; the law of evidence does not require any particular number of witness to be examined to prove any fact. As a rule of caution, based on the testimony of a single witness, the court may classify the oral testimony of a single witness, into three categories namely (i) wholly reliable, (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable. In the third category of cases, the court has to be circumscribed and has to look for corroboration in material particulars by

reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness; ***Lallu Manjhi Vs. State of Jharkhand12.***

63. In **Veer Singh Vs. State of U.P.13** it is held that conviction can be based on the evidence of sole witness in a criminal trial as quality of evidence matters not the quantity.

64. Keeping in mind the above, we proceed with the P.W.1, Kashiram. It is stated by him that on 21.11.1979 at about 4:45 p.m. in the evening when there was enough day light, he alongwith his brother "Ramphal' was returning to home. Deceased "Ramphal' was carrying his licensed gun and 25 cartridges and he was about 20 paces behind him carrying the bundle of grass. Accused-appellants Kishora, Karan Singh, Hallu and Bhaiyan pouncing out from the fields of 'jowar' of Baldu Lodhi with the axe (Kulhari), sickle (hasiya). They embraced the deceased from behind, tossed him on the ground and began inflicting the blows of sickle and axe and, thus, the deceased died of the injuries.

Medical Evidence of the mode and manner adopted by the accused

65. The post-mortem report of the deceased is evidence of the aforesaid injuries which are noted as under:-

Ante mortem injuries:-

(i) Incised wound 14 c.mx4c.m. brain deep on left side face and forehead with under ear of temporal parital and frontal bone of skull and the brain meetter is came at left eye is displaced in socket.

(ii) Incised wound 7 cm. X 2 c.m. bone deep on left side of head with under left ear of parital bone.

(iii) Incised wound 10 cm x 2 cm bone deep on right side of the face from the root of nose to right angle of mouth.

(iv) Incised wound 12 cm x 5 cm vertebral column deep under byers of 3, 4 and 5.

(v) Multiple incised wound (five in number) ranging for 2 c.m. x 0.5 cm to 2 cm x 1 cm muscle deep in the area of 15 cm x 16 cm on the front of chest.

(vi) Incised wound 2 cm x 1 cm skin deep on the middle of abdon 8 cm above the umbila

(vii) Incised wound 3 cm x 2 cm muscle deep the left infernal region.

(viii) Incised wound of 3.5 cm x 2 cm muscle deep on lateral side of left thigh on upper 1/3.

(ix) Incised wound on 3 cm x 2 cm muscle deep 1.5 cm late to no.8.

(x) Incised wound of 6 cm x 2 cm middle deep on right anterol as per upper 1/9 of right thigh.

(xi) Incised wound 3 cm x 28 muscle on anten aipet right thigh 8 cm below of no.10.

66. P.W.4, Dr. Suresh Sakalya the doctor posted in Lalitpur District Hospital who conducted the autopsy of the body proved his report and that the deceased died of the Ante mortem injuries. He assessed the approximate time of death being 21.11.1979 at about 5:00 P.M. No question was put to him as to the timing of the death. Thus, the death was proved by the ante mortem injuries, the nature of the injuries

undoubtedly show that they were caused by some sharp edged and pointed weapons, most of the injuries were incised wounds except injury no.1 i.e. lacerated over the head bone deep. The depth of the injuries upto muscle deep or bone deep confirms the weapon assigned to the accused namely axe (Kulhari) and sickle (hasiya).

67. In this way, in the absence of any contradiction in the statement of the sole witness as to the mode and manner adopted by the accused appellants and the weapons used by them which stood proved with further corroboration from the post-mortem report and the evidence of the medical witness P.W.4, Dr. Suresh Sakalya, it has to be accepted. Nothing carved out from both the witnesses against this proved state of things in the cross examination. It is further reinforced by the circumstances coupled with the motive of the accused persons to commit the crime which is indicative of conclusions that the accused persons are the real offenders who had committed the alleged crime, however, such occurrence had taken place in broad day light and Kashiram (the first informant) had witnessed the entire occurrence from a short distance of about 15-20 paces. There is no possibility of committing any mistake by him, moreover, it will be indeed perverse against the ordinary course of human nature and conduct for Kashiram to permit the real assailants of deceased "Ramphal' to go unpunished and instead of implicating the accused persons just with a view to satisfy his own ego.

68. In the present case, the evidence as to the presence on the spot of incident at the relevant time and date of the incident proved to be probable and natural, free from contradictions, exaggeration or embellishment. Some minor contradictions or inconsistency are immaterial, irrelevant details which are not in the capacity in anyway corrode the credibility of witness cannot be labelled as omission or contradictions. This settled legal principle is reiterated in various decision of Hon'ble Apex Court. It is held by Hon'ble the Apex Court in ***Brahm Swaroop and Another Vs. State of Uttar Pradesh14*** as under :-

"It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." Difference in some minor details, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and shifting 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 basis version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses."

69. On the basis of above discussion and perusal of the impugned judgement in the appeal, we do not find any error in the judgment of conviction and order of

sentence passed by the trial court. No intereference is required. The appeal deserves to be dismissed.

70. Consequently, the appeal against the judgment of conviction and order of sentence in Session Trial No.15 of 1980 (State Vs. Aman Singh) and Session Trial No.23 of 1980 (State Vs. Kishora) under Section 302/149, 147 and 148 I.P.C. is hereby dismissed.

71. Appellants are in jail. Certify this judgment to the court below for further necessary action and compliance. The lower court record be sent back to the District Judgeship, Lalitpur immediately for further action.

(2022)06ILR A664
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 2959 of 1984

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

Counsel for the Appellant:
Sri N.K. Saxena, Sri A.N. Misra, Sri G.S. Hajela, Sri Zafar Abbas, Sri Satyendra Kumar Mishra

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Evidence Act, 1872- Section 8- Motive- The motive has set forth in the written information and thus first information report, is, thus, proved and is a relevant fact under Section 8 of the Indian Evidence Act, 1872.

Although in a case of direct evidence, it is not mandatory for the prosecution to prove the motive but where the prosecution succeeds in proving the motive, the same only fortifies the case further against the accused.

Indian Evidence Act, 1872- Section 5- The doctrine of "falsus in uno falsus in omnibus" is not applicable in Indian Judicial System, the court has to separate grain from chaff and apprise in each case as to what extent the evidence is acceptable. If separation cannot be done, the evidence has to be rejected. The witnesses may be speaking untruth in some respect and it has to be apprised in each case as to what extent the evidence is worthy of acceptance. Merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

Settled law that some falsehoods or contradictions in the testimony of a witness will not render his entire statement false and the court may rely upon the relevant parts of the testimony, but where the truthful and relevant parts are inextricable, then the evidence has to be rejected.

Indian Evidence Act, 1872 - Section 134- Merely being relative of the deceased he can not be said to be interested for any otherwise reason to get the accused persons falsely implicated-Reliance can be based on the solitary statement of a witness, if the court comes to the conclusion that his statement is the true and correct version of the case of the prosecution-In the absence of any contradiction in the statement of the sole witness as to the mode and manner adopted by the accused with the weapons used by them which stood proved with further corroboration from the post-mortem report and the evidence of the medical witness P.W.12, Dr. Suresh Sakalya it has to be accepted.

It is the quality and not the quantity of evidence which is important. Where the evidence of a solitary witness is truthful and credible, the same may be sufficient for securing the conviction and cannot be discarded only because the witness happens to be related to the deceased as a related witness cannot be said to be an interested witness. (Para 17, 39, 44, 47, 68, 70, 75)

Criminal Appeal rejected. (E-3)

Judgements/Case Law relied upon:-

1. Prabhash Kumar Vs St. of Har. (2013) 82 ACC (SC) 401

2. Iyappa & ors. Vs St. of T.N (2011) 72 ACC (SC) 988

3. Zahira Habibullah Sheikh & anr. Vs St. of Guj. (2006) 3 SCC 374

4. Sheo Shankar Singh Vs St. of Jhar. & anr. (2011) 3 SCC 654

5. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. (1983)3 SCC 217

6. Shivaji Sahab Rao Bobade Vs St. of Maha. (1973) 2 SCC 793 (801)

7. Mrinal Das Vs St. of Tripura (2011) 9 SCC 479

8. Siddharth Vashisth @ Manu Sharma Vs St. of N.C.T., Del. (2010) 9 SCC 479

9. Babu @ Balasubramaniam & anr. Vs St. of T.N (2013) 8 SCC 60

10. Ashok Kumar Chaudhary Vs St. of Bih. (2008) 12 SCC 173

11. Sucha Singh Vs St. of Punj. (2003) 7 SCC 643

12. Vijendra Singh Vs St. of U.P with Mahendra Singh Vs St. of U.P (2017) 11 SCC 129

13. Shyam Babu Vs St. of U.P. (2012) 8 SCC 651

14. Lallu Manjhi Vs St. of Jhar. AIR 2003 SC 254

15. Veer Singh Vs St. of U.P. (2014) 2 SCC 455

16. Brahm Swaroop & anr. Vs St. of U.P (2011) 6 SCC 288

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The instant criminal appeal is directed against the judgment of conviction and order of sentence dated 27.09.1984 passed by the Additional District and Sessions Judge, Lalitpur in Session Trial No.47 of 1983 (State Vs. Karan Singh), convicting and sentencing the appellant under Section 302, 148, 149 of the Indian Penal Code, 1860 to undergo life imprisonment and rigorous imprisonment for one year respectively (Life imprisonment under Section 302/149 I.P.C. and rigorous imprisonment under Section 148 I.P.C.). From the same Case Crime No.53 of 1979, under Section 396 I.P.C., Police Station Saujana, District Lalitpur, three sessions trial were instituted i.e. Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others), Sessions Trial No.23 of 1980 (State Vs. Kishora) and Sessions Trial No.47 of 1983 (State Vs. Karan Singh)

Factual Matrix

2. The prosecution case as emerged from the written information given by the first informant, Kashiram on 22.11.1979 in the Police Station- Saujana, District Lalitpur, the evidence on record both the documentary and oral, are stated briefly as follows:-

The first informant Kashiram alongwith his real brother Ramphal both S/o Motilal R/o Village Agodi, Police Station Saujana, District Lalitpur went to their agricultural field of 'jowar' to take

care and protection of the crops. The first informant (Kashiram) handed over his licensed gun no.1516 of 12 bore with 25 cartridges to his brother "Ramphal' and went himself into the field to cut grass. After cutting the grass at about 5:00 p.m. in the evening, when the day light was still existing, the first informant lift the bundle of grass and moved on the way to his house with his brother "Ramphal' ahead of him. About ten paces away from their field on the way to their home, when they reached near the agricultural field of Baldu Lodhi, the accused persons Karan Singh S/o Majboot Singh Thakur armed with axe (kulhari), Aman Singh S/o Majboot Singh Thakur armed with sickle (hasiya), Kishora S/o Kamatua Nai armed with axe (Kulhari), Hallu S/o Kamatua Nai armed with axe, all residents of Agodi Police Station Saujana, District Lalitpur with brother-in-law of Kishora namely "Bhaiyan Nai' R/o Village Rangaon, Police Station Mandwara, District Lalitpur, came out from the crops of 'jowar' in aforesaid field of Baldu Lodhi. They caught hold the informant's brother Ramphal and tossed him on the earth. They inflicted blows of axe (Kulhari) and sickle (Hasiya) on him. Informant's brother Ramphal began to scream and the informant was also raising alarm for help, upon which Pooran, Pragi, Jagan, Sunnu, all residents of Village Agodi rushed to the spot, but after killing Ramphal, all the five assailants fled from the spot snatching the licensed gun, cartridges and the wrist watch from the hands of the deceased. When the witnesses began to gather near the spot of the incident, Kishora Nai made a fire from the licensed gun of the informant. It was stated that the dead body of Ramphal (deceased) i.e. the informant's brother was lying in the agricultural field of Baldu Lodhi and some of the villagers stayed near the dead body.

This written information dated 22.11.1979 was given by the informant in the police station Saujana at about 8:00 a.m. The first information report was lodged accordingly, on the basis of written information under Section 396 I.P.C. The distance of the spot of the incident from the Police Station Saujana is shown as about 13 k.m. in the F.I.R. towards South-West from the police station.

After registering the F.I.R., police reached at the spot of the incident and started the proceeding of inquest, prepared site map on the orientation of witnesses, collected the blood stained soil and plain earth soil from the spot of the incident, prepared memo thereof and sent the body for post-mortem. After getting the post mortem report, charge sheet was submitted before the court.

3. All the five accused were charged with the offence under Section 147 I.P.C. for having formed an unlawful assembly alongwith another associates on 21.11.1979 at about 5:00 p.m. near the agricultural field of one Baldu Lodhi having crops of 'jowar', situated in village Agodi, Police Station- Saujana, District Lalitpur, with a common object whereof to commit the murder of Ramphal (brother of the first informant Kashiram) and in furtherance of their common object of that unlawful assembly, the accused persons allegedly had committed the offence of rioting. They were further charged under Section 302/149 I.P.C. as they committed the murder of Ramphal intentionally causing his death on the relevant date and time of the incident on the spot of the incident in furtherance of the common object of their unlawful assembly. The accused persons were also charged under Section 307/149 I.P.C. for having attempted to commit the

murder of Kashiram by firing at him in pursuance of their common object on the relevant date and time on the spot of incident. They were also charged under Section 396 I.P.C. for having committed dacoity as they allegedly snatched the licensed gun alongwith 25 cartridges and automatic wrist watch and in the course of commission of the dacoity, murder of "Ramphal' was committed by one or some of them. Further, three accused Aman Singh, Hallu and Kishora were charged under Section 148 I.P.C. also for being armed with deadly weapons namley axes and sickle at the time of committing the offence of rioting.

4. Kishora, the accused in Sessions Trial No.23 of 1980 was charged under Section 379 I.P.C. for having committed theft of the gun bearing no. 1516 alongwith 25 cartridges and automatic wrist watch by taking out from the hadns of the deceased Ramphal on the relevant date and time at the spot of incident.

5. The prosecution proposed the following witnesses for oral examination and documents to prove the case before the trial court and documents given herein below in a table for the purpose of easy reference:-

P.W.-1, Chutti	
P.W.-2, Pooran	Ex. Ka-12- Statement of Pooran
P.W.-3, Sunu	Ex. Ka-11- Statement of Sunu
P.W.-4, Bichitra Kumar Gupta	Proved Ex. Ka-23- Extract Statement of Jagan Proved Ex. Ka-24- Extract Statement of Puran Proved Ex. Ka-25- Extract Statement of Pragi Proved Ex. Ka-26- Extract Statement of Sunnu
P.W.-5, Kashiram	Proved the written report Ex. Ka.-1 Ex. Ka.-30, Statement of Kashiram
P.W.-6, Surjan Singh	Proved Ex. Ka-14/8- Panchayatnama Proved Ex. Ka-20- Site plan
P.W.-7, Lal Singh	
P.W.-8, Devi Charan Shukla	
P.W.-9, Jai Narain Dubey	
P.W.-10, Jagram Singh	
P.W.-11, P.L. Vishwakarma	
P.W.-12, Suresh Sakalya	Proved the post mortem report, Ex. Ka-25/3
	Ex. Ka-8- Recovery memo of blood stained and plain earth. Ex. Ka-9- Recovery memo of plastic shoes. Ex. Ka-10- Recovery memo of "Kanthi-Mala' & Pen Ex. Ka-13- Statement of Pragi Ex. Ka-21- Search memo of house Ex. Ka-22- Search memo of house Ex. Ka-28/20- Charge

	Sheet "Mool' Ex. Ka-29/19- Charge Sheet "Mool' Ex. Ka-31- Statement of Jagan Ex. Ka-32/26-Report of Chemical Examiner Ex. Ka-33/27 - Report of Chemical Examiner and Serologist

6. As per the report of the Chief Judicial Magistrate, Lalitpur dated 28.03.2022, the sole appellant Karan Singh is absconding.

7. Learned counsel Sri Satyendra Kumar Mishra holding brief of Sri A.N. Misra Advocate appeared on behalf of the appellant. Sri Patanjali Mishra learned A.G.A. for the State respondents argued the prosecution case.

Arguments of the learned counsels.

8. Learned counsel for the appellant contended that the incident as stated by the prosecution witnesses is not as such and the deceased was killed somewhere else by some anonymous enemies earlier to the alleged date of incident i.e. 21.11.1979. He further submitted that even the presence of P.W.-5 (first informant, Kashiram) is doubtful because the first information report had been lodged with extraordinary delay without any plausible explanation. He contended that as alleged in the First Information Report, the incident of killing the deceased ''Ramphal' occurred at 5:00 p.m. on 21.11.1979, the spot of incident was 13 k.m. far away from the Police Station but the First Information Report was lodged at 8:00 a.m. on the next day i.e. 22.11.1979.

9. The next argument of the learned counsel for the appellant is with regard to impossibility of hiding of accused-appellant allegedly in the field of "'jowar", the crops whereof were more or less two feet in height. He further drew the attention towards the statement of P.W.-5 who stated that the accused appeared out from the field when the deceased reached near the "med' (boundary) of that field of "'jowar", and submits that the informant could see them pouncing on the deceased. According to the learned counsel for the appellant, hiding of the accused between the crops of approximately 2 feet in height was quite impossible.

10. Learned counsel for the appellant further contended that evidence on record reveals that the deceased "Ramphal' was member of a gang of dacoits and he might have been killed in a bit to commit dacoity at some other place or by some other rival gangs or by the villagers. For the reason of enmity, the first informant has taken undue advantage to make false implication against the accused-appellant. It is further argued that when the deceased was having gun with 25 cartridges, no one could muster courage to attack him in the manner as alleged in the F.I.R.

11. The motive is stated by the informant himself in the written information and the First Information Report establishes the enmity between the parties to the incident. Learned counsel for the appellant emphasises that the conviction is only based on suspicion, raised by the informant against the accused-appellant that the accused were suspecting the hands of the deceased in the killing of their family members in an earlier incident. It is argued that the suspicion, however, strong it may be can not take

place of the facts established on the evidences.

12. Learned counsel for the appellant lastly argued that the prosecution evidence itself raised doubt as to the killing of deceased on some earlier date from the alleged date of incident 21.11.1979, somewhere else and, thereafter, the dead body was planted on the alleged spot of the incident. The medical evidence (post-mortem report) also corroborates the oldness of the dead body of the deceased alleged to have been killed on 21.11.1979 at about 5:00 p.m. Learned counsel submitted that since the prosecution remained unsuccessful in proving its case beyond all reasonable doubts, therefore, the conviction recorded by the trial judge and the sentence awarded can not be sustained in the eye of law.

13. Learned counsel for the appellant added that the eye witnesses were planted in the case falsely and for this reason which they had turned hostile and did not support the case of the prosecution. As such, the evidence on record was not sufficient and material for recording the conviction of the the present accused-appellant.

14. In rebuttal, it is argued by the learned A.G.A. that the contention of learned counsel for the appellant as to the doubt about the presence of P.W.-5 (first informant) is not correct because his presence is admitted by all other prosecution witnesses consistently and without any contradiction. The prosecution case which finds support from the oral evidences of P.W.-5 which is un-haken. Further, he argued that the arguments of the learned counsel with regard to the false implication and concocting a case by the prosecution, is baseless. P.W.-5 in his statement has explained satisfactorily about the delay in lodging the F.I.R. He further argued that the entire prosecution case is well supported with the direct evidences of eye witnesses and also the motive set forth in the written information and the prompt F.I.R. is well established.

15. Learned A.G.A. lastly drew the attention towards the statement of the prosecution witnesses who turned hostile and contended that they were not under any coercion, fear or terror while their statement under Section 164 Cr.P.C. was recorded, as such, the statement of such witnesses in the course of their examination in the Court shall not be read as wholly unworthy. The statement of such witnesses to the extent of lagging support to the prosecution shall be read being reliable as corroboratory evidence. He further submits that the principle of "falsus in uno falsus in omnibus" does not apply in India. He referred on the case laws ***Prabhash Kumar Vs. State of Haryana1, Iyappa & Ors. Vs. State of Tamil Nadu2 and Zahira Habibullah Sheikh & Anr. Vs. state of Gujarat3.***

On the basis of above arguments, learned A.GA. submitted that the impugned judgment of conviction and order of sentence is good in law and deserves to be confirmed, no interference is required in the impugned judgment under appeal, as such, the appeal is liable to be dismissed.

Discussion

Motive

16. In ***Sheo Shankar Singh Vs. State of Jharkhand and Anr.4,*** the principles for the proof and relevance of motive in establishing the guilt of the accused and its

varying importance in cases based on circumstantial evidence and in those which are based on the testimony of eye witnesses has been discussed. Para "15' of the said judgment is being quoted hereunder:-

"15. The legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of this Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye-witnesses."

17. The suspicion of the accused persons over Ramphal (deceased) of having killed their family members is, however, proved by the witness P.W.-5. In his cross-examination by the defence, he stated that the criminal case with regard to the incident of killing of the family members of the accused appellant instituted against the brother of the informant (Ramphal), the deceased and his father. Police was searching his brother (Ramphal) but he could not be traced by them. Ramphal ultimately surrendered alongwith other "baghis' (dacoits) in District Chatarpur. He also stated that he does not know about the gang of dacoits to which the deceased Ramphal belonged, however, in the murder case, he was acquitted by the court concerned.

Witness Jagan has also stated in the cross examination that the parents of the accused appellant Karan Singh were murdered and father of the accused Hallu and Kishora was also murdered. He further stated that deceased Ramphal was prosecuted for the above three murders wherein he was acquitted. He further stated that the said criminal case was running in District Sagar.

Witness Pooran has also stated in the cross-examination about the murder of parents of accused Karan Singh, Aman Singh and father of Kishora and Hallu in village. He admitted that the accused persons had a strong suspicion over the deceased "Ramphal' of having committed their murder. This witness then stated that he heard that the Ramphal (deceased) had joined the gang of dacoit of "Moni Ram Sahai' and the people from the village were witnesses in the murder case against deceased Ramphal.

Pragi stated that when the murder of the parents of the accused appellants had occurred, they were very young. He himself also young age. As such, all witnesses Kashiram (P.W.5) Sunnu (P.W.3), Jagan, Pooran (P.W.2) and Pragi, even those who did not support the case of the prosecution in toto and had supported the fact constituting the motive behind the killing of Ramphal. The motive has set forth in the written information and thus first information report, is, thus, proved and is a relevant fact under Section 8 of the Indian Evidence Act, 1872.

Relevant date and time of the incident.

18. Though it is argued by the learned counsel for the appellant that the evidence on record shows that the deceased might have been killed somewhere else prior to the alleged date of incident dated 21.11.1979 and the dead body was planted maliciously by the first informant by reason of enmity with the accused appellant. We have gone through the evidences of P.W.-5 and as discussed above, it may be recorded that there was no enmity between the first informant Kashiram (P.W.-5) and the accused appellant. Kashiram (P.W.-5), the first informant himself stated that being the villager of the same village, the accused appellant and he were on normal terms of visiting each other houses and talking to each other. None of the witnesses of the prosecution stated about the "enmity', if any, of Kashiram with the accused appellant nor any suggestion of enmity had been given to the first informant. So far as enmity of the accused appellant with deceased Ramphal is concerned, it is established by evidence of prosecution witnesses that the same was because of the deceased being the accused in the murder case of parents of the accused, who had been acquitted. The arguments of the learned counsel for the appellant of planting of the dead body on the spot of the incident by the first informant (P.W.-5) is not acceptable. Particularly, when the spot of the incident is proved satisfactorily by all the witnesses of fact as well as the formal witnesses also.

19. The doctor P.W.-12, Dr. Suresh Sakalya had also not been confronted to impeach him about his assessment that the deceased might have died on 21.11.1979 at about 5:00 p.m. in the evening. No questions were put to him by the defence about the condition of the dead body on the date of the post-mortem examination so as to relate the same to the oldness of the dead body and to reach at the proximate time of death prior to the established date and time of the incident, i.e. on 21.11.1979 at about 5:00 P.M. It is, therefore, needless to discuss on this point.

20. The accused persons, as the written information itself reveals, are related toh each other. The accused Karan Singh and Aman Singh are real brothers, sons of "Majboot Singh Thakur', accused Kishora and Hallu are real brothers, sons of "Kamatua Nai', all residents of Village Agodi where the incident had occurred and first informant P.W.-5 resides. The accused Bhaiyan Nai is related to Kishora and Hallu being their brother-in-law (sister's husband) who is resident of Village Rangaon, Police Station Mandwara, District Lalitpur. P.W.-5 in his examination-in-chief stated that the father of accused Kishora and Hallu was murdered and parents of Karan Singh and Aman Singh were also murdered. They all were suspecting "Ramphal' to be the perpetrator of the crime and, therefore, hatched enmity with the deceased

"Ramphal'. Due to the suspicion, out of vengeance, the accused had killed the deceased Ramphal. In cross examination, this witness stated at the very inception that he is residing in village Agodi and during his lifetime the parents of the accused persons were killed. He further stated that being local resident of same village, he had conversation eventually with the accused persons also. Accused persons also used to visit the first informant P.W.-5, if need be in connection with some work. As such, P.W.-5 established that the accused-appellant had no enmity with him (P.W.-5).

About witnesses

21. Kashiram, P.W.5 is brother of the deceased, Pooran (P.W.-2) and Sunnu (P.W.3) are the eye witnesses. The first informant "Kashiram' who reported the incident dated 21.11.1979 to the Police on 22.11.1979 at about 08:00 A.M. had been examined by the prosecution as witness of fact and eye witness of the incident. Pooran (P.W.-2) and Sunnu (P.W.-3) were also examined as eye witnesses by the prosecution. These three witnesses were examined in Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others) and Sessions Trial No.23 of 1980 (State Vs. Kishora). A new witness namely Chutti was also examined as prosecution witness P.W.-1 in the case. P.W.-5 is real brother of the deceased "Ramphal' and, as such, related witness. P.W.-2 and P.W.-3 are the native villagers, owners of the agriculture fields situated near and abutting the field of Baldu, which is the place of the incident dated 21.11.1979 occurred at about 05:00 P.M. in the evening. They were agriculturist having their field in the near vicinity of the spot of the incident (the field of Baldu).

22. We have gone through the statement of P.W.-5 "Kashiram' and do not find any prior enmity of Kashiram himself with any of the accused persons. Even Kashiram stated that the accused persons were on the normal terms of visiting and conversing with him, if needed, in connection with any work, as they were residing since a long time in the same village.

23. Learned counsel for the defence has could not carve out any fact of complaint of enmity of Kashiram with any of the accused persons prior to the date of the incident or any civil or criminal litigation pending between them. No question was put to the witness "Kashiram' so as to elicit his interestedness in falsely implicating the accused persons for putting them behind the bars.

24. Witness P.W.-1, P.W.-2, P.W.-3 and P.W.-5 undoubtedly, as evidence came out from the record, are rustic villager and living in a milieu of a remote village namely Agodi in District Lalitpur. They are not highly educated, simply literate or even illiterate.

25. So far as the delay of more than 12 hours in lodging the F.I.R. is concerned, it is reasonably explained by the P.W.-5, Kashiram that he did not go in the night to lodge the report because of the fear of the accused persons. The evidence of his fear can be gathered from the evidence on record.

26. The milieu of the village Agodi and the life of the villagers there, may be gathered from the evidences coming out from the record. We can carved out the same as below.

(i) the spot of the incident in the village Agodi was within the territorial limit of District Lalitpur which was declared and notified as a dacoit affected area by the Government,

(ii) carrying a licensed gun even during the agricultural work in the evening in itself is an indication of fear of life to the brother namely Kashiram and Ramphal (deceased),

(iii) in cross examination of the witnesses, it has come that the deceased "Ramphal' was arraigned with the charge of murders of parents of accused persons. A criminal case was also lodged.

(iv) the deceased "Ramphal' alongwith some other "baghis' (dacoits) surrendered in District Chhatarpur. He was known to be an active member of the gang of the dacoits, identified as "Moniram Sahai Gang',

(v) One of the accused "Karan Singh' was himself suspected to be an active member of dacoits gang identified as "Gabbar Singh's Gang',

(vi) The way to the police station from the spot of the incident is shown to be about 13 k.m. which was in the outskirts of area not urbanized and populated, it was not easy to travel in the night,

(vii) the mode and manner adopted by the accused persons was not only violent but also brutal and gruesome,

(viii) The assailants after killing the deceased "Ramphal', fled away from the spot of the incident and were roaming free.

27. Before going through the statements of aforesaid witnesses of fact we would like to refer para "5' of the judgment of Apex Court in the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat5*** where Apex Court observed that:-

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-

sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

28. In view of the aforesaid circumstances and the witnesses, status, milieu and their normal prudence, we think it proper to observe on the basis of evidences that the prosecution witnesses of fact are rustic villagers, not highly educated, even illiterate or simply literate.

29. In the context of the aforesaid observation, we further refer to the judgment of the Apex Court in ***Shivaji Sahab Rao Bobade Vs. State of Maharashtra***6 which deals with an incident of murder in a rural area where the witnesses to the case were rustic and so it was observed that their behavioural pattern perceptive and un-perceptive habits have to be judged as such. The relevant para from the aforesaid judgment is reproduced hereunder:-

"8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to

assess or arrive at legitimate conclusions as the Court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

30. We think it pertinent to mention here that the witness P.W.-1 "Chutti' did not support the case of prosecution and declared hostile. The witness P.W.-5 remained intact on his stand and supported the case of prosecution. The prosecution has produced on record, two certified copies of the extracts of the statement of witnesses Jagan, Pooran, Pragi and Sunnu recorded by the Investigating Officer under Section 161 Cr.P.C. and that recorded by the Judicial Magistrate under Section 164 Cr.P.C. also. All these witnesses were examined by the trial judge in the Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others) and Sessions Trial No.23 of 1980 (State Vs. Kishora). The aforesaid two Sessions Trials as well as the present Sessions Trial No.47 of 1983 (State Vs. Karan Singh) have their origin from the same Case Crime No.53 of 1979, under Section 396 I.P.C.

31. In the trial of Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others) and Sessions Trial No.23 of 1980 (State Vs. Kishora), the witness did not support as to the mode and manner adopted, complicity and identification of the accused persons in commission of the incident dated 21.11.1979 but so far as the incident of killing of deceased "Ramphal' on 21.11.1979 at about 05:00 P.M. at the spot of the incident in the field of Baldu and their presence near the spot of the incident, was admitted by them.

32. They had retracted from their statement made under Section 161 Cr.P.C. before the Investigating Officer with regard to the mode and manner adopted by them and complicity and identity of the accused persons in commission of the offence dated 21.11.1979 before the Court. However, the same statement was given before the Magistrate under Section 164 Cr.P.C. which they admitted and proved before the Court. They also proved before the Court, identifying and verifying their signature on the statement under Section 164 Cr.P.C. The Magistrate, Sri Bichitra Kumar Gupta was also examined before the Court in those sessions trials and he proved the statement recorded by him under Section 164 Cr.P.C. of the accused, as such, the statement of the accused to the same effect under Section 164 Cr.P.C. is proved before the Court and is a proved document. The Magistrate, Sri Bichitra Kumar Gupta is also witnessed in the present sessions trial as P.W.-4. The extracts of the witness under Section 161 Cr.P.C and 164 Cr.P.C. cumulatively will be taken as the narration of the incident by the witness coupled with their statement in the present trial.

Evidence as to the status, character and profession of the deceased, Ramphal.

33. In the case before us there are five witnesses of fact. They are first informant Kashiram (P.W.5), Sunnu (P.W.3), Jagan, Pooran (P.W.2), Pragi. Along with P.W.5 (brother of the deceased), the rest of the witnesses namely Sunnu, Jagan, Pooran and Pragi were all examined as eye witnesses of the incident whose names have been given in the written information also. It is stated in the written report by the first informant that at the time of the incident, hearing the screams of the deceased and alarm raised by the first informant P.W.5, the other witnesses came running on the spot as they were working

in the nearby agricultural fields. On ebing challenged by them, the accused Kishora made a fire towards them and they succeeded in fleeing away from the spot. P.W.-5 being the brother of the deceased is a related witness. Learned counsel for the appellant has raised objection as to his credibility and reliability for the reason of his interestedness. Except P.W.5, rest of the witnesses turned hostile as they denied having seen the accused appellant committing the offence. The question, thus, would be as to the evidentiary value of the statement of the hostile witnesses, with regard to the facts deposed by them and the effect of the portion of their statement not supporting the prosecution case.

34. It is well settled that in a criminal trial, evidence of a hostile witnesses can form the basis of conviction. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence matters.

Reliance on the statement of hostile witnesses

35. In the case before us we have already noticed that prosecution witnesses Sunnu (P.W.3) and Pooran (P.W.2) were examined as the prosecution witnesses to prove the fact in issue as to whether the accused persons committed the killing of the deceased "Ramphal' on the relevant date and time on the spot of the incident alleged in the written information by inflicting blows of lethal weapons like axe, sickle, etc.

36. The Apex Court in the case of ***Mrinal Das Vs. State of Tripura7*** in para "67' has held as under:-

67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

37. In view of the aforesaid guidelines laid down by the Apex Court whereupon the evidence of the prosecution witnesses (declared hostile) is required to be evaluated. In the present case in our hand, since the learned counsel has raised objection as to the credibility and reliability of P.W.5, Kashiram (first informant) also and blamed him to concoct the case for false impliacation of the accused appellant, we would discuss the evidence of P.W.-5 later after evaluating the evidence of hostile witnesses and finding out which part of their testimony is to be taken into reliance and is corroborating the prosecution case.

38. In ***Siddharth Vashisth @ Manu Sharma Vs. State of N.C.T., Delhi8***, it is held that if the prosecution witnesses turned hostile the court may rely upon so much of his testimony which supports the case of prosecution and is corroborated by other evidences.

39. The doctrine of "falsus in uno falsus in omnibus" is not applicable in Indian Judicial System, the court has to separate grain from chaff and apprise in each case as to what extent the evidence is acceptable. If separation cannot be done, the evidence has to be rejected. The witnesses may be speaking untruth in some respect and it has to be apprised in each case as to what extent the evidence is worthy of acceptance. Merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. It is held in number of cases of Apex Court, one of such judgment is Babu @ Balasubramaniam & Arn. Vs. State of Tamil Nadu9.

40. In ***Ashok Kumar Chaudhary Vs. State of Bihar10 and Sucha Singh Vs. State of Punjab11,*** it was held that, if the testimony of a witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal and natural contradictions have appeared in his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are normal and not material in nature, then the testimony of an eye witness has to be accepted and acted upon. The distinction between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a parties case, material discrepancies do so.

41. In view of the above legal position, we first of all would like to remind that the spot of the incident alleged, is the field of "'jowar" in village Agodi, belonging to Baldu Lodhi on which boundary (med), the deceased Ramphal was about to reach when the accused appellant alleged to have pounced on him coming out from his hiding in the crops of "'jowar". The time of the incident was about 5:00 p.m. in the evening of 21.11.1979. The field of witnesses Sunnu (P.W.3), Jagan, Pooran and Pragi were situated nearby the spot of the incident, hearing the noise of screaming of the deceased and alarm raised by the first informant, the witnesses reached there. A fire from the gun was also made after killing the deceased by the accused Kishora towards the witnesses so as to ward off them.

42. In the context of the aforesaid fact stated in the written information, we would go through the statements of witnesses one by one.

Witness P.W.-5

43. Since the presence of P.W.-5, Kashiram is admitted by other witness of fact though they turned hostile and his presence is also found to be quite natural and probable in his agricultural field, his evidence now has to be evaluated keeping in mind that this witness was present on the spot of the incident and had seen the entire incident as stated in the written report filed by him.

Objection as to P.W.-5 being relative witness

44. Merely being relative of the deceased he can not be said to be interested for any otherwise reason to get the accused persons falsely implicated.

45. In V***ijendra Singh Vs. State of Uttar Pradesh with Mahendra Singh Vs. State of Uttar Pradesh12***, the Apex Court has held in para 31 as under:-

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

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

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

46. In S***ucha Singh and Another Vs. State of Punjab (Supra),*** it is held that relationship is not a factor to effect the credibility of a witness. It is more often than not that a relation would not conceal the 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. Para 13 of the said judgment is quoted under:-

13. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the 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.

47. In the context of evidences on record, we are of considered opinion that the argument of the learned counsel for the appellant about the witness (P.W.-5) being a close relative a partisan witness and his evidence should not be relied upon, has no substance. This impression in the mind of any person that relatives are not independent is not correct. In para "14' of the ***Sucha Singh and Another Vs. State of Punjab (Supra),*** the Apex Court has considered it as under:-

"14. In Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1953 Cri LJ

1465] it has been laid down as under : (AIR p. 366, para 26)

"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 relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

48. In this regard, para "22' from the judgment of the Apex Court in the case of ***Shyam Babu Vs. State of U.P.13***, is reproduced hereunder:-

"This Court has repeatedly held that the version of an eye-witness cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc. These principles have been reiterated in Mano Dutt and Another vs. State of Uttar Pradesh, (2012) 4 SCC 79 and Dayal Singh and Others vs. State of Uttaranchal, 2012 (7) Scale 165."

Enmity

49. We have gone through the statement of P.W.-5 "Kashiram' and do not find any prior enmity of Kashiram himself with any of the accused persons. Even Kashiram stated that the accused persons were on the normal terms of visiting and conversing with him, if needed in connection with any work, as they were residing since a long time in the same village.

50. Learned counsel for the defence could not carve out any fact of complaint of any enmity of Kashiram with any of the accused persons prior to the date of the incident or any civil or criminal litigation pending between them. No question was put to the witness (P.W.-5) "Kashiram' so as to elicit his interestedness in falsely implicating the accused persons for putting them being the bars.

Witness P.W.-3

51. P.W.-3, Sunnu -S/o Sultan resident of village Agodi, who by profession is an agriculturist, when produced before the court on 16.7.1982 [in Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others)], this witness [Sunnu (P.W.-3)] in unequivocal, explicit and assertively admitted in his examination-in-chief his presence near the spot of the incident at the relevant date and time of incident and that he went to his field for cutting grass. He also affirmed the presence of other witnesses Jagan, Pooran and Pragi who alongwith him ran towards the spot of incident in the field of Baldu hearing the screaming of Ramphal and alarm raised by the Kashiram. He had further admitted that accused Karan Singh was armed with axe (kulhadi), Hallu alongwith sickle and Kishora with kulhadi, accused Bhaiyan caught hold the deceased "Ramphal'. All the five accused named by him intended to kill the deceased "Ramphal', were inflicting blows of their arms on him, when the accused Kishora made a fire from the gun on the deceased "Ramphal', all the witnesses fled from the spot being under fear.

52. This witness has further explained in his cross-examination, the reason and the circumstance under which he turned hostile while produced before the Court in Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others). He stated that the statement given by him in the present Sessions Trial No.47 of 1983 (State Vs. Karan Singh) is correct. When he was read over the earlier statement given by him in the Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others), wherein he did not support the prosecution case about the role, mode and manner adopted by the five accused persons. On both the occasions, he stated on his own that he was scared of the Investigating Officer (Daroga Ji) and was given two suggestions by the the defence:-

(i) He was not making correct statement under the pressure of the police, which was denied by him saying it was incorrect.

(ii) P.W.-3 was given suggestion that he did not see anything on the spot of the incident. He further denied and stated that it was incorrect that he did not see anything.

53. This witness, during his cross-examination, has further confirmed the location of the spot of the incident being the field of Baldu, the occurrence of violent fracas running about 4-6 minutes before him. He also stated firmly about the injuries on the person of the deceased. He further stated that the blows of the arms (axes and sickles) were made on the neck, shoulder and abdomen of the deceased "Ramphal'. He lastly stated that when the fire from the gun was made on them, they all fled from the spot and that the gun was fired for the purpose of warding them off from the dead body of the deceased. As such, the witness P.W-3 remained versatile in his statement but it could not be said that he did not see the incident on the spot as his presence on the spot of the incident constantly remained same in both the cases un-retracted, un-contradicted and consistent, as such, the statement of this witness as to the presence of the accused persons on the spot of the incident, their role, the mode and manner adopted by them in committing the offence with the help of the arms held by them is to be taken into account in favour of the prosecution.

Witness P.W.-1

54. P.W.-1 Chutti - This witness was not named in the written information and the first information report. His name was not given by other witnesses namely Pooran, Jagan, Pragi, Kashiram and etc. of being present near or on the spot and that might have seen the incident. He claimed himself the witness of the inquest and, therefore, he proved his signature over the inquest report. In his cross-examination, Chutti (P.W.-1) stated about the location, dimension and position of the dead body lying on the earth of the spot of the incident near the boundary (med) in the field of Baldu. He stated about the injuries on the dead body only on the leg and near the eyes of the deceased and denied other injuries. The statement of this witness is irrelevant as to the role of the accused persons, mode and manner adopted by them in killing of the deceased and arms used by them in the course of incident because he has not claimed him being present on the spot at the time of the incident.

55. However, the witness P.W.-1 has proved the relevant date of the incident as he stated without any contradiction that the dead body was lying on the earth of the spot of the incident on the relevant date and time of the incident.

Witness P.W.-2

56. P.W.2 Pooran by profession is an agriculturist resident of village Agodi who was earlier been examined in the Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others) on 04.08.1982 and did not support the case of prosecution about the role of, mode and manner adopted, the arms held by the accused persons and killing of the deceased "Ramphal'. He denied seeing the accused appellant committing the murder of the deceased "Ramphal' on 21.11.1979 and also seeing the accused Kishora taking away the licensed gun and cartridges of the informant Kashiram and wrist watch of the deceased. In cross examination, he admitted that the investigating officer had interrogated him but denied from giving any such statement with regard to seeing the accused persons committing the offence. He admitted, however, that Ramphal was killed in the field of Baldu Lodhi abutting to the field of informant Kashiram but when like the other witness P.W. 3, he was asked about his statement made to the Magistrate under Section 164 Cr.P.C. and read over the statement dated 15.12.1979, he admitted the same having been given by him recorded by the Magistrate and his thumb impression thereon. This witness also has not been confronted by the defence in the cross examination about the presence of this witness alongwith other witnesses on the spot of the incident particularly the statement of the witness P.W.-3 in this regard, therefore, the presence of this witness with P.W.-3 on the spot on the relevant date at the relvant time of the commission of offence, his conduct of retracting from his statement under Section 161 Cr.P.C. and that recorded by the Magistrate under Section 164 Cr.P.C. will be treated as an afterthought by reason of some vested interest and, therefore, a false statement before the court which cannot be read in favour of the defence. However, this witness has proved the motive set up by the prosecution by saying that the parents of accused Karan and Aman Singh (real brothers) as well as parents of Kishora and Hallu (real brothers) were murdered in the village and the deceased Ramphal was a suspect for committing murder and a criminal case was also lodged against him wherein he was acquitted.

57. In the present matter (in Sessions Trial No.47 of 1983; State Vs. Karan Singh), when he was produced before the Court for examination-in-chief on 14.06.1984, P.W.-2 in explicit and unequivocal words, supported the case of prosecution on above aspects. In his cross-examination, P.W.-2 explained about his earlier statement in Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others). He said his statement in the present matter true and denied the suggestion that he was making a false statement under the pressure of the police. He also denied the suggestion that nothing was seen by him.

Witness P.W.-4

58. **P.W.-4, Bichitra Kumar Gupta-** the then Munsif Magistrate was examined in earlier Sessions Trial No.15 of 1980 (State Vs. Aman Singh & Others) where the witnesses turned hostile and proved the statements of the witnesses recorded under Section 164 Cr.P.C. which the hostile witnesses also admitted to have been recorded. Sri Bichitra Kumar Gupta in the present case also proved recording of the statement of witnesses under Section 164 Cr.P.C. on 15.12.1979. He stated that the statements of witnesses Kashiram and Pooran were recorded by him under Section 164 Cr.P.C. on 15.12.1979. Whatever they said, was recorded and after having the same reduced into writing by him, it was read over to them and they put their thumb impression prved as Ex. Ka-12 and Ex.Ka-30. He further stated that on 17.12.1979 and 15.12.1979, he recorded the statements of witnesses Pragi, Sunnu and Jagan under Section 164 Cr.P.C., proved as Ex.Ka-31 and Ex.Ka-11. As such the prosecution has successfully established that the witnesses turned hostile retracting their statement made before the investigating officer purposely and falsely, their statement as to the involvement of the accused persons, their mode and manner adopted in killing the deceased Ramphal and weapons used by them, all were supporting the case of prosecution and they could not deny their statement made before the Magistrate under Section 164 Cr.P.C.

In view of the above discussion, the statement of the witnesses, who were declared hostile in earlier Sessions Trial No.15 of 1980 (State Vs. Aman Singh), instituted on the same case crime number relating to the same incident, are held in the present sessions trial, correctly stating about the identity of accused appellant and his complicity in the offence, killing the deceased "Ramphal' in the mode and manner and with the help of weapons assigned to them in the written information, the prosecution in this case has been successful in establishing the case against the accused appellant.

Spot of the incident

59. As already discussed above, from the evidence of prosecution witnesses Sunnu (P.W.3) and Pooran (P.W.2) that they admitted the place of the incident near the agricultural field of Baldu Lodhi and that their own fields were situated nearby. They have consistently and without any contradiction proved that the dead body was lying on the spot of the incident when they reached there hearing the gunshot. The blood stained soil and plain earth soil were collected by the Investigating Officer from the spot and was proved in the court. The prosecution witnesses had also admitted the collection of aforesaid samples from the spot of the incident by the Investigating Officer. The inquest proceeding was done and proved by the witnesses which also

establishes the spot of the incident being the same place. The Investigating Officer, P.W.6, Sub Inspector, Surjan Singh in his examination-in-chief before the trial court proved that the dead body of the deceased "Ramphal' was lying on the spot of incident, where he made the inquest proceeding. He also proved preparation of site plan on the orientation of witnesses Kashiram (P.W.5) and Jagan. The site plan, Ex. Ka.20, shows the place where the dead body of the deceased was lying as "D'. There is a remark that "at its South nearby the vicinity, the crops of 'jowar' was found broken and the dead body of the deceased was lying". It also shows that the blood stained soil and plain earth soil was collected from the same place. The agriculture field of informant Kashiram has been shown by letter "C' at about ten paces away from the boundary (med) of the field of Baldu Lodhi where the incident occurred. In the vicinity, the witnesses Jagan and Pooran are shown near the place "C". As such, the spot of the incident as stated by the first informant, Kashiram in the written report submitted to the police, was proved to be the boundary (med) of the 'jowar' field of Baldu Lodhi.

Written information and delayed First Information Report

60. The witness P.W.-5 (first informant, Kashiram) submitted the information in writing to the police on 22.11.1979 stating the date of incident 21.11.1979 and time at about 5:00 P.M. and also his presence in connection with the agricultural work of removing grass from his field of 'jowar' situated near the spot of the incident in village Agodi. He further stated the presence of deceased "Ramphal' with him at the time of the incident, who was carrying the bundle of grass also carrying licnsed gun of the informant and that he was leading to the way to their home. The name of the accused-appellants are, respectively Aman Singh, Kishora and Hallu, all residents of village Agodi and accused Bhaiyan, the brother-in-law of the Kishora and Hallu resident of village Rangao Police Station Mandwara, District Lalitpur. P.W.-5 has also stated that the aforesaid accused persons were hidden in the field of Baldu Lodhi in the crops of 'jowar', which were about two feet in height and they became visible when they suddenly came out on the spot of the incident and pounced with their respective arms like axe and sickle, the deceased was caught hold by them and the accused persons injured him seriously by inflicting the blows of their lethal weapons and done him to death on the spot. In the course of the incident, the accused Kishora snatched the licensed gun of Kashiram from the hands of deceased "Ramphal' and Kishora, made a fire on the witnesses who came running towards the spot of the incident on hearing the scream of deceased and alarm raised by the first informal Kashiram (P.W.5) so as to ward off them. The motive is also stated by the first informant that the accused persons were suspecting that the deceased "Ramphal' had killed their parents much earlier to the present incident.

61. The incident as stated in the written information occurred on 21.11.1979 at about 5:00 P.M. before the sunset, but the first information report was lodged on 22.11.1979 at about 8:00 A.M., on the next morning of the incident. The distance of the spot of the incident from the police station is shown in the F.I.R. 13 Km.

62 . Learned counsel for the appellant vehemently argued that the first information report was lodged with an

unreasonable delay which is sufficient to cast a doubt as to the genuineness of the F.I.R. To deal with this objection, we have gone through the evidence of P.W.5 (the first informant) and the Investigating Officer (P.W.6). The first informant (P.W.-5) stated the time of the incident about 4:45 P.M. in the evening before sunset on 21.11.1979. He further stated in the examination-in-chief that on the very evening of the day of incident he did not go to the police station for lodging the F.I.R. due to the falling of the night and fear of accused persons, he went in the morning on the next day i.e. 22.11.1979 to the police station for lodging the report. He further stated that the written report of the incident was given in the police station who reduced the same into writing and gave him a copy, getting his signature for receiving. The written report given by him in the police station was proved as Ex. Ka.1.

63. In the cross examination, this witness stated about the proximate period of the violent fracas committed by the accused persons from 15-20 minutes to half an hour and that after the incident he stayed along with the native villagers near the dead body of his brother throughout the night. He further stated that he left the spot of the incident to go to the police station when dawn fell and came back with the Investigating Officer to the village at about 11 A.M. He clarified that for the whole day just from the dawn upto the sunset, the dead body was lying on the spot. He further stated that the inquest proceeding was started at about 11:00 a.m. on the date of the information of the incident.

64. P.W.-6, the Investigating Officer Surjan Singh, Sub Inspector stated that on 22.11.1979 he was present in the police station when P.W.5, Kashiram came to him. No question was put to this witness with regard to information of incident, if any, is received by him on the same evening nor any wilful delay on his part. Even question is not put nor suggestion given to him as to his interestedness or consultation prior to the lodging of F.I.R. on the basis of the written report submitted by P.W.-5 to alter the contents of the same. In cross examination, in answer to the question put by the defence, this witness (P.W.-6) assertingly stated that the first informant came to him at about 8:00 a.m. in the morning of 22.11.1979 to lodge the report. The report was lodged in the presence of P.W.-6 (Investigating Officer) in the police station and he proceeded for the spot of the incident.

65. So far as the delay of more than 12 hours in lodging the F.I.R. is concerned, it is reasonably explained by the P.W.-5, Kashiram that he did not go in the night to lodge the report because of the fear of the accused persons. The evidence of his fear, which has already been discussed, are arrayed again on the cost of the repetition herein below;

(i) the spot of incident in the village Agodi was within the territorial limit of District Lalitpur which was declared and notified as a dacoit affected area by the government,

(ii) carrying a licensed gun even during the agricultural work in the evening in itself is indication of fear of life to the brothers namely Kashiram and Ramphal (deceased),

(iii) in cross examination of the witnesses, it has come that the deceased "Ramphal' was arraigned with the charge of murders of parents of the accused persons, a criminal case was also lodged.

(iv) the deceased "Ramphal' alongwith the some other "baghis' (dacoits) surrender in district Chhatarpur. He was known to be an active member of the gang of the dacoits, identified as "Moniram Sahai Gang',

(v) One of the accused Karan Singh was himself suspected to be an active member of dacoits gang identified as "Gabbar Singh's Gang',

(vi) The way to the police station from the spot of the incident is shown to be about 13 k.m. which in the outskirts of the area not urbanized and populated, it was not easy to travel in the night,

(vii) the brutal mode and manner adopted by the accused persons was not only violent but also brutal and gruesome,

(viii)The assailants after killing the deceased fled away from the spot of the incident and were roaming free.

66. In view of the above, the fear of the first informant (P.W.-5) was quite natural and probable and not adverse influence can be drawn of his act of not moving instantly after the incident to the police station by travelling 13 km on rough and unpopulated way. This witness P.W.-5, Kashiram was also not confronted about availability of the means of transport, the nature and condition of the way causing obstruction, the risks in the night, the presence of the villagers and company of the Chaukidar or anyone else to go to the police station in the night for lodging the F.I.R. The witness P.W.5 himself has stated that before the sunrise, he left the village for going to the police station, he travelled about 13 Km. on foot, the statement of P.W.-6, Investigating Officer proves arrival of the P.W.5 in the police station at about 8:00 a.m. As such, the reason for not lodging the F.I.R. instantly in the evening and reaching the police station on the next morning stood explained and is beleivable. The arguments of the learned counsel as to the ingenuineness of the written information and the F.I.R. have no logical footing and, thus, liable to be rejected. The written information of the incident is given to the police station with reasonably promptness and there is no extraordinary delay so as to raise any doubt as to the genuineness of the F.I.R.

Mode and manner of the commission of offence

67. The fact of killing of the deceased "Ramphal' on 21.11.1979 at about 5:00 p.m. before sunset is proved by the witnesses Kashiram (P.W.5), Sunnu (P.W.3), Jagan, Pooran (P.W.2) and Pragi inconsistently without any contradiction. The spot of the incident is also proved on the evidences of the witnesses consistent with the testimony of P.W.-5 and the corroborative evidence of the inquest proceedings, the collection of the blood stained soil and plain earth soil, the recovery of the shoes of the deceased near the spot of the incident. It is noteworthy here that none of the witnesses amongst Sunnu (P.W.3), Jagan, Pooran (P.W.2) and Pragi contradicted the statement of P.W.-5, the first informant as to the involvement of the accused-appellant in the offence. The mode and manner adopted by the accused appellant, his involvement in the commission of offence and the weapon used by him though stated by the aforesaid witnesses Sunnu (P.W.3), Jagan, Pooran (P.W.2) and Pragi to the Investigating Officer in the course of the investigation and, thereafter, before the Magistrate under

Section 164 Cr.P.C. but they did not stand on their aforesaid pre-trial statements when produced before the trial court. As discussed at length the fear under which the aforesaid witnesses turned hostile, as it is held, they have retracted and nor truthful. As such, the only witness (P.W.5) as eye witness of the incident remains before us as to the mode and manner of the commission of the offence.

68. It is well known principle of law that reliance can be based on the solitary statement of a witness, if the court comes to the conclusion that his statement is the true and correct version of the case of the prosecution.

69. Section 134 of the Indian Evidence Act, 1872 for ready reference is quoted hereunder:-

"134. Number of witnesses.--No particular number of witnesses shall in any case be required for the proof of any fact."

70. It is settled that the courts are concerned with the merit of the statement of a particular witness and they are not concerned with the number of witnesses examined by the prosecution. The time honored rule of appreciation of evidence is that it has to be weighed and not counted; the law of evidence does not require any particular number of witness to be examined to prove any fact. As a rule of caution, based on the testimony of a single witness, the court may classify the oral testimony of a single witness, into three categories namely (i) wholly reliable, (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable. In the third category of cases, the court has to be circumscribed and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness; ***Lallu Manjhi Vs. State of Jharkhand14.***

71. In **Veer Singh Vs. State of U.P.15**, it is held that conviction can be based on the evidence of sole witness in a criminal trial as quality of evidence matters not the quantity.

72. Keeping in mind the above, we proceed with the P.W.-5, Kashiram, it is stated by him that on 21.11.1979 at about 4:45 P.M. in the evening when there was enough day light, he alongwith his brother "Ramphal' was returning to home. Deceased "Ramphal' was carrying his licensed gun and 25 cartridges of the informant, Kashiram and Kashiram was about 20 paces behind him carrying the bundle of grass, accused Kishora, Karan Singh, Hallu and Bhaiyan pouncing out from the fields of 'jowar' of Baldu Lodhi with axe (Kulhari), sickle (hasiya), they embraced the deceased from his behind, tossed him on the ground and began inflicting the blows of sickle and axe and, thus, the deceased died of the injuries.

Medical Evidence of the mode and manner adopted by the accused

73. The post-mortem report of the body is evidence of the aforesaid injuries which are noted as under:-

Ante mortem injuries:-

(i) Incised wound 14 c.mx4c.m. brain deep on left side face and forehead with under ear of temporal parital and frontal bone of skull and the brain meetter is came at left eye is displaced in socket.

(ii) Incised wound 7 cm. X 2 c.m. bone deep on left side of head with under left ear of parital bone.

(iii) Incised wound 10 cm x 2 cm bone deep on right side of the face from the root of nose to right angle of mouth.
(iv) Incised wound 12 cm x 5 cm vertebral column deep under byers of 3, 4 and 5.

(v) Multiple incised wound (five in number) ranging for 2 c.m. x 0.5 cm to 2 cm x 1 cm muscle deep in the area of 15 cm x 16 cm on the front of chest.

(vi) Incised wound 2 cm x 1 cm skin deep on the middle of abdon 8 cm above the umbila

(vii) Incised wound 3 cm x 2 cm muscle deep the left infernal region.

(viii) Incised wound of 3.5 cm x 2 cm muscle deep on lateral side of left thigh on upper 1/3.

(ix) Incised wound on 3 cm x 2 cm muscle deep 1.5 cm late to no.8.

(x) Incised wound of 6 cm x 2 cm middle deep on right anterol as per upper 1/9 of right thigh.

(xi) Incised wound 3 cm x 28 muscle on anten aipet right thigh 8 cm below of no.10.

74. P.W.12, Dr. Suresh Sakalya the doctor posted in Lalitpur District Hospital who conducted the autopsy of the body proved his report that the deceased died of the Ante mortem injuries. He assessed the approximate time of death being 21.11.1979 at 5:00 p.m. No question was put to thim as to the timing of the death. Thus, the death was proved by the ante mortem injuries, the nature of the injuries undoubtedly show that they are caused by some sharp edged and pointed weapons, most of the injuries are incised wounds except injury no.1 i.e. lacerated over the head bone deep. The depth of the injuries upto muscle deep or bone deep confirms the weapon assigned to the accused namely axe (Kulhari) and sickle (hasiya).

75. In this way, in the absence of any contradiction in the statement of the sole witness as to the mode and manner adopted by the accused with the weapons used by them which stood proved with further corroboration from the post-mortem report and the evidence of the medical witness P.W.12, Dr. Suresh Sakalya it has to be accepted. Nothing carved out from both the witnesses against this proved state of things in the cross examination. It is further reinforced by circumstances coupled with the motive of the accused persons to commit the crime which is indicative of conclusions that the accused persons are the real offenders who had committed the alleged crime, however, such occurrence had taken place in broad day light and Kashiram (the first informant) had witnessed the entire occurrence from a short distance of about 15-20 paces. There is no possibility of committing any mistake by him, moreover, it will be indeed perverse against the ordinary course of human nature and conduct for Kashiram to permit the real assailants of deceased "Ramphal' to go unpunished and instead of implicating the accused persons just with a view to satisfy his own ego.

76. In the present case, the evidence as to the presence on the spot of incident at the relevant time and date of the incident proved to be probable and natural, free

from contradictions, exaggeration or embellishment. Some minor contradictions or inconsistency are immaterial, irrelevant details which are not in the capacity in anyway corrode the credibility of witness cannot be labelled as omission or contradictions. This settled legal principle is reiterated in various decision of the Apex Court. It is held by the Apex Court in ***Brahm Swaroop and Another Vs. State of Uttar Pradesh16*** as under :-

"It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." Difference in some minor details, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and shifting 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 basis version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses."

77. On the basis of above discussion and perusal of the impugned judgement in the appeal, we do not find any error in the judgment of conviction and order of sentence passed by the trial Court. No interference is required. The appeal deserves to be ***dismissed.***

78. Consequently, the appeal against the judgment of conviction and order of sentence dated 27.09.1984 passed by the Additional District and Sessions Judge, Lalitpur in Session Trial No.47 of 1983 (State Vs. Karan Singh), convicting and sentencing the appellant under Section 302, 148 and 149 of the Indian Penal Code, 1860 is hereby dismissed.

79. Certify this judgment to the court below for further necessary action and compliance. The lower court record be sent back to the District Judgeship, Lalitpur immediately for further action.

(2022)06ILR A688
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Criminal Appeal No. 3054 of 2013

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

Counsel for the Appellant:
Sri Sudhir Kumar, Sri Munesh Kumar Upadhyay, Sri Sunil Kumar, Sri Sanjay Sharma, Sri Narendra Deo Rai

Counsel for Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 106- The provisions of section 106 of the Evidence Act will have no

applicability in the facts of the case as the dead body of the deceased has been found not from the house of the appellant, rather, it has been found from the canal of which sketch plan is at page 68 of the paper book. The canal is about 70 meter wide and is at a distance from village Nadrai. The place is otherwise a open place and, therefore, presumption under section 106 of the Evidence Act would not arise in the facts of the case.

Where the body of the deceased is recovered from an open place and not from within the house of the appellant, the burden of proof under Section 106 of the evidence act cannot be shifted upon him.

Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- Last Seen- for a conviction to stand on the basis of circumstantial evidence, the facts so established should be consistent only with the hypothesis of guilt of the accused and must exclude other possible hypothesis. In the facts of the case except to allege that the appellant had taken the deceased on motorcycle, there is no evidence either of last seen or to connect the missing dots so as to rule out any alternative hypothesis. An alternative hypothesis for the cause of death cannot be ruled out, particularly when there is a gap of nearly 3-4 days between the allegation of last seen and the time of death of the deceased. In such circumstances, the trial court was not justified in coming to the conclusion that the murder of deceased was done by the accused appellant.

There must be a reasonable proximity in time between the point when the deceased was last seen in the company of the accused and his death as the lapse of a considerable time cannot rule out the possibility of the deceased coming in the company of several other persons also.

Code of Criminal Procedure, 1973- Sections 228, 216 & 217- Originally the charges against the appellant were framed by sessions judge under section 498-A, 304-B, 201 IPC & ¾ D. P. Act and after the entire oral and documentary evidence was concluded by the trial court, that the alternative charge under section 302 IPC was framed . None of the witnesses were produced to prove the charge under section 302 IPC. No finding otherwise is contained in the judgment of the trial court to even suggest that no prejudice would be caused to accused on account of non holding of a new trial in the matter- Necessary ingredients to bring home a charge under section 302 IPC is clearly distinct from the evidence required to be adduced to prove a charge under section 304-B IPC read with section 498-A IPC. Statutory presumption would be available in such cases where the death is within seven years of marriage but for a charge under section 302 IPC the prosecution, by producing cogent evidence, must prove the charge and the presumptions would not be available in such case-The prosecution in support of charge framed under section 302 IPC will have to independently adduce evidence so as to establish the guilt of accused. It is thereafter that the accused gets right to cross examine the prosecution witnesses or to put forth its defence witnesses. Unless such a procedure is followed the right of the accused to prove his innocence would be compromised. Section 216 and 217 Cr.P.C. contains a wholesome procedure encompassing principles of natural justice with the intent that accused is given reasonable opportunity to prove his innocence in a fair criminal trial- In the facts of the case no such procedure consistent with the requirement of section 217 and 218 Cr.P.C. has been followed by the trial court. There is absolutely no whisper in the judgment about compliance of provisions contained in section 216 Cr.P.C. It may be reiterated that the trial court also has not independently formed an opinion that no prejudice would be caused to the appellant in the process. The trial, therefore, is clearly vitiated for non compliance of section 216 Cr.P.C.

When the trial is initially conducted to prove the offences u/s 498-A and 304B of the IPC, the charges having been framed under the said

sections, but after the entire evidence is led the court frames the Charge u/s 302 of the IPC and convicts the accused under the said section then the trial will stand vitiated as the burden of proof and the evidence to be led by both sides would be entirely different from that led in a trial u/s 304B. (Para 21, 22, 23, 25, 26, 27, 28)

Criminal Appeal allowed. (E-3)

Judgements / Case Law relied upon:-

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

2. Nagendra Shah Vs St. of Bih, (2021) 10 SCC 725

3. R Rachaiah Vs Home Secy, Bangalore, (2016) 12 SCC 172

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This appeal is by the accused Umesh Yadav challenging his conviction in Sessions Trial No.198 of 2012 under Section 302 read with section 201 IPC arising out of Case Crime No.605 of 2011 under Sections 498-A, 304-B, 201 IPC & ¾ of Dowry Prohibition Act, Police Station Sikandrarau, District Hathras, sentencing him to rigorous imprisonment for life under section 302 IPC, together with fine of Rs.20,000/- and for failure to pay fine to undergo additional simple imprisonment for a term of one year. He has also been sentenced to seven years rigorous imprisonment under section 201 IPC alongwith fine of Rs.10,000/- and failure to pay fine would result in simple imprisonment of six months. The punishments are to run concurrently. Appellant, however, has been acquitted of the charges under section 498-A, 304-B IPC & ¾ of Dowry Prohibition Act.

2. Facts giving rise to the appellant's implication in the aforesaid is the lodgement of First Information Report in Case Crime No.605 of 2011 as per which the informant Malkhan Singh married his daughter Reena to the appellant nearly three years back after payment of adequate dowry. It is alleged that the appellant used to harass informant's daughter for demand of dowry of a plot and assaulted her too. Appellant is also alleged to be having an illicit relationship with the wife of his brother Munesh. On 12.11.2011 the informant's daughter was thrown out of the house for having not brought enough dowry and asked to get a plot at Sikandrarau. Upon receiving such information the informant and his cousin Rameshwar brought her back and she was staying at Nagla Babool since 13.11.2011. As per FIR allegation the appellant Umesh alongwith his brother Munesh came to Nagla Babool on a motorcycle at 04.00 PM on 28.11.2011 and took informant's daughter with them on a motorcycle on the pretext that she will not have any grievance in future. The informant, however, received information that his daughter Reena has been done to death by Umesh and Munesh and their family members and the dead body has been thrown in Nirdai Canal in Police Station Dholna, District Kanshi Ram Nagar. Upon receiving such information the informant alongwith his brother Jai Narayan, Yograj, Shyoraj etc. reached Nagla Gulabi i.e. in-laws place of the daughter. Upon inquiry it came to their knowledge that his daughter has been done to death and is not traceable since 28.11.2011. No satisfactory reply was received about the whereabouts of deceased. It is then alleged that the informant visited the middleman Ramdas who had arranged the marriage itself and stayed at his house in the night and upon return found that accused persons have left their home alongwith cattle etc. in the night of 2/3.12.2011. The informant with his

relatives made efforts to trace out his daughter and her dead body was ultimately found floating in the canal and prompt information in that regard was given to Police Station Dholna. As per the inquest report the deceased appeared to have died due to strangulation. The body otherwise had no apparent injury marks etc. In the opinion of inquest witnesses the deceased was strangulated by tying saree around her neck by the appellant.

3. On the basis of information given, Chik of FIR in Case Crime No.605 of 2011 was lodged, which is mentioned in General Diary as paper no.38. Postmortem was performed by Dr. N.S. Tomar, who described the cause of death as asphyxia due to throttling. Inquest, site plan and postmortem etc. was duly prepared whereafter charge sheet was submitted against the appellant under sections 498-A, 304B, 201 IPC & ¾ of D.P. Act and the matter was committed to the court of sessions. The accused appellant was summoned in court and charge was read out to him. Appellant denied the charges and consequently trial proceeded in the matter. As many as 13 witnesses were examined by the prosecution.

4. The first witness produced on behalf of the prosecution is Malkhan Singh (the informant) as PW-1 on 12.09.2012, whereas the last witness PW-13 Jai Narayan was examined on 10.04.2013. It is thereafter that the accused appellant was examined under section 313 Cr.P.C. on 09.05.2013 and the judgment convicting the appellant and sentencing him to life and other punishments, noticed above, has been delivered on 29.05.2013.

5. At the outset it would be worth noticing that charge was read out to the accused appellant by the Sessions Judge, Hathras on 14.08.2012 under sections 498-A, 304-B, 201 IPC & ¾ D. P. Act and all the witnesses were examined to prove the aforesaid charge between 12.09.2012 to 10.04.2013. It is thereafter that alternative charge got framed by the concerned court under section 302 IPC. Admittedly, none of the witnesses were adduced after 24.04.2013 nor any of the witnesses previously adduced were recalled and the sessions court after examining the accused appellant under section 313 Cr.P.C. has proceeded to convict him for the alternative charge framed on 24.04.2013 under section 302 IPC, relying upon the evidence led earlier on the charges previously framed under section 498-A, 304-B, 201 IPC & ¾ D. P. Act. While examining the accused under section 313 Cr.P.C. the statements of witnesses were referred to the accused appellant and he has not been specifically confronted with the charge of murder. The principal contention advanced on behalf of the appellant, therefore, is that the entire trial stands vitiated for non compliance of the mandatory requirement contained in section 216 Cr.P.C.

6. It is worth noticing that there is no eye witness to the commissioning of alleged offence and the prosecution case rests upon circumstantial evidence.

7. In order to bring home the charge initially framed against the appellant the prosecution produced the FIR; written report; recovery memo of motorcycle; postmortem; inquest report; and charge sheet. Site plan with index has also been produced. The postmortem was conducted on 04.12.2011 at 12.55 PM in which death allegedly occurred 2-3 days back and the cause of death is asphyxia as a result of strangulation. In the inquest report prepared

on 03.12.2011 at 05.20 PM also death is reported to homicidal on account of throttling and no signs of injury was seen. In the opinion of the inquest witnesses the deceased has been done to death by her husband Umesh by strangulation.

8. Malkhan Singh, father of deceased Reena, has been adduced as PW-1, who has been declared hostile in view of his statement that neither any demand of dowry was made from his daughter nor she was ever harassed. He has also retracted from the statement under section 161 Cr.P.C. and has denied suggestion that on account of a subsequent compromise he is giving false statement. It has also been stated that he was mentally stressed on account of death of his daughter and persons from opposite party were present as such he has lodged the FIR. PW-2 Shyoraj Singh, brother in law of the informant, has also turned hostile. He has stated that deceased stayed for about 15 days at his house in Sikanderpur and left for village Katka alone and it is incorrect to state that she was taken to her in-laws place by her husband and brother-in-law Munesh. He has also disowned his statement allegedly given under section 161 Cr.P.C. PW-3 Kamla is the wife of PW-2 and sister of PW-1, who too has denied the prosecution version that the appellant and his brother had taken the deceased on motorcycle from her house. She has also disowned her statement under section 161 Cr.P.C. and declared hostile. PW-4 Yogendra is the inquest witness, who has feigned ignorance about the cause of death. PW-5 Manoj Kumar has also been declared hostile. PW-6 Ramdas is a retired teacher, who had arranged marriage of accused appellant with the deceased and has stated that there was no demand of dowry and he has also retracted from the statement under section 161 Cr.P.C. and has been declared hostile. PW-7 Ramvir Singh has also been declared hostile. PW-8 Baniram similarly has been declared hostile. PW-9 Omveer is the uncle of deceased and is inquest witness, who too has been declared hostile. Similarly, PW-10 Bishamwar Singh has also been declared hostile after he stated that police obtained his signatures on blank paper which apparently was used to prepare recovery memo in respect of motorcycle seized from the accused appellant. PW-11 Deepak Kumar is also declared hostile. PW-12 Dalvir Singh is the inquest witness and has not supported the prosecution case. PW-13 is the uncle of deceased, who has stated that accused Umesh had taken the deceased from Sikanderpur and her dead body was found three days, later.

9. The accused appellant in his statement under section 313 Cr.P.C. has denied having received any dowry for marriage or that he had illicit relations with sister in law. During the course of trial a plea was setup on behalf of the accused appellant that possibly the deceased had committed suicide as she was not able to conceive any child even after 3-4 years of marriage and she used to remain unhappy.

10. The trial court has relied upon the statement of PW-13 Jai Narayan, according to whom, Umesh had taken the deceased Reena three days back from Sikanderpur and her dead body was found later. The trial court has essentially relied upon the theory of last seen, relying upon the statement of PW-13 and the fact that the deceased had ligature mark all around her neck i.e. 25cm x 1.5cm just below thyroid cartilage and dissection of ligature mark subcutaneous tissue ecchymosed and her thyroid bone was also found fractured, to come to the conclusion that it was the

accused appellant who had throttled his wife. Trial court has also observed that onus was upon the husband to prove the cause of death inasmuch as he himself was involved in the crime and that is why he neither reported the death nor had given any information to the family of the deceased. Since allegation of dowry was not substantiated the trial court acquitted the appellant of offence under sections 498-A, 304-B IPC and ¾ D. P. Act. However, relying upon the theory of last seen, as also the fact that death of deceased was homicidal, the trial court convicted the appellant under section 302 read with 201 IPC. Thus aggrieved, the appellant is before this Court.

11. Learned counsel for the appellant submits that there exists no evidence in the eyes of law to connect the appellant with the commissioning of offence inasmuch as the plea of last seen is not substantiated in view of the fact that there was considerable gap between the time when the deceased was allegedly taken by appellant and her death. Possibility of another hypothesis, as being cause of death, cannot be ruled out. It is also argued that the trial itself stood vitiated inasmuch as the charge originally read out to the accused did not include section 302 IPC nor was it an alternative charge and it is only after conclusion of evidence adduced by prosecution that the charge was amended so as to include section 302 IPC and the judgment of conviction/sentence delivered without complying with requirement of section 216 Cr.P.C. is bad in law. Submission also is that even if alternative charge was to be framed, the prosecution was under an obligation to adduce evidence in support of the charge under section 302 IPC with a corresponding right with the accused to cross examine such witnesses or to produce his defence witnesses and failure to do so has vitiated the trial itself.

12. Learned AGA, on the other hand, submits that a fair trial is conducted in the matter and no prejudice is caused to the appellant on account of non following of procedure under section 216 Cr.P.C. It is further urged that the fact that prosecution witnesses turned hostile clearly indicates some sort of compromise between the parties, which cannot be encouraged, and the trial court has rightly convicted the accused appellant under section 302 IPC.

13. We have heard Sri Sunil Kumar, learned counsel for the appellant and Sri Ali Murtaza, learned AGA for the State and have perused the materials brought on record.

14. So far as the facts of the case are concerned, the factum of lodging FIR on the basis of a report of informant is proved. The allegation in the FIR is with regard to demand of dowry, particularly the demand of a plot at Sikandrarau. It is then alleged that on 28.11.2011 the accused appellant came with his brother and took the deceased on a motorcycle by assuring that the wife would face no further difficulty and thereafter killed her and threw the body in the canal. The postmortem report has also been proved, according to which, the death had occurred 2-3 days prior to 04.12.2011 when the postmortem itself was conducted at 12.55 PM. The dead body had ligature mark all around her neck i.e. 25cm x 1.5cm just below thyroid cartilage and dissection of ligature mark subcutaneous tissue ecchymosed and her thyroid bone was also found fractured. As per the inquest also the death was occasioned by throttling. The evidence thus placed on record leaves no room of doubt that

deceased Reena suffered homicidal death on account of throttling. There is absolutely no issue, so far, regarding cause of death of the deceased.

15. As per the FIR the death had occurred about 2-3 days back and tentative date of death as per the FIR and postmortem report appears to be 1st December, 2011.

16. According to prosecution version the deceased was taken by the accused appellant on 28.11.2011 to his village on a motorcycle from Nagla Babool and her body was found in the canal on 03.12.2011. There is a gap of about 3-4 days between the time accused appellant took the deceased and her dead body was found.

17. So far as the evidence of last seen is concerned there are apparently two witnesses i.e. PW-2 and PW3, who had supported such plea in their statement under section 161 Cr.P.C. but both of them have later turned hostile. In their deposition before the court PW-2 & PW-3 have clearly stated that the deceased left their home on her own for going to her parental village Katka, Aligarh. The prosecution version that the accused appellant had taken the deceased on motorcycle alongwith his brother Munesh on 28.11.2011 has been specifically denied. PW-2 & PW-3 are husband and wife and are closely related to the deceased. The only other statement to support the case of last seen is the statement of PW-13 Jai Narayan, who has stated that the deceased was taken by accused appellant whereafter her dead body was found three days, later. He, however, has not seen the accused appellant taking the deceased himself nor has disclosed the identity of the person from whom he gathered such information. Such person has otherwise not been adduced in evidence. The evidence of PW-13 is thus not reliable inasmuch as he has neither seen the deceased being taken by appellant himself nor has disclosed the identity of the person from whom such information was received. His statement cannot even be a hearsay evidence. No other evidence has been placed on record before the court on the basis of which it could be said that the accused appellant had taken the deceased on his motorcycle. The basis of last seen theory, in such circumstances, is clearly demolished on facts.

18. The trial court has merely referred to the statement of PW-13 to rely upon the theory of last seen. The statement of PW-13 has not been carefully examined by the trial court nor it has been seen that PW-13 was neither present at such time nor even claims to have seen the deceased going with the accused appellant. His statement cannot thus be relied upon to support the prosecution version that the deceased was lastly seen with the accused appellant.

19. The trial court has also failed to consider the fact that even if the plea of last seen was to be accepted, yet the delay of 3-4 days was material and an alternative hypothesis as being the cause of death during this period could not have been ruled out in the facts of the case. This being a case of circumstantial evidence the chain of events must be proved to be complete so as to rule out any alternative hypothesis as being the cause of death.

20. Law with regard to the principles to be followed for conviction in a case of circumstantial evidence has been summed up by the Supreme Court in Sharad Birdichand Sarda vs. State of Maharashtra,

(1984) 4 SCC 116, which has acquired the status of a locus classicus on the issue. The judgment has been followed recently by the Supreme Court in Nagendra Shah vs. State of Bihar, (2021) 10 SCC 725 for applying the five golden principles to observe as under in paragraph 17 to 19 of the judgment:-

"17. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , in para 153, this Court has laid down five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 reads thus : (SCC p. 185)

"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 inShivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] wherein the following observations were made : (SCC p. 807, para 19)

"19. ... 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."

(emphasis supplied)

18. Paras 158 to 160 of the said decision are also relevant which read thus : (Sharad Birdhichand Sarda case [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , SCC pp. 186-87)

"158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor General relying on a decision of this Court in Deonandan Mishra v. State of Bihar [Deonandan Mishra v. State of Bihar, AIR 1955 SC 801 : (1955) 2 SCR 570, 582 : 1955 Cri LJ 1647] , to supplement his argument that if

the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus : (AIR pp. 806-07, para 9)

"9. ... But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, ... such absence of explanation or false explanation would itself be an additional link which completes the chain.'

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been [Ed. : The matter between two asterisks has been emphasised in original.] satisfactorily proved [Ed. : The matter between two asterisks has been emphasised in original.] ,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case [Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19] wherein this Court observed thus : (SCC p. 43, para 30)

"30. ... Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.'"

(emphasis supplied)

19. In this case, as mentioned above, neither the prosecution witnesses have deposed to that effect nor any other material has been placed on record to show that the relationship between the appellant and the deceased was strained in any manner. Moreover, the appellant was not the only person residing in the house where the incident took place and it is brought on record that the parents of the appellant were also present on the date of the incident in the house. The fact that other members of the family of the appellant were present shows that there could be another hypothesis which cannot be altogether excluded. Therefore, it can be said that the facts established do not rule out the existence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis of the guilt of the appellant."

21. After referring to the provisions contained under section 106 of the Evidence Act the Court has observed that a case of circumstantial evidence can succeed only if the chain of circumstances is established and failure of prosecution to do so cannot be made good by any failure on part of the accused to discharge the burden under section 106 of the Evidence Act. The observations of the Court in paragraph 22 to 24 of the judgement in Nagendra Shah's case (supra) are also relevant and are reproduced hereinafter:-

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.

24. As we have already held in this case, the circumstances established by the prosecution do not lead to only one possible inference regarding the guilt of the appellant-accused."

22. The provisions of section 106 of the Evidence Act will have no applicability in the facts of the case as the dead body of the deceased has been found not from the house of the appellant, rather, it has been found from the canal of which sketch plan is at page 68 of the paper book. The canal is about 70 meter wide and is at a distance from village Nadrai. The place is otherwise a open place and, therefore, presumption under section 106 of the Evidence Act would not arise in the facts of the case.

23. In light of the principles laid down in Sharad Birdichand Sarda (supra), as followed in Nagendra Shah (supra), it is clearly discernable that for a conviction to stand on the basis of circumstantial evidence, the facts so established should be consistent only with the hypothesis of guilt of the accused and must exclude other possible hypothesis. In the facts of the case except to allege that the appellant had taken the deceased on motorcycle, there is no evidence either of last seen or to connect the missing dots so as to rule out any alternative hypothesis. An alternative hypothesis for the cause of death cannot be ruled out, particularly when there is a gap of nearly 3-4 days between the allegation of last seen and the time of death of the deceased. In such circumstances, the trial court was not justified in coming to the conclusion that the murder of deceased was done by the accused appellant. The finding, in that regard, by the trial court is found to be based on no evidence. In the facts of the case the chain of events referred to in Sharad Birdichand Sarda (supra) is otherwise not complete, since alternative hypothesis cannot be rule out. From the

considerations of materials produced on record we find that the prosecution has miserably failed to prove the alleged offence on part of the appellant beyond reasonable doubt.

24. We now proceed to deal with the other argument advanced on behalf of the appellant, in support of the appeal i.e. non adherence to the procedure stipulated in section 216 Cr.P.C.

25. We have noted that originally the charges against the appellant were framed by sessions judge under section 498-A, 304-B, 201 IPC & ¾ D. P. Act and the entire evidence was adduced by the prosecution in respect of such charges. The witnesses were also cross-examined in that context. It is after the entire oral and documentary evidence was concluded by the trial court, by 10.04.2013, that the alternative charge under section 302 IPC was framed on 24.04.2013. None of the witnesses were produced to prove the charge under section 302 IPC. No finding otherwise is contained in the judgment of the trial court to even suggest that no prejudice would be caused to accused on account of non holding of a new trial in the matter. Sections 216 and 217 Cr.P.C. have been considered by the Supreme Court in R Rachaiah vs. Home Secretary, Bangalore, (2016) 12 SCC 172 to hold the provision to be mandatory in following words in paragraphs 8 to 15 of the judgment:-

"8. The appellants filed a common appeal against the said conviction taking a specific plea to the effect that there could not have been any conviction under Section 302 IPC. In this regard, it was also pleaded that the "alternative charge" under Section 302 IPC was wrongly framed without following the procedure under Sections 216 and 217 of the Code and, therefore, the entire trial insofar as conviction under Section 302 IPC is concerned stood vitiated. It was further argued that there could not have been any conviction under Section 364 IPC as well in the absence of any specific charge under this section. The appellants also challenged the conviction on merits.

9. The High Court, in detail, discussed the merits of the case and did not find favour with the arguments of the appellants. It is not necessary for us to go into this aspect as we find that the trial which is conducted and on the basis of which conviction is recorded under Section 302 IPC is clearly vitiated as the same is in violation of the mandatory procedure prescribed under Sections 216 and 217 of the Code. These two sections are reproduced below:

"216. Court may alter charge.--(1) Any court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as

aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. *Recall of witnesses when charge altered.*--Whenever a charge is altered or added to by the court after the commencement of the trial, the prosecutor and the accused shall be allowed--

(a) to recall or resummon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the court may think to be material."

10. The bare reading of Section 216 reveals that though it is permissible for any court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and (4) of Section 216 of the Code. Sub-section (3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section (4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

11. Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or resummon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the court is to even allow any further witness which the court thinks to be material in regard to the altered or additional charge.

12. When we apply the aforesaid principles to the facts of this case, the outcome becomes obvious. The accused persons were initially charged for an offence under Section 306 IPC i.e. abetting suicide which was allegedly committed by Dr Shivakumar. It is manifest therefrom that the entire case of the prosecution, even after repeated investigations and medical

examination of the dead body/skeleton of Dr Shivakumar, was that the cause of the death was suicide. Thus, after the investigation, what the prosecution found was that Dr Shivakumar had committed suicide and, as per the prosecution, the three appellants had aided and abetted the said suicide which was committed by Dr Shivakumar. On this specific charge, 26 witnesses were examined and cross-examined by the appellants. Obviously, when the appellants are charged with an offence under Section 306 i.e. abetting the suicide, the focus as well as stress in the cross-examination shall be on that charge alone. At the fag-end of the trial, the charge is altered with "alternative charge" with the framing of the charge under Section 302 IPC. This gives altogether a different complexion and dimension to the prosecution case.

13. Now, the charge against the appellants was that they have committed murder of Dr Shivakumar. In a case like this, addition and/or substitution of such a charge was bound to create prejudice to the appellants. Such a charge has to be treated as original charge. In order to take care of the said prejudice, it was incumbent upon the prosecution to recall the witnesses, examine them in the context of the charge under Section 302 IPC and allow the accused persons to cross-examine those witnesses. Nothing of that sort has happened. As mentioned above, only one witness i.e. official witness, namely, Deva Reddi, Deputy Superintendent of Police, was examined and even he was examined on the same date i.e. 30-9-2006 when the alternative charge was framed. The case was not even adjourned as mandatorily required under sub-section (4) of Section 216 of the Code.

14. In a case like this, with the framing of alternative charge on 30-9-2006, testimony of those witnesses recorded prior to that date could even be taken into consideration. It hardly needs to be demonstrated that the provisions of Sections 216 and 217 are mandatory in nature as they not only subserve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity. Cross-examination of the witnesses, in the process, is an important facet of this right. Credibility of any witness can be established only after the said witness is put to cross-examination by the accused person.

15. In the instant case, there is no cross-examination of these witnesses insofar as charge under Section 302 IPC is concerned. The trial, therefore, stands vitiated and there could not have been any conviction under Section 302 IPC."

26. Necessary ingredients to bring home a charge under section 302 IPC is clearly distinct from the evidence required to be adduced to prove a charge under section 304-B IPC read with section 498-A IPC. Statutory presumption would be available in such cases where the death is within seven years of marriage but for a charge under section 302 IPC the prosecution, by producing cogent evidence, must prove the charge and the presumptions would not be available in such case.

27. The prosecution in support of charge framed under section 302 IPC will have to independently adduce evidence so as to establish the guilt of accused. It is thereafter that the accused gets right to cross examine the prosecution witnesses or to put forth its defence witnesses. Unless

such a procedure is followed the right of the accused to prove his innocence would be compromised. Section 216 and 217 Cr.P.C. contains a wholesome procedure encompassing principles of natural justice with the intent that accused is given reasonable opportunity to prove his innocence in a fair criminal trial.

28. In the facts of the case no such procedure consistent with the requirement of section 217 and 218 Cr.P.C. has been followed by the trial court. There is absolutely no whisper in the judgment about compliance of provisions contained in section 216 Cr.P.C. It may be reiterated that the trial court also has not independently formed an opinion that no prejudice would be caused to the appellant in the process. The trial, therefore, is clearly vitiated for non compliance of section 216 Cr.P.C.

29. The plea taken by learned AGA that the matter be remanded to trial court also cannot be accepted for the following reasons:-

(i) No evidence exists against the appellant to bring home the charge under section 302 IPC as all witnesses of fact have turned hostile.

(ii) The appellant has remained in jail for more than 11 years without remission and we cannot allow him to remain in custody any further, as such a course would be wholly unjust in the facts of the case.

30. In view of the aforesaid deliberations and discussions, this appeal succeeds and is allowed. The judgment and order dated 29.05.2013, passed by the Additional Sessions Judge, Court No.1, Hathras, convicting and sentencing the appellant in Session Trial No.198 of 2012 (State vs. Umesh Yadav) arising out of Case Crime No.498-A, 304-B, 201, 302 IPC & ¾ of Dowry Prohibition Act, Police Station Sikandrarau, District Hathras is hereby set aside. The appellant is acquitted from the charges of offence under section 302 read with 201 IPC and he shall be set at liberty forthwith, if he is not wanted in any other case.

(2022)06ILR A701
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 3246 of 2012
Connected with
Criminal Appeal No. 3641 of 2012

Smt. Rajola & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Noor Mohammad (Junior), Sri Manu Khare, Sri Yogesh Kumar Srivastava, Sri Jitendra Singh Lodhi, Sri Harish K. Yadav, Sri Rajendra Prasad Tiwari, Sri Vinay Kumar Tiwari, Sri Chandra Prakash Pandey, Sri Rajrshi Gupta, Sri Sharad Saran, Sri Dileep Kumar

Counsel for the Respondent:
G.A., Sri Ali Hasan

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 302/34 & 498-A - Husband or relative of husband of woman subjecting her to cruelty, Section 304-B - Dowry death, Dowry prohibition Act,1961 - Section 3/4 , The Code of criminal procedure, 1973 - Section 207,313,

Indian Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge , Section 113B - Presumption as to dowry death.

Marriage of the deceased with appellant - six years prior to incident - F.I.R. lodged by informant (father of deceased) - Sufficient dowry given in marriage - torture by relative - relation to the demand of Rs. One lac for purchasing a tractor – demand of motorcycle - subjected to harassment - not fulfilling demand - family members arrived at the matrimonial home of his daughter - at about 2 o'clock in the night - found the door of the house closed from outside - opened by uncle of his son-in-law - found daughter lying dead in the room who was set ablaze.

(B) Criminal Law - first ingredient of Section 304-B IPC - death of women must have been caused by burns or bodily injury or otherwise than under normal circumstances - evident from statements of P.W.1, P.W.2 & P.W. 3 - reached matrimonial house of deceased at about 2 a.m. - deceased found lying burnt inside the room of the house **-** inquest report - deceased died of the burn injuries - postmortem - death being Asphyxia due to ante-mortem burn injuries - proved that the death was caused by ante-mortem burn injuries which was otherwise than under normal circumstances .**(Para - 39)**

(C) Criminal Law - Second ingredient of Section 304-B IPC - death must have been occurred within 7 year of the marriage to raise a presumption of dowry death - date of marriage of deceased with appellant - proved as 31.4.2000 - death of the deceased, thus, proved to have been taken place within seven years of her marriage. **(Para - 40,44)**

(D) Criminal Law - Indian Evidence Act, 1872 - Section 113B - Presumption as to dowry death - testimony of prosecution witnesses - proved that unnatural death of deceased caused by burn injuries within seven years of marriage - soon before her death, deceased was subjected to cruelty by her husband and his family members in connection with the demand of dowry - appellant caused dowry death of victim - charge under Sections 304-B IPC proved against the appellants - charges under Section 498-A & Section 4 Dowry Prohibition Act proved.**(Para - 45,47,48)**

(E) Criminal Law - Conviction of appellants under section 302 IPC by trial court - based on hypothesis and contrary to the evidence on record - Taking recourse to the Section 106 of Indian Evidence Act - not found to be justified - trial court committed illegality in convicting the appellants under Section 302 IPC with the aid of Section 106 of the Indian Evidence Act. **(Para - 50)**

HELD:- Charges under Section 304-B, 498-A IPC & Section 4 Dowry Prohibition Act are proved beyond all reasonable doubt, against the appellants. Conviction and sentence awarded by trial court under Section 302 IPC stands modified accordingly. **(Para - 51)**

Criminal Appeals partly allowed. (E-7)

List of Cases cited:-

1. Pawan Kumar & ors. Vs St. of Har., 1998 (3) SCC 309

2. Prem Kanwar Vs St. of Raj., 2009(1)JT197

3. Hem Chand Vs St. of Har., (1994) 6 SCC 727

4. G.V. Siddaramesh Vs St. of Karn., (2010)3 SCC 152

5. Sunil Dutt Sharma Vs State , (2014) 4 SCC 8 375

6. V.K. Mishra & anr. Vs St. of Uttarakhand , (2015) 9 SCC 588

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

1. These criminal appeals arise from the judgment and order dated 31.07.2012 passed by the Additional District & Sessions Judge, Court No. 3, Jhansi in Sessions Trial No. 133 of 2007 (State Vs. Sunil Kumar Yadav and another), arising out of Crime No. 193 of 2006, under

Section 302 read with Section 34, 498-A IPC & Section 4 Dowry Prohibition Act, Police Station Erach, District Jhansi, whereby the appellants Smt. Rajola, Raj Kumar @ Majhaley, Smt. Ram Dulari @ Uma, Neetu @ Ram Kumar and Sunil Kumar Yadav have been convicted and sentenced under Section 302/34 IPC with life imprisonment and fine of Rs.10,000/- each; in default of payment of fine to undergo additional imprisonment for a period of six months; under Section 498-A IPC with three years imprisonment and fine of Rs.2,000/- each; in default of payment of fine to undergo additional imprisonment for a period of two months and under Section 4 Dowry Prohibition Act with one year imprisonment and fine of Rs.1,000/- each, in default of payment of fine to undergo additional imprisonment for a period of one month.

2. The prosecution case in brief is that, on 01.11.2006 at about 5.10 a.m., an F.I.R. was lodged at the police Station Erach, District Jhansi by the informant Manmohan Singh, the father of the deceased r/o Village Puraini, Police Station Bhoganipur, District Kanpur Dehat by filing a written report stating therein that his daughter Smt. Anita Yadav aged about 26 years was wedded to Sunil Kumar Yadav R/s Village Dikauli, Police Station Erach, District Jhansi six years prior to the incident. Sufficient dowry was given in marriage, but his daughter told him that her husband Sunil Kumar, mother-in-law Smt. Rajola, brother-in-law Raj Kumar @ Majhale, his wife and younger brother-in-law Neetu aged about 20 years used to torture her in relation to the demand of Rs. One lac for purchasing a tractor. The first informant stated that he helped as much as he could to purchase the tractor. Again, they pressed his daughter to bring a motorcycle from her father and subjected her to harassment for not fulfilling their demand. His daughter informed him about this then he along with other members of his family went to village Dikauli and expressed their inability to pay money for the motorcycle and also asked to bring his daughter with him but they did not see her off. The first informant returned to his village. On 31.10.2006, in the night at about 8 p.m., his daughter phoned and told that the inmates of her sasural were beating her and pleaded him to rescue her. At that information, he along with the other family members arrived at the matrimonial home of his daughter at about 2 o'clock in the night where he found the door of the house closed from outside. He got it opened by Rameshwar, uncle of his son-in-law and there he found that his daughter Anita was lying dead in the room who was set ablaze. On the basis of the written report (Tahreer), the case was registered as Crime No. 193 of 2006 under Sections 498-A, 304-B IPC Section ¾ Dowry Prohibition Act. The detail of the case was entered in the G.D. report No. 6.

3. The investigation of the case was handed over to the circle officer Garautha.

4. The inquest of the deceased Smt. Anita, was conducted by S.I. Lalit Kishor on the same day and the report was prepared by him along with other relevant papers required for the purpose of post-mortem. Dead body was sealed and handed over to constable Satendra Kumar and Ram Sewak who brought it to the mortuary C.H.C. Mauranipur, Jhansi.

5. The post-mortem was conducted on 1.11.2006. It is mentioned in the post mortem report that the dead body brought by constable Satendra Kumar and Ram

Sewak was received in a sealed cloth, seal on which tallied with the sample seal. The findings recorded in the post mortem report are as under:

External examination: age about 26 years, body of average built female with both upper limb flexed and both lower limb flexed. Body is in pugilistic attitude. Both eyes closed, mouth closed but semi opened & tooth looking between the lips.

Ante-mortem injuries: Superficial to deep burn present over the body except both buttocks upper and lower quadrant where line of redness present. Whole body is black in colour except normal area. Hair of scalp, burnt totally except at posterior part of head where hairs were unburnt (choti latak rahi hai).

Abdomen burst on upper part right side and from burst appearing loop of small intestine and liver lower part visible, both are blackish in colour. Right elbow joint is burnt where both upper end of the radius @ ulna bone exposed with blackish colour. Left elbow joint is burnt and left whole joint with underlying bone exposed.

Thorax: wall & ribs burnt. Pleura congested. Larynx, traccea and bronchi-sooty black particles present over the congested mucosa. Right & left lungs-congested and pericardium-congested. Heart-right side full, left side empty.

Abdomen: Wall burnt, peritoneum congested, Cavity only smell and gases present. Buccal Cavity, pharynx & teeth-16/16. Esophagus congested. Stomach contents about 50 ml semi digested food present. Small intestine semi digested food present. Large intestine faecal matter at places. Gall bladder congested. Pancreas congested. Spleen congested. Kidneys congested. Urinary bladder-empty. Generation organs NAD except burnt.

Time since death about 18 hours.

Cause of death was asphyxia due to antemortem burn.

6. During investigation, wet and dry soil along with burnt ash of clothes was taken into possession and recovery memo was prepared. An invitation card of marriage of the deceased was given by the informant and memo was prepared. After inspection of the place of occurrence, site plan was prepared and statements of witnesses conversant to the facts of the case were recorded. On the basis of the material collected during investigation, prima facie case was found to be made out against the accused under Sections 498-A, 304-B IPC & Section ¾ Dowry Prohibition Act and hence the charge sheet was submitted to the court concerned.

7. Learned Chief Judicial Magistrate took cognizance of the offences and provided copies of the prosecution papers in compliance of Section 207 Cr.P.C. to the accused persons and committed the case to the court of sessions for trial.

8. The trial court after taking into consideration the material on record, framed the charges against the appellants under Sections 498-A, 304-B IPC & Section 4 Dowry Prohibition Act and alternative charge under Section 302/34 IPC.

9. Charges were read-over and explained to the appellants, the accused appellants pleaded not guilty, denied the

charges and demanded trial. Consequently, the case was fixed for prosecution evidence.

10. In support of its case, the prosecution examined P.W.1 Manmohan Singh who is the first informant and father of the deceased, P.W.2 Tulsiram, P.W. 3 Virendra Sigh Yadav both uncles of deceased as witnesses of fact, P.W.4 S.I. Rafiq Khan was Investigating Officer who prepared fard relating to the seized articles, recorded the statements of witnesses and submitted the charge sheet. P.W. 5 constable Ram Jiwan prepared chik F.I.R. on the basis of written report (tahreer) and made entry in the G.D., P.W. 6 Dr. R.P. Verma conducted the post-mortem and prepared the report. P.W. 7 Hammi Lal Verma C.O. investigated the case prior to P.W. 4 Rafiq Khan and prepared site plan and also recorded the statements of witnesses.

11. On conclusion of prosecution evidence, statements of the appellants were recorded under Section 313 Cr.P.C. wherein they had denied all the allegations made against them including the date of marriage and also stated that the deceased committed suicide by setting herself ablaze because she was under depression being issue-less. Her cremation was performed by appellant Sunil Kumar in the presence of her father and uncle. About the invitation card, it was said to be a fabricated document. In addition thereto, the appellant Sunil Kumar further stated that his marriage was solemnized on 10.5.1998 without dowry. In the year 1999, they both became Voters in the gram panchayat. Since 2003, they had been living separately from other family members. The deceased could not concieve and as such she was under depression for about 6-7 months and on 31.10.2006 at about 10 A.M., while the accused Sunil Kumar was out in relation to the canvassing of the election of Dharmendra Rajpoot, he got information from Chatur Singh that his wife had committed suicide by setting herself ablaze. He immediately came back to his house and sent information to the police station through the village chaukidar and also informed his sasural (the informant) from S.T.D. Phone of Chatur Singh. The family and the first informant came there.

12. The dead body was handed over to him after inquest and post mortem and he performed the last rites of the deceased. The appellants Ram Dulari @ Uma and Smt. Rajola stated that they both went to the temple for Aarti at about 8 o'clock where they were informed by the villagers that smoke was coming from their house so they came back and found that Sunil Kumar was trying to open the doors of the room which was bolted from inside. With the help of the Lekhpal, door was opened where Anita was lying burnt and dead. The information was then given to Raj Kumar and Neetu who were in the field.

13. In defence, two witnesswes namely D.W. 1 Parshuram Yadav & D.W. 2 Lachchi Ram were examined.

14. The learned trial court passed the order dated 31.7.2012 for convicting and sentencing the appellants. Hence this appeal.

15. Heard Shri Yogesh Kumar Srivastava and Shri Noor Mohammad, learned Advocates for the appellants and Shri Rupak Chaubey and Ms. Arti Agarwal, learned A.G.As. for the State and perused the record.

16. Learned counsel for the appellants submits that the trial court has erred in

convicting the appellants without considering and appreciating the evidence on record. The prosecution could not prove its case with cogent and reliable evidence. The appellants are innocent and have committed no offence as alleged. There are material contradictions in the statements of prosecution witnesses. The prosecution witnesses are relatives of the deceased. Learned trial court has not considered the fact that the deceased was issue less and was living in distress and committed suicide by setting herself ablaze when the appellants were not present at home. The appellants themselves had informed the parents of the deceased about her death. Initially the parents had no complaint and were satisfied that deceased had committed suicide but later in order to blackmail the appellants, a false case was registered against them. The appellants never subjected the deceased to cruelty in relation to the demand of dowry. It is further submitted that no injury was found on the person of the deceased which gives rise to the inference that deceased had committed suicide by setting herself at fire and the appellants had committed no offence. Lastly, it is submitted that the learned trial court without considering all these facts had convicted the appellants under Section 302 IPC whereas after the investigation, the offence under Sections 498-A, 304-B IPC & Section ¾ Dowry Prohibition Act was found to have been committed. The finding recorded by the learned trial court is based on conjuctures. Learned trial court has misinterpreted Section 106 of Indian Evidence Act to convict the appellants. The judgment in question, thus, pleaded to be erroneous and that the appellants deserve acquittal after allowing the appeals.

17. Learned A.G.A., in rebuttal urged that there is sufficient evidence on record on the basis of which the learned trial court has concluded that the appellants had committed the murder of the deceased inside their house by setting her ablaze. The burden to disclose the facts as to how she had died inside their house was on the appellants because of the said fact being in their special knowledge which can be explained by them only as per Section 106 of Indian Evidence Act. The appellants did not discharge the said burden and, therefore, their conviction is perfectly justified. There is sufficient evidence regarding the demand of dowry and harassment of the deceased in relation thereto by the appellants. Though the fact of death within seven years of marriage was proved by the prosecution but it was not relied by the learned trial court. The appellants were, therefore, convicted and sentenced under Section 302 IPC with the aid of Section 106 of Indian Evidence Act which cannot be said to be against law. The decision of the learned trial court is perfectly sound and the present appeals being devoid of merit are liable to be dismissed.

18. From the submissions made by the learned counsel for the parties, the first and foremost question arises for consideration by this Court is that whether the finding given by the learned trial court convicting the accused/appellants under Section 302 IPC with the aid of Section 106 of Indian Evidence Act and acquitting them under Section 304-B IPC on the basis of evidence on record is correct or not.

19. Before we deal with the contentions raised by the learned counsel for the appellants, it would be convenient to take note of the evidence adduced by the prosecution.

20. The prosecution had examined seven witnesses out of which P.Ws. 1 to 3 are the witnesses of fact.

21. P.W. 1 Manmohan Singh, the father of deceased, the first informant, stated that his daughter Anita was wedded to appellant Sunil Kumar Yadav on 23.4.2000 and that he offered dowry according to his capacity. Afterwards, her husband Sunil Kumar, mother-in-law Rajola, brother-in-law Raj Kumar @ Majhaley, his wife Smt. Ram Dulari @ Uma and younger brother-in-law Neetu @ Ram Kumar made demand of Rs. One lac for purchasing tractor. At this, he helped them as much as he could. They, again demanded for the motorcycle and when the said demand was not fulfilled, they subjected his daughter to harassment. His daughter informed him by telephone and also when she came to his house knowing that he along with the members of his family went to the village of her husband and expressed his inability to fulfill the demand and also requested to send his daughter with him but the in-laws of the deceased did not see her off, so he came back to his house. On 30.10.2006, his daughter informed him on telephone that she was being beaten because of the demand of motorcycle, on this the first informant assured her daughter that he would reach there after few days. On 31.10.2006 at about 8 o'clock, his daughter again called on telephone and said that her in-laws would kill her and told him to come soon. The first informant could reach to the matrimonial house of her daughter at the village Dikauli at about 2 o'clock in the night (2 a.m.) where he found that the door of the house was bolted from outside. He called Rameshwar, the uncle of appellant Sunil Kumar Yadav who was living nearby and got the door opened. His daughter was lying inside the room in the burnt state the inmates of the house were not present. P.W. 1 then went to the police station Erach with a written report on the basis of which the case was registered. P.W.1 proved the written report as Ext. Ka-1 being in his writing.

This witness was subjected to gruel cross-examination on the part of the defence but he had asserted the facts as narrated during the examination-in-chief, relating to the demand of dowry and the resultant harassment by the husband and in-laws of her daughter, the deceased.

22. P.W. 2 Tulsiram, is the uncle of the deceased, he also stated that the marriage of deceased was solemnized with Sunil Kumar Yadav on 23.4.2000. Adequate dowry in the shape of household articles such as utensils, Almirah, single bed and several other items as also gold ornaments, clothes were given. After marriage when his niece came back to her village Puraini, she told him and other members of her family that her husband Sunil Kumar Yadav, mother-in-law Rajola, brother-in-law Raj Kumar @ Majhaley, his wife Smt. Ram Dulari @ Uma and younger brother-in-law Neetu @ Ram Kumar made a demand of Rs. One lac for the tractor and also subjected her to cruelty. They also threatened her to leave her matrimonial house in case their demands were not fulfilled. P.W. 2 intervened and tried to help them as much as he could but the family members and husband of the deceased did not give up and again made a demand for motorcycle. Knowing that he along with his brother Manmohan Singh and Sahdev Singh went to Dhikauli where the appellants raised demand for motorcycle and told that if they wanted Anita to live in their house, their demands

had to be fulfilled. P.W. 2 stated that he did not send her with them so they came back. On 31.10.2006 at about 8 o'clock, Anita told on the mobile that she was being beaten by her hsuband and in-laws and asked them to come soon otherwise she would be killed. On the said information, he along with his brother (P.W.1) and other members of his family went to the village Dhikauli in the night at about 2 o'clock (2 a.m.) where the door of the matrimonial house of the deceased was bolted from outside. They called Rameshwar, uncle of appellant Sunil Kumar who was living nearby and got the door opened, where they saw Anita lying inside the room in the burnt state. No inmate of the house was present inside. The report of the offence was lodged by his brother Manmohan Singh at the police station. The inquest of deceased Anita was conducted in his presence and he had identified his signature on the inquest report, as Ext. Ka-2.

This witness (P.W.2) has also been subjected to gruel cross-examination on the part of the learned counsel for appellants but he firmly asserted the facts relating to the date of marriage, demand of dowry and harassment of the deceased at the hands of her husand and in-law as narrated by him during the examination-in-chief.

23. P.W.3 Dr. Virendra Singh Yadav, another uncle of deceased Anita, who has narrated that on 23.4.2000 the marriage of Anita was solemnized with Sunil Kumar as per Hindu rituals. Anita studied up to class 5th. In the marriage adequate dowry including household articles, ornaments, clothes etc. and Rs. 55,000/- (fifty five thousand) in cash, were given. After marriage when Anita came back from her sasural, she told before him and other members of his family that her husband Sunil Kumar Yadav, mother-in-law Rajola, brother-in-law Raj Kumar @ Majhaley, his wife Smt. Ram Dulari @ Uma and younger brother-in-law Neetu @ Ram Kumar were making demand for Rs. One lac to purchase a tractor and subjected her to cruelty. On this, P.W.3 along with the other members went to the sasural of Anita and reconciled the matter with the members of her family and also made help (financial) as far as possible. But they made a demand for motorcycle which fact was told by Anita. Knowing that, he along with his brothers Manmohan Singh, Tulsi and nephew Sahdev Singh went to the matrimonial house of Anita at village Dhakauli, where her husband and family members demanded money for motorcycle and said that they would keep Anita in their house, only when their demand of motorcycle was fulfilled. P.W.3 and other members of the family then requested to see her off with them but they did not send her. On 31.10.2006 at about 8 p.m., Anita called through telephone that she was being beaten by in-laws and requested that they should reach early to save her life otherwise she would be killed. P.W. 3 along with his brother (P.W.1) and other members of the family reached the village Dhakauli at about (2 a.m.) 2 o'clock in the night. The door of the matrimonial house of Anita was bolted from outside. It was got opened by Rameshwar, uncle of appellant Sunil Kumar living in the neighbourhood. When he entered the house, he found his niece Anita lying inside the room in burnt state and no one else was present inside. The report of this incident was lodged by his brother Manmohan Singh (P.W.1) on the same day at the police station Erach. The inquest of the body of deceased Anita was conducted in the presence of Nayab Tehshildar, Garautha and P.W.3 also put his signature on the inquest report.

Invitation card of marriage of the deceased Anita was also seized by the Circle Officer provided by his brother in his presence which he proved as Material Ext. 1.

This witness has also been subjected to lengthy cross-examination from the side of the appellants but he had reiterated firmly the facts relating to the date of marriage, demand of dowry and harassment of the deceased at the hands of her matrimonial family including her husband.

24. P.W.4 Rafiq Khan is the Investigating Officer who proved the investigation of the case and also the fard (recovery memo) of seizure of the invitation card as Ext. Ka-3. He has also submitted the charge sheet proved as Ext. Ka-4.

25. P.W. 5 constable Ram Jiwan who was posted at the police station concerned on the day of the incident proved the chik F.I.R. as Ext. Ka-5, in his hand writing and signature, and stated that he registered the case on the basis of the written report given by the informant Manhohan Singh and also entered its detail in the G.D. report no. 6. P.W. 5 also proved the carbon copy of the G.D. by comparing with the original as Ext. Ka-6.

26. P.W. 6 Dr. R.P. Verma conducted the postmortem of the body of deceased Anita. He proved the postmortem report being in his hand writing and signature as Ext. Ka-7.

27. P.W. 7 Hammilal Verma was the previous Investigating Officer, who got prepared the inquest report and other related papers by S.S.I. Lalit Kishor which he proved as Ext. Ka-2 and Ext. Ka-9 to Ka-14. P.W.7 also inspected the place of occurrence and prepared the site plan which he proved as Ext. Ka-8.

28. Before we proceed to evaluate the evidence on record led by the prosecution in support of the charges framed against the appellants, it is necessary to examine the law relating to 'dowry-death', "cruelty' and "dowry demand'.

29. **Section 304B and Section 498A I.P.C. is as under:-**

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

Explanation.-- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

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

30. **"498A. Husband or relative of husband of a woman subjecting her to cruelty.--**

Whoever, being the husband or the relative 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.

Explanation.--For the purpose of this section, "cruelty" means--

(a) any willful 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 to coercing her or any person related to her to 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."

31. **The term "dowry" has been defined in Section 2 of the Dowry Prohibition Act, 1961 (in short 'Dowry Act') as under :-**

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

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

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mehr in the case of person whom the Muslim Personal Law (Shariat) applies.

Explanation I- For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this Section unless they are made as consideration of the marriage of the said parties.

Explanation II- The expression 'valuable security' has the same meaning in Section 30 of the Indian Penal Code (45 of 1861)."

32. Explanation to Section 304B refers to dowry" as having the same meaning as in Section 2 of the Act'. The question is "what is the periphery of the dowry as defined therein? The argument is that there must be an agreement at the time of the marriage in view of the words "agreed to be given" occurring therein, and in the absence of any such evidence it would not constitute "dowry'. It is noticeable that this definition with the amendment includes not only the period before and at the time of marriage but also the period subsequent to the marriage.

33. This position was clarified in ***Pawan Kumar and others vs. State of Haryana, 1998 (3) SCC 309:-***

"The offence alleged against the accused is under Section 304B I.P.C. Which makes "demand of dowry" itself punishable. Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved; hardly any offenders would come under the clutches of law. When Section 304B refers to "demand of dowry", it refers to the demand of property or valuable security as referred to in the

definition of "dowry" under the Act. The argument that there is no demand of dowry, in the present case, has no force. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence that could be either direct on indirect. It is significant that Section 4 of the Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word "agreement" referred to in Section 2 has to be inferred on the facts and circumstances of each case. The interpretation that the accused seeks, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provisions of the Act including Section 3, which refers to giving or taking dowry and Section 4, which deals with a penalty for demanding dowry under the Act and the I.P.C. makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry."

34. The Apex Court has highlighted all the aspects of law relating to 'dowry demand' and 'dowry death' in the case **Prem Kanwar Vs. State of Rajasthan, 2009(1)JT197.**

35. Section 113B of the Evidence Act is also relevant for the purpose of the case at hand. Both Sections 304B I.P.C. And Section 113B of the Evidence Act were inserted, as noted earlier, in view of the dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113B reads as under:-

"113B: Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry, the Court shall presume that such persons has caused the dowry death.

Explanation- For the purposes of this Section' dowry death' shall has the same meaning as in Section 304B of the Indian Penal Code (45 of 1976).

36. The necessity for insertion of the above two provisions has been aptly analyzed by the Law Commission of India in its 21st Report dated 10th August, 1988 on 'Dowry Deaths and Law Reform'. Keeping in view the impediment in the pre-existing laws in securing evidence to prove dowry related death, the legislature thought it wise to insert a provision relating to presumption of dowry death on the proof of certain essentials. It is in this background presumptive Section 113B in the Evidence Act had been inserted. As per the definition of 'Dowry death; in Section 304B I.P.C., and the wordings in the presumptive Section 113 B of the Evidence Act, one of the essential ingredients, amongst other, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment for or in connection with the demand of dowry".Presumption under Section 113B is a presumption by law. On proof of the essentials mentioned therein, the Court would raise a presumption that the accused persons caused the dowry death. The said presumption shall be raised on the proof of the following essentials:

(1) The question before the Court must be whether the accused committed the

dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B I.P.C.

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

37. A conjoint reading of Section 113B of the Evidence Act and Section 304B I.P.C. shows that there must be material to show that soon before the death, the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is relevant in a case where Section 113B of the Evidence Act and Section 304B I.P.C are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution.

38. It has been held that 'Soon before' is a relative term and it would depend upon the circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of "soon before' the occurrence. It was observed in a catena of decision of the Apex Court that it would be hazardous to indicate any fixed period, which brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304B I.P.C. and Section 113B of the Evidence Act is to be examined with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to the expression 'soon before' used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that the Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of a period which can come within the term 'soon before' is to be made by the Courts depending upon the facts and circumstances of each case. Suffice it to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death of the victim. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the death of the victim. If alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

39. In the instant case, so far as the first ingredient of Section 304-B IPC is concerned that the death of women must have been caused by burns or bodily injury or otherwise than under normal circumstances, from the statements of P.W.1, P.W.2 & P.W. 3 it is evident that when they had reached the matrimonial house of the deceased at about 2 a.m. she was found lying burnt inside the room of the house. Ext. Ka-2 inquest report also

shows that the deceased died of the burn injuries. The postmortem Report Ext. Ka-7 shows the cause of death being Asphyxia due to ante-mortem burn injuries. P.W. 6 Dr. R.P. Verma has proved the cause of death being ante-mortem burn injuries. It, therefore, stands proved that the death was caused by ante-mortem burn injuries which was otherwise than under normal circumstances.

40. As far as the second ingredient that such death must have been occurred within 7 year of the marriage to raise a presumption of dowry death, the first informant PW-1 Manmohan Singh stated in the written report Ext. Ka-1 that he had married his daughter with the appellant Sunil Kumar Yadav R/o village Dikauli, Police Station Eirach, District Jhansi six years prior to the incident. During his examination before the court, P.W.1 disclosed the date of marriage as 23.4.2000. P.W. 2 Tulsiram and P.W.3 Dr. Virendra Singh Yadav also proved the date of marriage as 23.4.2000. Material Exhibit 1, the invitation card on record has been proved by P.W. 3 Dr. Virendra Singh Yadav wherein the date of marriage is mentioned as 23.4.2000. During his examination, the investigation officer P.W.4 stated that he seized the invitation card from the members of family of the deceased. In this way, the date of marriage of the deceased was proved as 23.4.2000. The date of death being 31.10.2006 lead to an inference that the victim died within seven years of her marriage.

41. It is pertinent to note that though the appellants in their statements under Section 313 Cr.P.C. did not admit the date of marriage as 23.4.2000 and contended that it was performed on 10.5.1998 but no evidence was produced in the shape of the invitation card or any other document to prove the disputed date of marriage as asserted by the appellants. A transfer certificate Ext. Kha-1 has been produced and Parshuram, principal of the school was produced as D.W.1 to prove the contents of the transfer certificate who has stated that Sunil Kumar yadav took admission in class 9th on 10.07.1996 and on failure in the high school examination, the transfer certificate was issued in the month of June, 1999. The appellant Sunil Kumar was studying in the school in the year 1996-97 in class 9th. 1997 to 1998 and 1998 to 1999 in class 10th. Except this, D.W.1 did not say anything which would be relvant about the disputed date of marriage by the appellants.

42. Learned trial court has mentioned in para no. 17 of the judgment that P.W. 1 stated during the examination that at the time of marriage, Sunil Kumar was studying in the class 9th or 10th. On the basis of this statement of P.W.1 and the statement of D.W. 1 about the years of education relating to the appellant Sunil Kumar in the year 1998-99, the period of marriage of the deceased at the time of her death was concluded to be beyond 7 years. Further, the learned trial court has quoted an order of this Court passed in Criminal Misc. Bail Application No. 9088 of 2010 wherein it was noted that the name of deceased Anita was mentioned in the voter list of gram panchayat Dikauli in the year 1999 and the said fact was not contradicted by the State. From the contents of the aforesaid bail order of this Court, the learned trial court had concluded that the deceased was married to Sunil Kumar Yadav prior to the year 1999, though neither any voter list was produced before the trial court nor any evidence was led in this regard by the appellants. The trial court

has also noted that P.W.2 narrated before it that in the year 1999, the name of Anita was entered in the voter list as wife of appellant Sunil Kumar Yadav because she was engaged, i.e. her marriage was settled. On the basis of the above facts, the learned trial court had concluded the period of marriage of deceased with appellant Sunil Kumar Yadav on the date of her death being beyond the period of seven years. In this regard, it is to note that Ext. Kha-1, the transfer certificate has no relevance in so far as the factum of the date of marriage of deceased with appellant Sunil Kumar Yadav. No evidence either in the nature of invitation card or any voter list of gram panchayat, Dikauli of the year 1999 had been produced before the trial court besides any other oral or documentary evidence to prove the contention of the appellants about the date of marriage being 10.5.1998.

43. A perusal of statement of P.W. 2 shows that a suggestion was given to him about the date of marriage being 10.5.1998 in relation to the entry in the voter list of the year 1999 but no such voter list was shown to him nor P.Ws. 1 and 2 anywhere had admitted the date of marriage as suggested by the defence/appellants. The conclusion drawn by the trial court is based on its own hypothesis on assumption simply on the suggestion about the entry of the voter list which was never produced before it. The trial court has, thus, illegally discarded the testimony of P.W. 1 to P.W. 3 about the date of marriage of the deceased as also the veracity of invitation card which was proved as Material Ext. 1 by the prosecution witnesses. The findings of the learned trial court, in this regard, not being based upon any documentary or oral evidence but being hypothetical is liable to be set aside. The assumption drawn by the trial court cannot overthrow the reliable testimony of the prosecution witnesses which is corroborated by documentary evidence produced by them.

44. On due appreciation the evidence on record, the date of marriage of the deceased with appellant Sunil Kumar Yadav stands proved as 31.4.2000. The death of the deceased, thus, proved to have been taken place within seven years of her marriage.

45. Now the next requirement is to ascertain as to whether soon before her death the deceased was subjected to cruelty or harassment by her husband or his relatives and such cruelty or harassment must be in connection with the demand of dowry.

46. In this regard, P.W. 1 who is father of the deceased has supported the prosecution version about the demand of dowry and harassment of the deceased in his examination in chief and also during the cross examination and remained intact in that regard. P.W. 2 Tulsiram uncle of the deceased also proved demand of dowry and harassment of the deceased by her husband and other family members. P.W. 3 Dr. Virendra Singh Yadav another uncle of the deceased also deposed about demand of dowry and harassment of the deceased by her husband and other family members in his examination-in-chief as also the cross-examination. Both the witneses remained intact throughout. As per the statement of the prosecution witnesses the demand of dowry of Rs. One lac was made by the appellants to purchase a tractor for which the parents and uncle of the deceased gave money as per their capacity but again the demand of dowry for motorcycle was made and on failure to fulfill the said demand, the deceased was subjected to torture and was

beaten by the appellants. When the prosecution witnesses went to her sasural to reconcile the matter even then the appellants made the demand for motorcycle and also refused to send off the deceased with her parents. On 30.10.2006 telephonic information was given by the deceased herself that she was being beaten by the appellants and when her parents reached at her matrimonial house, she was found lying burnt inside the room of the house. The appellants ran away from their house and the door was found closed from outside. It is, thus, established that after marriage the deceased was subjected to torture on account of non fulfillment of demand of dowry. This situation continued till the fateful day, when the girl died in her matrimonial home by burn injuries.

47. From the due appraisal of the testimony of the prosecution witnesses as abovenoted, it is proved that unnatural death of deceased was caused by burn injuries within seven years of marriage and soon before her death, the deceased was subjected to cruelty by her husband and his family members in connection with the demand of dowry.

48. Now section 113 B of the Indian Evidence Act comes into picutre, on the basis of the material on record the presumption is to be drawn by the court that the appellant had caused the dowry death of the victim. The charge under Sections 304-B IPC stands proved against the appellants. There is clinching evidence on record against all the appellants relating to harassment of the deceased in relation to non fulfillment of demand of dowry, which brings the offence under Section 498-A IPC as well as under Section 4 Dowry Prohibition Act into picture. Hence, the charges under Section 498-A & Section 4 Dowry Prohibition Act also stand proved.

49. Now, the question arises as to whether in the above circumstances, the appellants can be convicted under Section 302 IPC. In this regard, we may note that the learned trial court had not found the charge under Section 304-B IPC proved on the ground that the marriage of the deceased was performed with the appellant Sunil Kumar Yadav more than seven years prior to the date of death, which finding has been found to be hypothetical by this Court on mis-appreciation of the evidence on record, as discussed herein above. The charge under Section 302 IPC framed by the learned trial court was an alternative charge. In case, the charge under Section 304-B IPC was not proved only then the court was to travel further to consider whether the case falls under Section 302 IPC. If case under Section 304-B IPC is found proved, there is no need to consider the matter for the offence under Section 302 IPC unless there is positive evidence to conclude that the appellants had caused her death either by setting her ablaze or causing fatal injury.

50. Learned trial court has convicted and sentenced the appellants under Section 302 IPC and recorded the finding that looking to the position in which dead body was found the appellants caused the death by initially making the deceased unconscious and then setting her ablaze so that she may not protest or save herself. In this regard, there is no evidence on record to show that the deceased was administered something obnoxious and, thereafter, she was set ablaze by the appellants. Even during postmortem no ante-mortem injury except burn injuries were found on the person of the deceased. P.W. 6

Dr. R.P. Verma, who conducted autopsy had also expressed inability to give any opinion as to whether the death was suicidal or homicidal. In situation like this, no conclusion could be drawn that the death of the deceased was homicidal only. So, the findings returned by the trial court that the deceased was first made unconcious by administering some substance and then set ablaze also appears to be based on hypothesis and contrary to the evidence on record. Taking recourse to the Section 106 of Indian Evidence Act is also not found to be justified in the present case in as much as presence of the appellants in the house or room wherein the deceased had died could not be proved by the prosecution. As a result, the learned trial court cannot but be said to have committed illegality in convicting the appellants under Section 302 IPC with the aid of Section 106 of the Indian Evidence Act.

51. Thus, from the aforesaid discussion made above the charges under Section 304-B, 498-A IPC & Section 4 Dowry Prohibition Act are proved beyond all reasonable doubt, against the appellants. The conviction and sentence awarded by the trial court under Section 302 IPC by the judgement and order dated 31.7.20212 stands modified accordingly.

52. Now the consideration has to be given on the question of sentence in the case of proven charges under Section 304-B IPC.

53. In the case of ***Hem Chand v. State of Haryana [(1994) 6 SCC 727],*** The Apex Court has held in paragraph 7 of the judgment as under:-

"Now coming to the question of sentence, it can be seen that Section 304-B I.P.C. lays down that

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

The point for consideration is whether the extreme punishment of imprisonment for life is warranted in the instant case, A reading of Section 304-B I.P.C, would show that when a question arises whether a person has committed the offence of dowry death of a woman that all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage, the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown then the court shall presume that such a person has caused the dowry death. It can therefore be seen that irrespective of the fact whether such person is directly responsible for the death of the deceased or not by virtue of the presumption, he is deemed to have committed the dowry death if there were such cruelty or harassment and that if the unnatural death has occurred within seven years from the date of marriage. Likewise there is a presumption under Section 113-B of the Evidence Act as to the dowry death. It lays down that the court shall presume that the person who has subjected the deceased wife to cruelty before her death shall presume to have caused the dowry death if it is shown that before her death, such woman had been subjected, by the accused, to cruelty or harassment in connection with any demand for dowry. Practically this is the presumption that has been incorporated in Section 304-B I.P.C. also. It can therefore be seen that irrespective of the fact whether the accused has any direct connection With the death or

not, he shall be presumed to have committed the dowry death provided the other requirements men-tioned above are satisfied. In the instant case no doubt the prosecution has proved that the deceased died an unnatural death namely due to strangulation, but there is no direct evidence connecting the accused. It is also important to note in this context that there is no charge under Section 302 I.P.C. The trial court also noted that there were two sets of medical evidence on the file in respect of the death of the deceased. Dr. Usha Rani, P.W. 6 and Dr. Indu Latit, P.W. 7 gave one opinion. According to them no injury was found on the dead body and that the same was highly decom-posed. On the other hand, Dr. Dalbir Singh, P.W. 13 who also examined the dead body and gave his opinion, deposed that he noticed some injuries at the time of re-post mortem examination. Therefore at the most it can be said that the prosecution proved that it was an unnatural death in which case also Section 304-B I.P.C. would be attracted. But this aspect has certainly to be taken into consideration in balancing the sentence to be awarded to the accused. As a matter of fact, the trial court only found that the death was unnatural and the aspect of cruelty has been established and therefore the offences punishable under Sections 304-B and 201 I.P.C. have been established. The High Court in a very short judgment concluded that it was fully proved that the death of the deceased in her matrimonial home was a dowry death otherwise than in normal circumstances as a result of cruelty meted out to her and therefore an offence under Section 304 I.P.C. was made out. Coming to the sentence the High Court pointed out that the accused-appellant was a police employee and instead of checking the crime he himself indulged therein and precipitated in it and that bride killing cases are on the increase and therefore a serious view has to be taken. As mentioned above Section 304-B I.P.C. only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case."

54. The view taken by the Apex Court in Hem Chand case (supra) was again affirmed by the Court in the case of G.V. Siddaramesh Vs. State of Karnataka (2010)3 SCC 152 in para 30 as under:-

"On the point of sentence, learned Counsel for the appellant pointed out that the appellant is in jail for more than six years. The appellant was young at the time of incident and therefore, the sentence awarded by the trial court and confirmed by the High Court may be modified. In so far as sentencing under the section is concerned, a three Judge Bench of this Court in the case of Hemchand v. State of Haryana [(1994) 6 SCC 727] has observed that:

"Section 304B merely raises a presumption of dowry death and lays down that the minimum sentence should be 7 years, but it may extend to imprisonment for life. Therefore, awarding the extreme punishment of imprisonment for life should be used in rare cases and not in every case.

Keeping in view the facts and circumstances of the case, this Court reduced the sentence from life imprisonment awarded by the High Court to 10 years R.I. on the above principle."

55. A reference on this point may also be made to the recent pronouncement of the Apex Court in the case of ***Sunil Dutt Sharma V State reported in [(2014) 4 SCC 8 375]*** wherein Hon'ble Apex Court has considered the law on the point of sentence under Section 304-B IPC in detail and reduced the sentence from life imprisonment to ten years.

"13. Would the above principles apply to sentencing of an accused found guilty of the offence under Section 304-B inasmuch as the said offence is held to be proved against the accused on basis of a legal presumption? This is the next question that has to be dealt with. So long there is credible evidence of cruelty occasioned by demand(s) for dowry, any unnatural death of a woman within seven years of her marriage makes the husband or a relative of the husband of such woman liable for the offence of "dowry death" under Section 304-B though there may not be any direct involvement of the husband or such relative with the death in question. In a situation where commission of an offence is held to be proved by means of a legal presumption the circumstances surrounding the crime to determine the presence of aggravating circumstances (crime test) may not be readily forthcoming unlike a case where there is evidence of overt criminal acts establishing the direct involvement of the accused with the crime to enable the Court to come to specific conclusions with regard to the barbarous or depraved nature of the crime committed. The necessity to combat the menace of demand for dowry or to prevent atrocities on women and like social evils as well as the necessity to maintain the purity of social conscience cannot be determinative of the quantum of sentence inasmuch as the said parameters would be common to all offences under Section 304-B of the Penal Code. The above, therefore, cannot be elevated to the status of acceptable jurisprudential principles to act as a rational basis for awarding varying degrees of punishment on a case to case basis. The search for principles to satisfy the crime test in an offence under Section 304-B of the Penal Code must, therefore, lie elsewhere. Perhaps, the time spent between marriage and the death of the woman; the attitude and conduct of the accused towards the victim before her death; the extent to which the demand for dowry was persisted with and the manner and circumstances of commission of the cruelty would be a surer basis for determination of the crime test. Coupled with the above, the fact whether the accused was also charged with the offence under Section 302 of the Penal Code and the basis of his acquittal of the said charge would be another very relevant circumstance. As against this the extenuating/mitigating circumstances which would determine the "criminal test" must be allowed to have a full play. The aforesaid two sets of circumstances being mutually irreconcilable cannot be arranged in the form of a balance sheet as observed in Sangeet (supra) but it is the cumulative effect of the two sets of different circumstances that has to be kept in mind while rendering the sentencing decision. This, according to us, would be the correct approach while dealing with the question of sentence so far as the offence under Section 304-B of the Penal Code is concerned.

14. Applying the above parameters to the facts of the present case it transpires that the death of the wife of the accused-appellant occurred within two years of marriage. There was, of course, a

demand for dowry and there is evidence of cruelty or harassment. The autopsy report of the deceased showed external marks of injuries but the cause of death of deceased was stated to be due to asphyxia resulting from strangulation. In view of the aforesaid finding of Dr. L.T. Ramani (PW-16) who had conducted the postmortem, the learned Trial Judge thought it proper to acquit the accused of the offence under Section 302 of the Penal Code on the benefit of doubt as there was no evidence that the accused was, in any way, involved with the strangulation of the deceased. The proved facts on the basis of which offence under Section 304-B of the Penal Code was held to be established, while acquitting the accused-appellant of the offence under Section 302 of the Penal Code, does not disclose any extraordinary, perverse or diabolic act on the part of the accused-appellant to take an extreme view of the matter. Coupled with the above, at the time of commission of the offence, the accused-appellant was about 21 years old and as on date he is about 42 years. The accused-appellant also has a son who was an infant at the time of the occurrence. He has no previous record of crime. On a cumulative application of the principles that would be relevant to adjudge the crime and the criminal test, we are of the view that the present is not a case where the maximum punishment of life imprisonment ought to have been awarded to the accused-appellant. At the same time, from the order of the learned Trial Court, it is clear that some of the injuries on the deceased, though obviously not the fatal injuries, are attributable to the accused-appellant. In fact, the finding of the learned Trial Court is that the injuries No. 1 (Laceration 1" x ½" skin deep on the side of forehead near hair margin) and 2 (Laceration 1 ½" x 1" scalp deep over the frontal area) on the deceased had been caused by the accused-appellant with a pestle. The said part of the order of the learned Trial Court has not been challenged in the appeal before the High Court. Taking into account the said fact, we are of the view that in the present case the minimum sentence prescribed i.e. seven years would also not meet the ends of justice. Rather we are of the view that a sentence of ten years RI would be appropriate. Consequently, we modify the impugned order dated 4.4.2011 passed by the High Court of Delhi and impose the punishment of ten years RI on the accused-appellant for the commission of the offence under Section 304-B of the Penal Code. The sentence of fine is maintained. The accused-appellant who is presently in custody shall serve out the remaining part of the sentence in terms of the present order."

56. In ***V.K. Mishra and another v. State of Uttarakhand reported in [(2015) 9 SCC 588]***, the Apex Court has again considered the question of sentence in cases of dowry death and has observed in paragraph nos. 40 and 41 as under:-

"40. For the offence Under Section 304-B Indian Penal Code, the punishment is imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. Section 304-B Indian Penal Code thus prescribes statutory minimum of seven years. In Kulwant Singh and Ors. v. State of Punjab (2013) 4 SCC 177, while dealing with dowry death Sections 304-B and 498-A Indian Penal Code in which death was caused by poisoning within seven years of marriage conviction was affirmed. In the said case, the father-in-law was about eighty years and his legs had been amputated because of severe diabetes and

mother-in-law was seventy eight years of age and the Supreme Court held impermissibility of reduction of sentence on the ground of sympathy below the statutory minimum.

41. As per prison records, the accused-Rahul Mishra is in custody for more than five years which includes remission. Bearing in mind the facts and circumstances of the case and the occurrence of the year 1997 and that the accused-Rahul Mishra is in custody for more than five years, interest of justice would be met if life imprisonment awarded to him is reduced to imprisonment for a period of ten years. Appellants V. K. Mishra and Neelima Mishra, each of them have undergone imprisonment of more than one year. Appellants No.1 and 2 are aged about seventy and sixty four years and are said to be suffering from various ailments. Considering their age and ailments and facts and circumstances of the case, life imprisonment imposed on Appellants V. K. Mishra and Neelima Mishra is also reduced to imprisonment of seven years each."

57. In the present case, at the time of occurrence, appellant Sunil Kumar Yadav, husband of the deceased was 30 years of age; Smt Rajola mother-in-law was aged about 53 years; Rajkumar @ Majhale younger brother of Sunil Kumar Yadav, was aged about 23 years; Smt. Ram Dulari @ Uma, wife of Rajkumar was aged about 21 years and Neetu @ Ram Kumar the youngest brother of Sunil Kumar was aged about 20 years. As per the record, all the appellants are in custody from 31.7.2012. After six years of marriage the deceased had died out of burn injuries. No antemortem injury was found on the person of the deceased. As per the doctor who had conducted autopsy the death cannot be said to be homicidal by definite opinion.

58. Keeping in mind the principle of sentence under Section 304-B IPC as enunciated by the Apex Court, in the facts and circumstances of the present case, the occurrence which took place in the year 2006 and that the appellants have already undergone the sentence for more than nine years, in our considered opinion, interest of justice would be served if the appellants are awarded sentence under Section 304-B IPC to imprisonment for a period of ten years, each. The conviction of the appellants for other offences and sentences of imprisonment imposed for each offence awarded by the trial court are hereby affirmed. All the sentences shall run concurrently.

59. Resultantly, the appeals are ***partly allowed***, modifying the judgment and order dated 31.7.2012 of the learned Sessions Court to the above extent.

60. Office is directed to certify this judgement to the court concerned forthwith to ensure compliance and also to send back the trial court record.

(2022)06ILR A720
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No.3952 of 2012
alongwith
Criminal Appeal No.3239 of 2012
alongwith
Criminal Appeal No.3404 of 2012

Pawan Kumar Pandey @ Bablu & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Sheshadri Trivedi, Sri Ajay Kumar Pandey, Sri Anand Kumar Pandey (Amicus Curie), Sri Pratik J.Nagar, Sri Rajrshi Gupta, Sri Satish Trivedi, Sri Rizwan Ahmad, Sri Dileep Kuma (Sr. Advocate)

Counsel for the Respondent:
G.A., Sri Rahul Mishra, Sri Satyendra Narain Singh, Sri Ravindra Nath Tripathi, Sri Rajeev Upadhyay

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 147, 148 149, 302, 120-B, 504, 506 & Section 7 Criminal Law Amendment Act - The Code of criminal procedure, 1973 - Section 156,157,161,174,313, Arms Act, 1959 - Section 3/25 , The Railways Act - Section 137,138

Appellants (7 in number) convicted for offence - FIR lodged by son (witness of fact) of deceased - dispute related to holding of the post of the Principal in the institution concerned - deceased trying hard to get appointment on the post of Principal being the Senior-most Lecturer in the institution - Accused-appellant was Manager of institutions - Rs.10 lacs received from M.P. Funds in account of Principal - for development and construction of building - Manager and his sons tried to misappropriate money - deceased confronted them - dispute between his father and Manager of institution (motive assigned by him to commit the murder) - All five accused persons gheraoed his father - surrounded him and opened fire - total five fires made - could be more than that - incident witnessed from a distance of ten paces . **(Para - 4,15,20,24,186)**

(B) Evidence Law - The Evidence Act, 1872 - Section 11 - when facts not otherwise relevant are relevant if they are inconsistent with any fact and issue or relevant fact if by themselves or in connection with other facts they make the existence or non-existence of any fact or issue or relevant fact highly probable or improbable , Section 103 - burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence,Section145 - Cross - examination as to previous statements in writing ,Section155 – Impeaching credit of witness.(Para - 217,219)

(C) Criminal Law - The first information report being ante-time - lapse on the part of the officer posted in the Police Headquarter - in not making correct entries in the relevant column of form-13 Exhibit Ka-5 - in itself, would not make the first information report ante-time or demolish the prosecution case. (Para - 154)

(D) Criminal Law - Presence of the witnesses on the spot - contradictions in the testimonies of PW-1(son of deceased) and PW-2(Peon of institution) - are minor which do not go to the root of the matter and cannot be given undue credence - held - description in the testimony of PW-1 & PW-2, the eye witnesses of the occurrence, corroborated by the surrounding circumstances of the case such as lodging of the prompt report by PW-1 and the description given by him about the occurrence supported by the testimony of PW-2 is categorical proof of the presence of these two witnesses on the spot. **(Para-181,186)**

(E) Criminal Law - Ocular Vs. Medical Evidence - in case of any inconsistencies or contradiction between medical and ocular evidence - the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence - unless the oral evidence is totally irreconcilable with the medical evidence, the oral evidence would have primacy - It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all that the oral evidence is liable to be discarded - held - inconsistencies pointed out for the appellants in the medical evidence vis-a-vis ocular evidence of PW-1 is not a relevant factor so as to discard or disbelieve the ocular evidence.**(Para - 203,204)**

(F) Criminal Law - Ballistic Report - mere fact that the ballistic report did not support the recovery made by the prosecution would not be a reason to discard the ocular evidence which is supported by the medical evidence. (Para -206)

(G) Criminal Law – Motive - motive though is not of much importance in a case of positive ocular evidence, i.e. of eye witnesses account - but the motive if proved or established is a very relevant and important aspect to highlight the intention of the accused - is relevant to show that the person who had the motive to commit the crime actually committed it - equally settled that such evidence (of motive) alone would not ordinarily be sufficient to record conviction - Both witnesses of fact proved - dispute between the Manager and Principal (deceased) - in relation to some money received from the M.P. Fund - utilization of which could not be made as per the wishes of the Manager.**(Para -207,209)**

(H) Criminal Law - Flaws in the investigation - any irregularities or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case - need not dilate on this issue. (Para -211)

(J) Criminal Law - Plea of Alibi of the accused-appellants - burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi - burden of the accused is undoubtedly heavy - strict proof is required for establishing the plea of alibi - held - None of the documents to be believed as genuine documents so as to accept them as a strict proof of plea of alibi of the appellants **-** plea of alibi taken by the appellants in their statements under Section 313 Cr.P.C. and the proof brought in the shape of defence witnesses and the documentary evidences filed by them is a concocted story.**(Para -218,219,243,249)**

HELD:-No error or infirmity in the finding returned by the trial court on the noted issues, in holding that the prosecution had proved lodging of the first information report in a prompt manner, the presence of the witnesses on the spot and the motive assigned to the accused appellants to cause the murder . Prosecution proved the involvement of all the appellants in the occurrence beyond all reasonable doubt. Judgement and order passed by trial court affirmed. **(Para - 212,250,252)**

Criminal Appeals dismissed. (E-7)

List of Cases cited:-

1. Nem Singh Vs Emperor, 1934 AIR (ALL) 908

2. Guchun Misir & ors. Vs St., 1956 Law Suit (AII) 245

3. St. of U.P. Vs Moti Ram & anr., 1990 (4) SCC 389

4. Sahib Singh Vs St. of Har., 1997 (7) SCC 231

5. Malempati Pattabi Narendra etc. Vs Ghattamaneni Maruthi Prasad & ors., 2000 (5) SCC 226

6. St. of U.P. Vs Babu Singh, 1998 (2) ACR 1654

7. Jumni & ors. Vs St. of Har., 2014 (85) ACC 650

8. Ayodhaya Prasad Namdeo Receiver Vs Babu Ram Prasad, AIR 1954 V.P.

9. Chhanga & ors. Vs St. of U.P., Criminal Appeal No. 2927 of 1982

10. Roy Fernandes Vs St. of Goa, 2012 (3) SCC 221

11. Ombir Singh Vs St. of U.P., 2020 AIR SC 2609

12. Rajesh Singh & ors. Vs St. of U.P, 2011 (11) SCC 444

13. St. of U.P. Vs M.K. Anthony,1985 1 SCC 505

14. Leela Ram (D) Through Duli Chand Vs St. Of Haryana & anr.,1999 (9) SCC 525

15. Rammi @ Rameshwar Vs St. of M.P., 1999 (8) SCC 649

16. St. of U.P. Vs Hari Chand, 2009 (13) SCC 542

17. Darbara Singh versus St. of Punj., 2012 (10) SCC 476

18. St. of Raj. Vs Kishore, 1996 (8) SCC 217

19. St. of U.P. Vs Sughar Singh & ors., 1978 (1) SCC 178

20. Binay Kumar Singh Vs St. of Bihar, 1997 (1) SCC 283

21. Jayantibhai Bhenkarbhai Vs St. of Guj., 2002 (8) SCC 165

22. Jitendra Kumar Vs St. of Har., 2012 (6) SCC 204

23. Darshan Singh Vs St. of Punj., 2016 (3) SCC 37

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

1. Heard Sri Dileep Kumar, learned Senior Advocate assisted by Sri Rizwan Ahmad, learned counsel for the appellants, Sri Durgesh Kumar Singh, learned counsel appearing for appellant-Shyam Narain Pandey in the connected Criminal Appeal No.3239 of 2012 as also Sri Rahul Mishra and Sri Rajeev Upadhyay, learned counsels for the first informant, Sri Roopak Chaubey, learned AGA for the State.

Introduction:-

2. These appeals are directed against the judgement and order dated 07.08.2012 passed by the Additional Sessions Judge, Court No.2, Azamgarh in Sessions Trial No.435 of 2006 arising out of Case Crime No.65 of 2006 under Section 147, 148 149, 302, 120-B, 504, 506 IPC and Section 7 Criminal Law Amendment Act, Police Station Atraulia, District Azamgarh whereby the appellants (7 in number) have been convicted for the offence under Section 147, 148, 302 read with Section 149, 120-B IPC and 7 Criminal Law Amendment Act. They have been acquitted for the offence under Section 504 and 506 IPC. Two appellants namely Rajesh Kumar Pandey and Amit Kumar Pandey in the connected Sessions Trial No.436 of 2006 and Sessions Trial No.437 of 2006 have been acquitted for the offence under Section 3/25 Arms Act.

3. The sentence awarded to the appellants are under Section 147 for one month rigorous imprisonment and fine of Rs.1000/-, the default punishment is one month additional rigorous imprisonment; under Section 148 the sentence for two years rigorous imprisonment and Rs.3000/- as fine, the default punishment is six months additional rigorous punishment; under Section 7 Criminal Law Amendment Act sentence for six months additional rigorous imprisonment. Under Section 302/149 read with Section 120-B, the appellants have been sentenced for imprisonment for life and Rs.25,000/- each towards fine, the default punishment is three years additional rigorous imprisonment. All the punishments are to run concurrently.

PROSECUTION CASE:-

4. The prosecution story unfolded with the first information report lodged on 28.02.2006 at about 19.45 hrs. by Sri Atul Tripathi son of deceased Rajendra Prasad Tripathi resident of P.S. Atraulia, District

Azamgarh. The written report given by Sri Atul Tripathi narrates that he and his deceased father were resident of P.S. Atraulia District Azamgarh. On 28.02.2006, the first informant (Atul Tripathi), alongwith Arun Kumar Pandey, Krishna Kumar Tiwari, Rajkumar Tiwari and Ram Shiromani Shukla, was waiting at the 'Kesari Chauraha' for the arrival of his father from Azamgarh. While they were standing, his father alighted from a bus and moved to the pavement towards the East-South side of the crossing (Kesari Chauraha) to go to his house alongwith the first informant and other witnesses.

5. At that point of time, suddenly from a Bolero car, Sons of Laxmi Narain Pandey namely Rajesh Kumar Pandey, Pawan Kumar @ Babloo, Amit Kumar Pandey, Umesh and Ramesh alighted carrying weapons in their hands. They encircled his father and Rajesh Kumar Pandey, Pawan Kumar @ Babloo and Amit Kumar Pandey killed his father by firing from their weapons, Umesh and Ramesh also fired. Laxmi Narain Pandey and Shyam Narain Pandey were sitting in the car and exhorting the assailants that the deceased should not be spared as he wanted to become the Principal. While firing, all the assailants ran away in the said car towards the west side. Crowd was collected on the spot.

6. While leaving the dead body of his father, the first informant went to the police station to lodge the report. The time of the incident as noted in the Check report is 28.02.2006 at about 06.00 PM and the report was lodged on 28.02.2006 at 19.45 hrs, the distance of the police station from the place of the incident which is 'Kesari Chauraha', Kasba Atraulia noted therein is half (½) kilometer. The original report and original G.D. were brought in the Court and G.D. entry of Rapat No.35 was proved to have been prepared on the same date, the carbon copy of which was filed on record. The G.D. entry and the check report were proved to be in the handwriting and signature of PW-6, which were marked as Exhibit Ka-16 & 17. It was stated by PW-6 in his examination-in-chief that the special report of the crime was sent through Constable 694 Ram Surat Yadav on 28.02.2006 itself and entry of the same was made at G.D. No.40 in his handwriting and signature, which was marked as Exhibit Ka-18. The paper No.129 of the special report being in his handwriting and signature was produced in the Court which was noted and proved as Exhibit Ka-18. In cross, PW-6 was contradicted about several inconsistencies pointed out in the entries made by him which would be discussed at the appropriate place of this judgement.

7. At this stage, while noting the police papers, it may be recorded that the Investigating Officer proved the memo of collection of blood stained and plain earth from the spot as Exhibit Ka-10. On 28.02.2006, another memo was prepared of recovery of a bag besides the dead body as Exhibit Ka-2. It was noted in the recovery memo of bag that one bag Rexin, brown-black was found lying besides the dead body. It was seized and opened, a typed application signed by deceased Dr. Rajendra Prasad Tripathi dated 25.02.2006, a service book of the deceased and a letter dated 17.02.2006 addressed to the District Inspector of Schools, Azamgarh wherein prayer for determination of salary was made and the date certified as 17.02.2006 was mentioned, were found and seized. It is further recorded therein that the application dated 25.02.2006 was addressed to the Commissioner Azamgarh, Division,

Azamgarh, District Magistrate, Additional District Magistrate (Revenue and Finances) and Superintendent of Police, Azamgarh, wherein it was mentioned that the accused persons namely Manager Laxmi Narain Pandey and his sons were giving him threat to kill him. The application was seized by the police for including it in the investigation, whereas bag and service book were handed over to the first informant with the direction that he should keep it preserved and would produce it whenever needed in the investigation.

8. The arrest of three accused persons namely Rajesh Kumar Pandey, Umesh Kumar Pandey and Ramesh Kumar Pandey who were travelling in the Bolero Car and the seizure of Bolero Car without registration number used in the occurrence, was made on 05.03.2006, memo of which was prepared and exhibited as Exhibit Ka-11. It was noted therein that a country made pistol 315 bore in working condition, with the description mentioned in the recovery memo was recovered from the possession of Rajesh Kumar Pandey. In the chamber of the pistol one empty cartridge of 315 bore was found and two live cartridges 315 bore from the clothes of Rajesh Kumar Pandey were recovered. The recovered articles were sealed but no independent witness could be found as no-one was ready to be a witness.

9. The arrest of Laxmi Narain Pandey and Pawan Kumar Pandey @ Babloo and Amit Kumar Pandey was made on 06.03.2006 from a public place. Two country made pistols of 315 bore and 303 bore were recovered from the possession of Amit Kumar Pandey, wherein one-one live cartridge was found in the chambers of each weapon. The description of both the weapons has been given in the recovery memo proved and exhibited as Exhibit Ka-12. It was noted therein that both the weapons were in working condition.

10. The inquest of the body was conducted on the same day i.e. on 28.02.2006 commencing at 21.10 hrs and ended at 22.25 hrs. The postmortem of the body was conducted on 01.03.2006 at about 11.30 AM. The proximate time of death mentioned therein was about half (½) day. On external examination, Doctor had recorded that:-

"An average built body, eyes, mouth closed, clotted blood present over face and head. Blood oozing out from the nose. Rigour mortis present in both extremities. The postmortem staining present in different parts."

11. On internal examination, the doctor has reported that:-

"Temporal, parietal and frontal bone of right and left side of the head were fractured, brain lacerated, clotted blood present, right lung lacerated, about 500 ML blood present in the chest cavity. Right chamber of heart was full, left chamber empty. Semi digested food about 100 ML was present in the stomach; small intestine filled by gases and pasty matter. Large intestine had faecal matter."

12. One copper colour metallic bullet of 3 cm in length recovered from liver was handed over to the Constable in a sealed envelope with sample seal. The clothes of the deceased were sealed in another bundle and handed over to the police. The cause of death was hemorrhage and shock due to ante-mortem injuries. The postmortem report was proved as Exhibit Ka-4 by the doctor PW-3, being in his handwriting and signature. The charge sheet was submitted

by the Investigating Officer on completion of the investigation and on committal, charges under the above noted sections were framed against the accused persons who had denied the same and demanded trial.

13. The weapons recovered from the possession of the accused persons were sent to the ballistic expert, the forensic laboratory report is on record. The finding therein indicate that presence of nickle was noted in two weapons of 315 bore marked as 1/06 and 2/06 whereas in the 303 bore pistol marked as 3/06, remnants of firing, led, copper and nickle was present. The used cartridges marked as EC-1 could not be tallied with two weapons of 315 bore marked as 1/06 and 2/06. The bullet recovered from the dead body marked EB-1 could not be tallied with the weapons 1/06 and 2/06, whereas in the country made pistol of 303 bore marked as 3/06, cartridges of 315 bore could not be loaded. The result is that the weapons recovered from the accused could not be connected to the crime. The accused persons, thus, had been acquitted under Section 3/25 of the Arms Act.

14. The prosecution had produced 10 witnesses to prove its case and the defence produced 16 witnesses in their support.

Ocular version of Eye-witnesses :-

15. Amongst the witnesses of fact, PW-1, the first informant, in the examination in chief, had described the topography of the place of the incident namely Kesari Chauraha and stated that his father (the deceased) was a teacher in Maruti Vidyalya Inter College and was appointed as a Lecturer in Social Science in the said institution in the year 1979. He remained on the said post till July 1997 when he was appointed as the Principal being the senior most Lecturer on the retirement of the then Principal Sri Paras Nath Mishra. Accused-appellant Laxmi Narain Pandey was the Manager of the institutions in the year 2000-01 when Rs.10 lacs were received from the M.P. Funds in the account of the Principal Rajendra Prasad Tripathi for development and construction of building. Laxmi Narain Pandey, the Manager and his sons were trying to misappropriate the money and the deceased had confronted them. On the pressure created by the Manager the said money was returned by his father to the Chief Development Officer, Azamgarh through cheque. Later on, the said money was got transferred by the Manager of the institution in the account of the degree college which had resulted in a dispute between his father and the Manager and the Manager started conspiring to remove his father from the post of Principal. The appellant Shyam Narain Pandey was appointed as Principal in April 2003 on forged educational testimonials just in order to remove the deceased from the post of Principal. Despite the said fact, his father was working in the institution as a teacher and the Manager Laxmi Narain Pandey and his sons, the accused herein, had threatened him and thrown him out of the institution.

16. A writ petition was filed by his father (the deceased) in the High Court wherein educational testimonials of Shyam Narain Pandey were found forged. After enquiry on the complaint of the deceased, Shyam Narain Pandey was removed from the post of Principal by the Commission. It is stated therein that in the year 2005, his father was again appointed as Principal and his signatures were attested, however, that order was withdrawn by the Manager by

illegal means. The salary of the deceased was also stopped since 2003 and after much efforts, his father (the deceased) got the post of Principal.

17. PW-1 stated that the incident had occurred on 28.02.2006 at about 06.00 PM. His father went to the office of the District Inspector of School, Azamgarh to collect Board copies and the first informant also accompanied him but he came back early after his work was completed. While coming back, his father told to wait for him at the Kesari Chauraha where he would reached around 06.00 PM and that he would bring copies. The first informant alongwith the persons named in the first information report was waiting for his father at the crossing and they were at a "Takht" on the southern pavement, which was at the west of the crossing. As soon as his father got down from the bus and moved to the tea stall of Ram Singh towards east, the bus moved ahead, he and the witnesses moved towards his father, a Bolero car came from right behind the bus at the centre of the road on the northern side of his father, the accused Rajesh, Amit, Pawan @ Babloo, Ramesh and Umesh alighted from the car carrying weapons like country made pistol in their hands. Pawan @ Babloo, Rajesh and Amit encircled his father and fired, while his father was felling down being hit by the fires, Ramesh and Umesh also fired at his father. Laxmi Narain Pandey and Shyam Narain Pandey were exhorting them to kill while sitting in the car saying that "kill that bastard, wanting to become Principal." His father fell down on sustaining injuries and died. The Bolero Car belonged to Laxmi Narain Pandey. The first informant got shocked on seeing the incident. The accused persons fled away in the car towards the West.

18. PW-1, in his examination-in-chief, further stated that on 01.03.2006, the District Inspector of School was about to handover the charge of the Principal of the institution to his father as Board examinations were to commence on 04.03.2006 and it was the reason for conspiring to commit the murder of his father.

19. PW-1 stated that the report of the incident was written by him and given in the police station, his signature and the contents of the report were proved by PW-1 in the Court, which was marked as Exhibit Ka-1. PW-1 stated that the Investigating Officer recorded his statement. The bag of his father found besides the dead body was seized by the police and was given in his custody. One application addressed to the Commissioner, District Magistrate and Superintendent of Police taken out from the bag was seized and a memo was prepared on which his signature and that of Ramakant Mishra were taken. Paper No.9 Ka/1, memo taking possession of the bag and Superdiginama was proved by him bearing his signature, marked as Exhibit Ka/2. The recovered letter, paper No.11 Ka/2, was shown to this witness wherein he had proved the signature and stamp of his father and stated that it was in the handwriting and signature of his father which he could identify and that the same was seized by the police on the spot, it was marked as Exhibit Ka-3. The bag was marked as Material Exhibit-1.

20. The cross-examination of PW-1 was made about the narration by him of the dispute between his father and Laxmi Narain Pandey, the Manager of the institution; i.e. the motive assigned by him to commit the murder. PW-1 reiterated that the appointment of Shyam Narain Pandey

though was made by the Commission but it was a result of fraud and his father got a stay order from the High Court about the appointment of Shyam Narain Pandey. Shyam Narain Pandey remained Principal from 2003 till 2005. Further, when Rs.10 lacs were received from M.P. fund, his father was the Principal and Laxmi Narain Pandey was the Manager. The said grant was for Intermediate institution. Laxmi Narain Pandey was also the Manager of a Degree College and both the institutions were located nearby. The money came in the account of his father but could not be utilized for the intermediate institution. He then stated that he cannot say much about the accounts of the institution. The suggestion that his father had misappropriated the money and on the said dispute it was returned to the Chief Development Officer, Azamgarh, had been categorically denied. It was admitted by PW-1 that his father was removed from the post of Principal in April 2003. Further suggestion that a charge of misappropriation of Rs.10 lacs was levelled against his father and that is why another Principal was appointed was denied.

21. As to the identity of the accused person, PW-1 stated that Rajesh, Pawan, Amit, Umesh and Ramesh are sons of Laxmi Narain Pandey and he had no knowledge about the education and occupation of those persons. Shyam Narain Pandey is not related to Laxmi Narain Pandey and is resident of Ballia. On a question put to PW-1 about the identity of accused Pawan Kumar, he categorically stated that he knew Pawan Kumar by name and face and also that he was son of the Manager Laxmi Narain Pandey and that he knew Pawan Kumar since 2001. PW-1 also identified accused Pawan Kumar standing in the Court and stated that the said accused hit a bullet in the head of his father.

22. PW-1 stated that his house in Atraulia was at a distance of half a kilometer towards north-east side of the Kesari Chauraha. His father, mother and sister were occupants of the house. Giving details of the incident, PW-1 stated that the Bolero car stopped at the east of the crossing facing towards west. He was at a distance of ten paces from the car towards south-west. Laxmi Narain Pandey was sitting inside the car in the middle seat at the southern gate and the gate was open and he could clearly see Laxmi Narain Pandey from the place where he was standing. Laxmi Narain Pandey was taking his body out of the car while exhorting other accused persons to kill. He knew Laxmi Narain Pandey for the last about ten years.

23. He further stated that there was a day light at the time of the incident, electric light was not on by then and he made no mistake in identification of Laxmi Narain Pandey. A suggestion was given that Laxmi Narain Pandey and Pawan Kumar were lodged in the District Jail, Lucknow few days from prior to the incident till the date of the incident, had been categorically denied by PW-1.

24. In cross, PW-1 was confronted about the presence of crowd at the Kesari Chauraha in the evening hours and that the police usually remain present for checking purpose. He though accepted that Kesari Chauraha used to become crowded by 3.00 PM and it was a crossing for the big and small vehicles running on Azamgarh-Faizabad road but stated that police was not present on the spot. He further stated that there was no jam like situation and that the Bolero Car stayed for 5-6 minutes at the site of the incident and that no members of public threw stones on Bolero car. He further stated, on confrontation, that when bus stopped, his father got down alone and

bus moved ahead, his father was not caught and fired but the accused surrounded him and then opened fire. All five accused persons gheraoed his father. PW-1 also gave the direction in which the accused persons were standing while encircling his father and the distance of them from the deceased. He further stated that as per his knowledge, total five fires were made but it could be more than that. His father fell down after being hit by the bullet, facing downwards. The incident was witnessed by him from a distance of ten paces and while he was about to move forward towards his father, Ramesh and Umesh opened fire and that time deceased was falling. After the accused left in the car, he went near his father but crowd did not allow him to touch the deceased.

25. On a query made from PW-1 as to whether his clothes were soaked with the blood of his father, he stated that he could not hug his father though he wanted to, people were holding him while he was sitting besides the dead body of his father for about 10-15 minutes. After 15 minutes, when people left him, he kept on crying for 5-10 minutes but did not touch his father. In the meantime, his mother and sister also reached the spot. His house was at a distance of half a kilometer on the southern side from the police station Atraulia. His mother and sister became unconscious and remained lying as such for about 10 minutes but the police of the Police Station Atraulia did not reach by then.

26. PW-1 stated that he then wrote the report while sitting at a Samadhi Sthal Balakdas which was about 10-12 feet on the northern side of the place of the incident. It took about 20 minutes to write the report and then he went to the police station, by that time even the police of the Police Station Atraulia did not reach there. It took him about 15 minutes to reach the police station as he went on foot and when he gave the report, the police came to know that a murder had been committed on the spot.

27. After lodging of the report, police personnel came on foot with him, they were 3-4 in number. The Investigating Officer reached after half an hour of reaching other police personnel on the spot and he came by an official Jeep. After 2-4 minutes of coming to the place of the incident, the Investigating Officer started inquest. The body was then moved from the place of the incident and it must be about 10.30 PM when the police took the body to Azamgarh. PW-1 stated that by the time body was sealed and sent away, the police of many police stations reached at the spot and some officers also came. They took the sealed body towards east and then put it in a vehicle which he could not see. PW-1 stated that he remained at the place of the incident even after the body was taken away and he was there till 12.00 hrs.

28. In cross, PW-1 was confronted about the proof of his father travelling by bus on the fateful day. He stated that his father alighted from a Roadways bus. The bag of his father was given in his custody by the police after preparation of the memo and no bus ticket was found inside it. About Rs.250/- were found in the pocket of pant of his father which was given to him without any paper work. Neither the bus ticket nor any pass of traveling by the bus was recovered from the clothes of his father (the deceased). On further confrontation, he stated that the fact that his father was about to receive the charge of Examination Controller on 01.03.2006 could be known to him from his father and his father told

him that he was going to bring Board copies from the office of the District Inspector of School, Azamgarh. He says that he also accompanied his father but he came back early and could not know as to whether copies were received by his father. He had denied the suggestion that his father did not alight from the bus at the Kesari Chauraha on the date of the incident.

29. PW-1 was further confronted about the place of the residence of other witnesses and that is how about the presence of the witnesses on the spot. PW-1 stated that when the Investigating Officer recorded his statement, all four witnesses were not with him and they went with his mother and sister and, thereafter, he did not know where they had gone and that they did not meet the Investigating Officer in front of him. Affidavit of four witnesses given in the office of the District Magistrate were put to PW-1 to confront that those affidavits were filed to put undue pressure on the witnesses. Suggestion about the enmity of the deceased with other persons was also given to PW-1 in order to project that some unknown persons had committed the offence on account of land dispute and the appellants had been falsely implicated due to enmity. It has also come in the evidence of PW-1 that on the date of the incident, the Ex-Principal of the institution namely Sri Paras Nath Mishra had died. The suggestion that he went to the house of Sri Paras Nath Mishra was denied by him.

30. On a suggestion that Rajkumar Tiwari, who is witness in the instant case, was peon in the institution and his salary was withheld by accused Shyam Narain Pandey when he was Principal as Rajkumar Tiwari used to remain absent and did not work properly, PW-1 showed his ignorance. He was again confronted on various missing details in the description given in the first information report and his previous statement under Section 161 Cr.P.C. which he replied and stated that the report was written by him on his own and no-one was helping him nor he asked anyone. A suggestion was also given to PW-1 that a bus stand was there on the eastern side at a distance of about half kilometer from the Kesari Chauraha and buses used to stop there.

31. About the posting of his father in the institution concerned, when confronted, PW-1 reiterated that his father was a Lecturer in the institution since the year 1979. When confronted about the nature of his appointment and the post that whether his father was about to become Principal or the Examination Controller, PW-1 stated that whatever had been stated by him was informed by his father and he did not know much about the post held by his father. The suggestion that his father was absent from the institution for a long time i.e. from 14.04.2003 was denied by PW-1. He further stated that he did not know as to whether another Senior Lecturer Sri Ram Naval Pandey was the Principal of the institution on the date of the incident. About knowing the witnesses Krishna Kumar Tiwari and Arun Kumar, he stated that he knew them as they were appointed in place of their father on compassionate ground. All other witnesses Ram Shravan Pandey and Rajkumar Tiwari were Peons in the institution and were close to his father. He denied that the name of accused Shyam Narain Pandey was added at the instance of witnesses Rajkumar Tiwari and Ram Siromani Pandey.

32. On a query made by the Court that the post of Principal and Examination Controller were two different posts and in

the examination-in-chief PW-1 stated that on 01.03.2006, the District Inspector of School was about to handover charge of the Principal to his father whereas in the cross he stated that it was the charge of the post of Examination Controller, PW-1 explained that it might have been stated because of the confusion but the correct fact was that his father was to be handed over the charge of the post of Examination Controller by the District Inspector of School. The suggestion that accused Shyam Narain Pandey had sworn an affidavit before the Oath Commissioner, High Court in a case at about 07.10 PM, on the date of the incident, was repelled by PW-1 saying that he had no knowledge of the same but he had categorically denied the suggestion that Shyam Narain Pandey was falsely implicated at the instance of Krishna Kumar Tiwari and Raj Kumar Tiwari. PW-1 categorically denied the suggestion that he was not present on the spot. PW-1 lastly denied that his father was coming back from the house of the Ex. Principal Sri Paras Nath Mishra and then the incident had occurred.

33. PW-2 Rajkumar Tiwari, a resident of P.S. Atraulia District Azamgarh stated on oath that he was working as Peon in Matruti Inter College since 1970-71 and had superannuated on 30th April 2006. In the year 1996-97, Sri Paras Nath Mishra was the Principal of the institution. After retirement of Sri Paras Nath Mishra on 30.06.1997, Sri Rajendra Prasad Tripathi who was the Senior-most Lecturer became officiating Principal in July 1997 and he continued to work as such for about three years, his tenure was about 7 years and there was no dispute in the initial three years. PW-2 pointing to the accused Laxmi Narain Pandey present in the Court, stated that he was the Manager of the institution who had created an atmosphere of corruption and fear in the institution, he was a man of criminal nature and became Manager by illegal means.

34. PW-2 stated that accused Laxmi Narain Pandey was a convict in the murder case of 5-6 persons in Village Hatdiya in the year 1970-71 and was sentenced for life imprisonment by the Sessions Court. Apart from that, 7-8 cases in P.S. Atraulia were against the said accused. He stated that the accused Laxmi Narain Pandey was in the habit of realizing money by illegal means from the students of the college and doing bungling in the scholarship of Harijan students. He had also manhandled one peon of the institution about three months prior to the incident.

35. In the year 2001-02, Rs.10 lacs were received from M.P. fund for construction of building and other purposes. With a view to misappropriate that money, the Manager wanted to get signature of deceased Rajendra Prasad Tripathi in a blank cheque which he had denied and thereafter Manager and his sons used to exert a lot of pressure on the deceased. Because of the pressure, the deceased (Principal) had returned the money to the Chief Development Officer, Azamgarh. Being annoyed by the said fact, the Manager was hatching conspiracy with his sons to kill the deceased. In order to remove the deceased from the post of Principal, co-accused Shyam Narain Pandey was appointed as Principal on the basis of forged papers through the Commission. The deceased, the then Principal namely Rajendra Prasad Tripathi gave an application against the appointment in the Commission and on enquiry, the testimonials of Shyam Narain Pandey were found forged and his appointment was

cancelled. After removal of Shyam Narain Pandey, the deceased again became Principal and, thereafter, the Manager and Shyam Narain Pandey jointly hatched conspiracy to kill him and in furtherance of their intention, the accused persons namely the Manager Laxmi Narain Pandey, his sons and the co-accused Shyam Narain Pandey committed the murder.

36. Narrating the occurrence, PW-2 stated that the incident had occurred at about 06.00 PM on 28.02.2006 when sun was being set and sky was clear. He was present at the Atraulia Kesari Chauraha alongwith Krishna Kumar Tiwari, Arun Kumar and Atul Kumar Tripathi (PW-1) and they were waiting for the Principal Rajendra Prasad Tripathi while sitting on a Chawki. On a day before, the Principal had instructed them to wait for him at the Kesari Chauraha as he would go to the office of the District Inspector of School, Azamgarh on 28.02.2006 (the next date) to bring Board copies and other material. On the day of the incident, the Principal (the deceased) went to Azamgarh and all the witnesses were waiting for him at the Kesari Chauraha. At around 06.00 PM, a bus stopped at the crossing and the Principal (deceased) alighted. The bus moved ahead to the West, while the Principal Sahab was going towards the east, he stopped at the tea Stall of Ramu Singh, they moved towards him. They were directed by sign, by the deceased to move towards north and at that time, a Bolero Car (without number) came and stopped on the opposite side. The accused persons namely Rajesh Pandey, Ramesh Pandey, Umesh Pandey, Amit Kumar Pandey and Pawan Kumar Pandey got down from the car, all carrying country made pistols. In the front seat of the car accused Shyam Narain Pandey and in the middle seat accused Laxmi Narain Pandey were sitting and both the persons while sitting inside the car were exhorting the accused persons to kill the deceased by saying that "बड़ा प्रिंसिपली करने चला है बचने ना पाए". The accused Amit, Rakesh, Babloo, Umesh and Ramesh gheraoed the Rajendra Prasad Tripathi, Amit fired at the back of the right earlobe whereas Babloo fired at the back of left earlobe, Rakesh fired at the back and thereafter the deceased started falling down and then Umesh and Ramesh also fired. The deceased fell down and died instantly. Both Laxmi Narain Pandey and Shyam Narain Pandey were also challenging the witnesses that if they moved ahead, they would also met the same fate. All the accused then sat in the car and fled towards the west. Lot of commotion had occurred on the spot because of the incident. After sometime, wife and daughter of the deceased came on the spot, they became unconscious and then PW-2 alongwith Krishna Kumar and Arun Kumar took them to the village. PW-2 stated that he was interrogated by the Investigating Officer.

37. In cross, PW-2 narrated that prior to the incident he was going to the school daily and was putting his signatures on the attendance register. He admitted that his salary was stopped from 19.01.2005 but stated that the reason for stopping of the salary was not his absence. He admitted that the withheld salary was not received by him till date though proposal in that regard had been sent. PW-2 further stated that he had retired on attaining the age of superannuation of 60 years and admitted that Shyam Narain Pandey and Laxmi Narain Pandey were behind all his problems, i.e. for stoppage of salary but he never went to the deceased to seek help.

38. On further confrontation, PW-2 denied that he was terminated on account

of long absence and also submitted that he read in the newspaper that his services were terminated four days prior to his superannuation. A suggestion that he was very close to the deceased Rajendra Prasad Tripathi was denied by PW-2 who reiterated that even after the incident till 30.04.2006 i.e. till the date of his superannuation, he was continuously going to the school and since thereafter he remained at his house. PW-2 stated that the Investigating Officer reached his home after 20-25 days of the incident but he could not remember the date. He stated that he gave statement to the Investigating Officer for the first time on the day when he came his home. On confrontation about the affidavit given in the office of the District Magistrate, PW-2 stated that the said application was dictated by him in the Collectorate Kachehri and after attestation of the same by an Advocate it was given by him in the Court. He stated that he narrated the same fact in the affidavit given to the District Magistrate as stated in the Court and before giving the said affidavit, the Investigating Officer did not meet him.

39. On confrontation, PW-2 stated that he did not mention the said fact to the family members of the deceased as he did not find any purpose to do so and admitted that he was told that his Advocate was brother of Bajrang Tripathi who was real brother of deceased Rajendra Prasad Tripathi. Various questions were put to PW-2 on the affidavit given by him in the office of the District Magistrate to which he gave categorical replies. The affidavit given by him was shown in the Court and he admitted the same.

40. On further confrontation about the post which the deceased was holding, PW-2 reiterated that the deceased became officiating Principal in the year 1997 after retirement of Paras Nath Mishra. He had reiterated the criminal antecedents of accused Laxmi Narain Pandey who was the Manager of the institution. It has come in the evidence of PW-2, in cross, that in the murder case of five persons, he alongwith Laxmi Narain Pandey and other persons was convicted by the Sessions Court and they all had been acquitted by the High Court. PW-2, however, explained that he was implicated being brother in law of Laxmi Narain Pandey. The suggestion that he was not related to Laxmi Narain Pandey was denied by him.

41. PW-2 further stated that two days after he gave affidavit to the District Magistrate, the Investigating Officer came to his house to record his statement. The Investigating Officer also interrogated him about the affidavit given by him. It has come in the evidence of PW-2, in cross, that the investigation of the case was transferred from the police station Atraulia to the police station Mubarakpur. He, however, stated that he did not know the reason as to why the investigation was transferred. PW-2 denied that his name was included amongst the witnesses for the reason that he was a victim at the hands of the accused and the prosecution was sure that he would give evidence against them. The suggestion that PW-2 had not witnessed the incident had been categorically denied and that he gave the testimony after making a deal with the family members of the deceased.

42. PW-2 further stated that he was not sure as to whether the deceased was the Principal on the date of the incident and the date when he became the Principal He, however, heard that when Shyam Narain Pandey was removed from the post of

Principal because of forged testimonials, the deceased Rajendra Prasad Tripathi was appointed.

43. In a gruelling cross-examination running into several pages, continued for about two months on several dates, PW-2 narrated the manner in which the deceased was killed and categorically stated that he had identified both the accused namely Laxmi Narain Pandey and Pawan Kumar Pandey and there was no doubt about the same. As to whether the deceased got the Board copies and the reason why they were present on the spot of the incident, PW-2 reiterated, in cross, that the reason given by him to wait for the deceased at the crossing was correct. He stated that he alongwith other witnesses had witnessed the incident while standing at the same place and when accused ran away they went near the deceased. He denied the suggestion that he was not present at the place of the incident and was in Atraulia market and that no incident had occurred in his presence and he was making deposition due to enmity.

44. PW-2 admitted that Shyam Narain Pandey was the Principal during his service period and his appointment in the institution was made by the then Principal Paras Nath Mishra. He admitted that Paras Nath Mishra had died on the date of the incident and the distance between the house of PW-2 and Paras Nath Mishra was 1 KM. PW-2, however, stated that he did not participate in the last rites of Paras Nath Mishra though he went to his house after hearing the news. PW-2 stated that he could not tell as to whether college was closed when condolence meeting was held and that he did not participate in the condolence meeting. PW-2 further stated that he went to the institution on the date of the incident and made his signature on the register at about 09.00 AM. The college was open till 04.00 PM and he also performed his duties on the said date. PW-2 reiterated that he was present in the institution till 03.00 PM and till the college was open no condolence meeting was held in his presence. He then stated that Sri Paras Nath Mishra died at the dawn and categorically denied that the college was closed due to condolence and every teacher and employee of the institution went to the house of Sri Paras Nath Mishra and that he also participated in the cremation ceremony.

45. On confrontation, PW-2 denied that he was suspended by Shyam Narain Pandey on account of long absence from duty though he admitted that his salary was stopped and that had caused annoyance and further when he applied for the loan from GPF account, Shyam Narain Pandey was the Principal and that he could not get the loan. PW-2 also admitted that he did not get pension till date though he had denied termination of his services.

46. Queries were made from PW-2 about his criminal antecedent and that he remained in jail in the murder case in which he was one of the accused alongwith Laxmi Narain Pandey. A suggestion was also given about enmity with Laxmi Narain Pandey because of the election of Gram Pradhan contested by his wife against the wife of Laxmi Narain Pandey which he denied. Another suggestion of enmity of grabbing of land of his brother by Laxmi Narain Pandey which was also denied. PW-2 further admitted that his mother Sundari Devi contested election against the wife of Laxmi Narain Pandey for the post of Gram Pradhan and had lost but stated that the said election was held much prior to the incident.

47. Further suggestion was given to PW-2 that he remained absent for a long time and on account of the said fact, show cause notice was given by the District Inspector of School and he managed forged entries in the attendance register.

48. At this stage, one document namely the notice dated 09.02.2004 was shown to PW-2 upon which he had denied his signature and handwriting on the receiving. Certain portions of his examination-in-chief was put to PW-2 to confront that no such submission was made by him in his previous version under Section 161 Cr.P.C. PW-2 stated that all those facts were narrated by him to the Investigating Officer but why it was not written therein, was not known to him. He was also confronted about the time when sun was set on the date of the incident. PW-2 was also confronted that he did not show the Chowki (wooden bench) whereupon they were sitting at the crossing. He was also confronted that the reason to remain present on the spot was not narrated by him to the Investigating Officer in his statement under Section 161 Cr.P.C., i.e. that the deceased told him to wait at the crossing as he went to bring the Board copies. On further confrontation, PW-2, in cross, stated that when the Principal (deceased) alighted from the bus he was empty hand, no Board copies were with him. He was further confronted that he was giving oral testimony on the condition that his pension would be released.

49. Lastly PW-2 had denied the suggestion that he was not present on the spot and was giving evidence against Shyam Narain Pandey due to enmity. Apart from these two witnesses of fact, all the other witnesses are formal witnesses.

Formal Witnesses:-

50. PW-3 is the doctor who had conducted the postmortem of the dead body. PW-3 proved the injuries, noted above, on the person of the deceased. PW-4 is the first Investigating Officer who proved the police papers prepared uptil inquest.

51. PW-5 is the second Investigating Officer to whom the investigation was handed over on 02.03.2006. PW-6 is the Constable clerk who proved the preparation of check FIR and G.D. entry of the same. PW-7 is the police officer who proved the collection of recovered articles and sending them to the forensic laboratory. PW-10 is the officer posted in CBCID, to whom the investigation was handed over on 05.05.2006 on an order passed by the State Government. He conducted the investigation and filed the charge sheet. Amongst the formal witnesses, PW-3 had proved the injuries noted above found on the person of the deceased.

DEFENCE SUBMISSION:-

52. Placing the prosecution evidence, it is vehemently argued by Sri Dilip Kumar learned Senior Advocate that this is a case of false implication of accused persons because of admitted enmity of private witnesses PW-1 and PW-2, one of whom is the son of the deceased and another an employee of the institution against whom disciplinary action was taken by the co-accused Shyam Narain Pandey as Principal of the institution. Further, there are material contradictions in the testimony of PW-1 who is stated to be an eye witness of the incident.

53. The question is as to whether the story of the first informant with regard to the place of the incident and the manner of occurrence could be proved, with the presence of other eye witness, in as much as, the prosecution could not even prove the fact that the deceased had travelled by a Roadways bus on that day. It is vehemently argued that the entire story narrated by PW-1 from the beginning was concocted, in as much as, the narration by PW-1 of the reason of enmity of the deceased with accused Laxmi Narain Pandey for Rs.10 lacs received from M.P. Fund, could not be proved by the prosecution. In cross, it has come that the said money was though transferred by the deceased to the Chief Development Officer, Azamgarh but it was again refunded to the accused Laxmi Narain Pandey for degree college. The enmity suggested by the prosecution because of the dispute relating to the money (Rs. 10 lacs), therefore, falls. The story of the pressure created by Laxmi Narain Pandey upon the deceased to handover money to him was creation of the witnesses PW-1 & PW-2.

54. It is argued that PW-1 was not sure as to whether the deceased (his father) was to be given charge of the post of Principal or the Examination Controller on the next date of the incident, i.e. 01.03.2006. In view of the apparent contradictions in his statement-in-chief and cross, his version that the deceased went to the office of the District Inspector of School to bring the Board copies and that being the reason of the presence of the witnesses on the spot, therefore, is proved to be false. Besides the apparent contradictions in his testimony, no material such as answer books were found near the dead body nor noted in the inquest, the said fact was also admitted by PW-2 that the deceased did not bring answer books with him. No copy or no other material was found besides the dead body. No bus ticket or pass to travel by the roadways bus was found either in the pocket of clothes of the deceased or in the alleged bag found by the Investigating Officer besides the dead body. There is no memo of alleged money recovered from the pocket of the pants of the deceased. In the inquest report, the column for noting the things found besides the dead body is blank which further proves the stand of the defence that nothing was found besides the dead body. As per the evidence of PW-1, the deceased had alighted from the roadways bus. A presumption, thus, has to be drawn in the ordinary course of business that he was travelling with ticket or a pass but no such material was found near the dead body. The entire theory of prosecution of the deceased having alighted from the roadways bus, thus, falls short of evidence. There is, thus, no evidence on record to prove that the deceased went to the office of the District Inspector of School, Azamgarh and was coming back from the said office by a Roadways bus as narrated by the prosecution witnesses. The reason for their presence given by the prosecution witnesses (PW-1 & PW-2) to receive the deceased at the Kesari Chauraha as he was bringing the Board copies, therefore, proved to be wholly concocted story. The presence of prosecution witnesses (PW-1 & PW-2) on the spot, therefore, is belied.

55. It is then argued that once the reason for presence of PW-1 and his companion (PW-2) on the spot could not be proved by the prosecution, the presence of witnesses on the spot becomes highly doubtful. The direction wise details given by PW-1 as to which accused fired in which manner, further goes to show that

the prosecution had concocted the entire version of PW-1 about his presence on the spot. There is apparent contradictions in the testimony of PW-1 about the number of fires from the medical evidence wherein only three firearm injuries of entry wounds were found on the person of the deceased. Two other firearm injuries as indicated in the postmortem report are exit wounds corresponding to two entry wounds. According to the learned Senior Counsel, PW-1 having counted the number of firearm injuries as indicated in the postmortem report without understanding its impact, stated that all the accused persons had fired at the deceased and that total 5 fires were made by assigning firearm in the hands of each accused.

56. It is clear in his version that PW-1 though stated that Umesh and Ramesh also fired but did not explain as to whether their fire hit the deceased.

57. PW-2 Rajkumar Tiwari conspicuously absented from the spot soon after the occurrence and did not meet the police officer as is evident from his testimony and that of PW-4. His statement was recorded after about 20-25 days of the occurrence and the admitted fact that he gave an affidavit to the District Magistrate to record his testimony show that the prosecution had pressurized the witnesses to give a false testimony. The statement under Section 161 Cr.P.C. of PW-2 was recorded only after he gave affidavit to the District Magistrate on 20.03.2006. It is admitted to this witness (PW-2) that he did not meet the Investigating Officer before giving affidavit to the District Magistrate. It is further argued that, in cross of PW-2, it has come that Ex. Principal Paras Nath Mishra died on the same day and it was suggested that PW-1 was coming from his house, which was near the place of the incident, when this murder was committed. This suggestion given to the witnesses could not be successfully refuted by PW-1 or PW-2 which fact coupled with the above noted facts makes it evident that the prosecution had suppressed the truth, i.e. the reason for the presence of the witnesses on the spot.

58. It is then argued that the suggestion of enmity of the deceased with other persons on account of lodging of the first information report by him was admitted. Further there was a considerable delay in sending the dead body to the police lines. As per the statement of PW-1, the body was sent for postmortem from the place of the incident at about 10.30 PM but as per the entries in Form 13, which records movement of the dead body, the body was dispatched from the place of the incident at 10.25 PM but received in the police lines in the morning at about 11.15 AM. The postmortem commenced at about 11.30 AM and the doctor (PW-3) admitted that he had received the body in the mortuary at 11.15 AM. Similar entries could be seen from two documents maintained at the police lines which are the postmortem register and GD proved by the defence as Exhibit Kha-1 and Kha-2. The entries in the said documents do tally with the postmortem report (Exhibit Ka-4) and the time of arrival and dispatch of the dead body to the mortuary recorded therein is 10.45 PM. The first Investigating Officer namely PW-4 was cross-examined on the issue of arrival of the body in the mortuary and he also admitted that as per his information, the body had reached the mortuary at about 6.00-7.00 AM though it was asserted by PW-4 that the body was straightway sent to the mortuary from the place of the incident for postmortem.

59 The defence witness DW-1, clerk of the police Headquarter, Azamgarh brought the original postmortem register and G.D. and as per the entries therein, it was proved by DW-1 that the dead body of Rajendra Prasad Tripathi (deceased) had reached at the police lines on 01.03.2006 at about 10.45 AM.

60. With the statement of DW-1, learned Senior Counsel for the appellant vehemently argued that the entries in both the documents namely Kha-1 and Kha-2 were of 10.45 AM. There is no corresponding entry in Form 13 wherein a column exist for noting the time of arrival of the dead body in the police lines and also of sending it to the mortuary. The contention is that since only one time namely 22.25 hrs dated 28.02.2006 has been mentioned in the relevant column in Form 13 with regard to which the relevant entry in the postmortem register at serial No.82 Rapat number 50 time 10.45 AM dated 01.03.2006 exist, it can be inferred that the dead body reached the police station only in the morning at about 10.15 AM. It is argued that the distance of the police lines from the place of the incident was about 33 KM. In any case, dead body could not have been received in the police lines at about 10.25 PM as noted in the relevant column of form 13 as it was proved to be the time of dispatch of the dead body. Looking to the distance of the police Headquarter from the place of the incident, only entry of the postmortem register and Rapat No.15 in G.D. (Kha-1 and Kha-2) have to be considered to ascertain the time when the body was received in the police lines, Headquarter Azamgarh. The doctor had proved that the body was received by him for the postmortem at about 11.15 AM on 01.03.2006 alongwith police papers and he conducted postmortem at 11.30 AM.

61. In light of the above evidence on record, no explanation could be offered by the prosecution witnesses specially the Investigating Officer to explain the gap of 12 hrs in transportation of the dead body to the police lines. The Constables carrying the dead body were not examined on the vital delay of arrival of the dead body in the police station and then to the mortuary. As per the opinion of the Doctor, the proximate time of death estimated by him was ½ day that means 12 hrs. From the above opinion of the expert also the death could not have been caused at around 06.00 PM, as projected by the prosecution witnesses of fact (PW-1 & PW-2). It seems more probable that the death was caused sometimes around midnight and for that reason, the body was received in the police lines/mortuary in the morning. The statement of the Investigating Officer (PW-4) also becomes significant when he says that he had received information that the body was received in the mortuary at about 06.00-07.00 AM.

62. In view of the above circumstances, two probabilities arise, firstly, that the incident had occurred in the dead of night and no-one had seen the murder and secondly that some unknown person who were carrying ill will against the deceased on account of lodging of the first information report against them under Section 307 IPC had killed him and for that reason, the body was received in the police lines and the mortuary during morning hours on the next day i.e. 01.03.2006. As a consequence to that, the first information report becomes Ante-time. By preponing the time of lodging of the first information report, the prosecution tried to build a case of the presence of alleged eye witnesses (PW-1 & PW-2) at the site of the incident. The special report of the incident was also

sent with considerable delay and as per the endorsement on the same, it was received by the Judicial Magistrate on 04.03.2006.

63. All the above facts taken together prove the improbability of the deceased having alighted from the bus at the Kesari Chauraha at the time which was fixed by the prosecution witnesses. According to the defence, in fact, PW-1 was present in his house which was at a short distance from the place of the incident and the deceased had gone to the house of Paras Nath Mishra, the Ex-Principal who had died on the same day. While coming from the house of Paras Nath Mishra, the deceased was killed by unknown assailants and PW-1, who came from his house projected himself as an eye witness in a motivated manner to falsely implicate the accused persons because of enmity. The reason for presence of the witnesses namely PW-1 on the spot was not narrated in his previous statement under Section 161 Cr.P.C. which fact further proves that PW-1 is lying.

64. It is further argued that when it was put to PW-1 that a bus stand was nearby, only 250 paces towards the west from the place of the incident, he admitted the same and this admission would be further proof of the fact that there was no reason for the roadways bus to stop at the Kesari Chauraha which was a busy place. In fact the place of the incident as narrated by PW-1 and the reason for his presence at the said place all are concocted story which could not be proved by the prosecution. The falsity in the testimony of PW-1 is further proved from the fact that he gave a false affidavit in the bail matter against accused Shyam Narain Pandey.

65. On motive, it was vehemently argued by the learned Senior counsel for the appellants that there is no evidence of the suggested motive and PW-1 could not even prove the motive in his oral testimony. It is lastly argued that both the witnesses are interested and partisan witnesses, PW-1 being son of the deceased and PW-2 having grudges against the co-accused Shayam Narain Pandey. No independent witnesses was produced though the incident allegedly had occurred at a crowded place at a time (in the evening) when lot of crowd was collected on the spot. Strict scrutiny of the prosecution evidences, therefore, would be required and it becomes important to ascertain as to whether the deceased had actually travelled by bus.

66. To prove the said doubt in the prosecution story bus ticket was a significant evidence which could not be found by the prosecuting officer. The bag which was allegedly found near the dead body was a planted one. The prosecution witnesses were put to cross on the evidence of proof of traveling of the deceased by bus but none of them could give any satisfactory answer. This fact itself completely ruled out the story of traveling of the deceased by the roadways bus.

67. It is argued by the learned Senior Counsel for the appellant that in the statement of the second Investigating Officer (PW-5) though it has come that he had interrogated the District Inspector of School and recorded his statement but the said statement was neither produced in the evidence nor exhibited. Without proving the evidence of the District Inspector of School, the substance of the statement of the second Investigating Officer in that regard would be liable to be thrown away.

68. The Material Exhibit-12, the bullet recovered from the dead body, could

not be matched with the weapons allegedly recovered from the accused persons. This again show the falsity in the case of the prosecution about the weapons in the hands of the accused persons and the offence committed by them. The appellants had been acquitted for the offence under the Arms Act as the recovery of weapon was planted.

69. It is urged that PW-2 admittedly had motive to falsely implicate the co-accused Shyam Narain Pandey. Further investigation of the case was done by the CBCID under the order passed by the State Government. The PW-10, the third Investigating Officer of CBCID, though collected evidence for the offence under Section 120-B but did not produce any witness in the Court and, thus, allegation of conspiracy could not be proved. There is no transparency in the investigation. The material improvement in the testimony of PW-2 were put to the Investigating Officer namely PW-5 who could not explain the same. The offence under Section 7 Criminal Law Amendment Act, which was indicated in the first information report had not been mentioned in any of the police papers prepared by the Investigating Officer.

70. The Investigating Officer did not ascertain the post which the deceased was holding on the date of the incident. There are several flaws in the investigation which were pointed out to the Investigating Officer to dispute the presence of eye witnesses and no satisfactory reply could be obtained. From the entry in the case diary dated 28.02.2006, it was pointed out by the learned Senior Counsel that there was interpolation in the case diary about the bag seized as the case property. This interpolation was put to the Investigating Officer namely PW-4 who could not give any satisfactory answer. It was also observed by the trial Court that there was an interpolation in the case diary and the word "bag" was later introduced.

71. Sri Dilip Kumar learned Senior Counsel for the appellants places reliance on various judgements of this Court and the Apex Court, **Nem Singh Vs. Emperor1, Guchun Misir & others Vs State2, State of U.P. Vs. Moti Ram & another3, Sahib Singh Vs. State of Haryana4, Malempati Pattabi Narendra etc. Vs. Ghattamaneni Maruthi Prasad & others5, State of Uttar Pradesh Vs. Babu Singh,6 Jumni & others Vs. State of Haryana7, Ayodhaya Prasad Namdeo Receiver Vs. Babu Ram Prasad8, Chhanga & others Vs. State of U.P.9 to buttress his arguments.**

72. It is argued by Sri Durgesh Kumar Singh learned counsel for appellant Shyam Narain Pandey that the accused persons Laxmi Narain Pandey and Shyam Narain Pandey were wrongly convicted in the offence of murder with the aid of Section 149 when admittedly they did not step out of the car. Only role of exhortation had been assigned to these appellants as per own case of the prosecution itself. The accused Laxmi Narain Pandey and Shyam Narain Pandey cannot be said to have committed any offence in prosecution of the common object of the assembly which was projected as unlawful assembly. Reference has been made to the decision of the Apex Court in **Roy Fernandes Vs. State of Goa10** to assert that the conviction of two appellants namely Laxmi Narain Pandey and Shyam Narain Pandey for the offence under Section 302 IPC with the aid of Section 149 IPC is a result of misapplication of law. Further, PW-1 did

not even assign the role of exhortation to Shyam Narain Pandey in his statement under Section 161 Cr.P.C., his version before the Court, therefore, is a material improvement. As established from the record, PW-2 had motive to falsely implicate Shyam Narain Pandey. He, therefore, is liable to be acquitted.

73. It is lastly argued by Sri Durgesh Kumar Singh learned Advocate that appellant Shyam Narain Pandey could not have been present on the spot, in as much as, he was in Allahabad and sworn an affidavit before the Oath Commissioner in the High Court. Two witnesses, DW-7 a litigant and DW-12, a lawyer were produced in the Court to prove the plea of alibi. Even PW-1 in his testimony admitted that he had never seen Shyam Narain Pandey prior to the incident and could not explain as to how he knew him.

74. This fact shows that PW-1 could not identify Shyam Narain Pandey at the time of the incident. His implication was later made on deliberations at the instance of PW-2 who was having enmity with Shyam Narain Pandey. This fact further proves the falsity in the statement of the prosecution witnesses and the case of prosecution falls on account of all the material contradictions found in the testimony of the prosecution witnesses.

DEFENCE EVIDENCE:-

75. To press the plea of alibi of accused Laxmi Narain Pandey, Pawan Kumar Pandey and Shyam Narain Pandey following evidence has been placed before the Court by the defence.

76. For Laxmi Narain Pandey and Pawan Kumar Pandey, their statement under Section 313 Cr.P.C. were placed wherein Laxmi Narain Pandey stated that he was lodged in the District Jail, Lucknow on the date and time of the incident. Similar plea was taken by appellant Pawan Kumar Pandey that he was lodged in the District Jail, Lucknow alongwith his father on the date and time of the incident. In support of this plea of alibi, the witnesses from the District Jail, Lucknow and the office of the Railway Police Force had been brought in the Court.

77. DW-2 came from the District Jail, Lucknow and deposed that he brought the gate book register and register No.1 (Kaidi register) register No.7 Doctor Mulaiza register in the Court. This witness had simply brought the document noted above and did not say anything beyond that, he was not cross-examined by the prosecution.

78. DW-3, the Head Constable posted in RPF Post, Charbagh (NR) Lucknow brought the original G.D. from the date 14.02.2006 till 27.02.2006 under the orders of the Court and proved the G.D. entries dated 24.02.2006, 16.26 hrs and 25.02.2006 as Exhibit Kha-3 and Kha-4. It was stated by DW-3 that as per the entries in the General Diary, two persons namely Laxmi Narain Pandey and Pawan Kumar Pandey were caught by the T.C. (Ticket Collector) and were handed over to RPF post (NR), Charbagh Lucknow alongwith two chargesheets. The entry in that regard exists at serial No.60 of G.D. When the case was registered against these persons, Constable Gauri Shankar Singh was on duty and according to DW-3 these entries might be in the writing of Gauri Shankar Singh. It was further stated that as per the entries in G.D. 25.02.2006 at 00.10 hrs, Laxmi Narain Pandey and Pawan Kumar Pandey were in the RPF lock-up under the

supervision of Constable Gauri Shankar Singh and they were handed over to Constable Shiv Raj Prasad who made entries at G.D. No.4, 00.10 hrs of handing over the accused persons to him. Constable Shiv Raj Prasad was on duty till 08.15 AM on 25.02.2006 and these two accused alongwith 15 other persons were handed over to another Constable at about 08.15 AM on 25.02.2006, entry of which could be seen at serial No.25 of the G.D. This witness stated that all the above entries and signatures might be of Constable Shiv Raj Prasad. As per the G.D. entries dated 25.02.2006 rapat No.47, two accused persons alongwith 15 others were taken to the Court of ACJM North Railway Charbagh Lucknow by the RPF Constables and they were brought back on the same day at about 18.00 hours, entries of which was made in the G.D. at rapat No.57. In the entries of return of the accused persons in the Lock-up, out of 17 persons, 4 persons were released as they had deposited the requisite fine.

79. These two accused persons namely Laxmi Narain Pandey and Pawan Kumar Pandey did not pay the fine of Rs.880/- per person imposed upon them and, therefore, they were inflicted punishment of 15 days imprisonment. The result was that 13 remaining accused including two persons namely Pawan Kumar Pandey and Laxmi Narain Pandey were lodged in the District Jail, Lucknow.

80. DW-3 in his testimony stated that all the above noted G.D. entries could be found in the original copy of the same.

81. In cross, he further stated that the names of the appellant Laxmi Narain Pandey and Pawan Kumar Pandey could be found in the list of those persons who did not deposit the requisite fine. On recall, DW-3 filed original Khuraki register, RPF Charbagh, Lucknow for the period from 03.11.2005 to 17.11.2006 and refuted the suggestion of the prosecution that all the documents were forged and prepared in order to provide undue benefit to the accused appellants. One register known as Jama Talashi register dated 24.02.2006 was also brought in the Court by DW-3 and it was stated that during frisking of the accused persons, one mobile charger was found which was not returned to him and as such there was no signature of the accused appellant Laxmi Narain Pandey therein, the copy of the Jama Talashi register was proved as Exhibit Kha-6. The original Khurakhi register was proved as Exhibit Kha-7, wherein it was indicated that meals of two times were given to the accused appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey in the RPF locker. One sealed envelope addressed to the Additional District and Sessions Judge, Court No.3 Azamgarh sent by the Additional Chief Judicial Magistrate (N.R.) Lucknow was produced by DW-3 in the Court, seal of which was opened therein. Five papers found in the envelope were marked as Exhibit Kha-9, Kha-10, kha-11 and kha-12 and kha-13. Kha-12 pertains to case No.1440 of 2006 arising out of case No.787 of 2006 under Section 137 Railway Act, Laxmi Narain Pandey son of Shiv Kumar Pandey, resident of Adilpur, P.S. Atraulia, District Azamgarh.

82. In cross DW-3 admitted that none of the entries in the register filed by him were made in his presence.

83. DW-4 is the Deputy Jailer, District Jail, Lucknow who brought, on the direction of the Court, the record of proforma for health screening and reasons

of admission of the accused in jail, which is the record of the jail hospital. He stated that the entire record of the District Jail, Hospital Lucknow was destroyed in a fire outbreak on 15.03.2006 and the copy of the available record was being filed in the Court as certified by the present Jailer, District Jail, Lucknow as Exhibit Kha-5. He categorically stated that the record which was summoned by the court had been destroyed in the fire incident and was not available in the hospital of the District Jail. Original register No.7, Hospital Mulaiza Register for the period from 21.02.2006 till 04.03.2006, gate register from 24.02.2006 till 18.03.2006 and Kaidi register No.1 dated 28.02.2006 till 07.03.2006 were shown to him and he stated that he was not authorized to send these documents to the Court which were brought by the Constable Ram Nayan Tiwari examined as DW-2.

84. DW-4 categorically stated that for sending those document only the Jailer, District Jail was authorized.

85. DW-5 is the Jailer, District Jail, Lucknow who stated on oath that the above noted documents were sent by him through the Constable Ram Nayan Tiwari (DW-2) as they were summoned by the Court. He further stated that those registers were not sent sealed as there was no such order of the Court. DW-5 narrated that the register noted above bears signatures of two accused appellants namely Pawan Kumar Pandey and Laxmi Narain Pandey in the relevant columns.

86. He was crossed by the prosecution on various discrepancies such as overlapping in the thumb impression and incomplete description of the accused appellants against their names.

87. DW-6 is the Jailer, posted in the District Jail, Lucknow between 07.02.2006 till 20.12.2006. He had identified the entries in the register gate book of the District Jail, Lucknow for the period from 24.02.2006 till 18.03.2006, original of which was brought in the Court and stated that as per the entries therein of dated 22.02.2006 at 17.31 hrs, two accused appellants Pawan Kumar Pandey and Laxmi Narain Pandey were lodged in the District Jail, Lucknow at serial No.2 & 3 alongwith other 11 persons. He stated that the said entries were made by the then Bandi Rakshak on duty. The certified photostat copy of the gate book/gate register was filed by DW-6 under his signature as Exhibit Kha-14.

88. He stated that on 02.03.2006 at 11.36 hrs, 11 prisoners were released from the jail and amongst whom the name of accused appellant Pawan Kumar Pandey was entered at serial No.1 and Laxmi Narain Pandey at serial No.4. The attested photo copy of the said entries was filed by DW-6 under his signature as Exhibit Ka-15. He explained that in Kaidi register No.1, original of which was before him in the Court, the entries of lodging and release of the convicted accused persons were made and, according to the said Register, at serial No.964 of 25.02.2006, the factum of lodging of Laxmi Narain Pandey son of Shiv Kumar Pandey resident of Village Adilpur, District Azamgarh was noted whose release was made on 02.03.2006 on deposit of fine of Rs.880/- through receipt No.406814. The copy of the said receipt was pasted in the register and the identification marks of Laxmi Narain Pandey had also been noted therein.

89. Similarly, the name of the accused appellant Pawan Kumar Pandey was

entered at serial No.965 in register No.1 and the name of his father was mentioned as Laxmi Narain Pandey. His date of lodging in the jail was mentioned as 25.02.2006 with the description of his age, weight, height and identification marks. The names of his relatives had also been indicated therein and he was released on 02.03.2006 on deposit of Rs.880/- by the Railway Court, receipt of which was pasted as receipt No.406815. It was stated that both the receipts were received from the office of the Additional Chief Judicial Magistrate, (NR) Lucknow. However, he could not identify the signature of the Deputy Jailer on the said entries. The photostat certified copy of the register No.7 (release register) dated 02.03.2006 filed by DW-6 under his signature was exhibited as Exhibit Kha-6 wherein the accused appellant Pawan Kumar Pandey and Laxmi Narian Pandey were shown as having been released at serial No.12 & 13; respectively.

90. Two photostat copies of register No.1 (kaidi register) were filed by DW-6 under his signature as Exhibit Kha-17 and Kha-18.

91. In cross, DW-6 had admitted that none of the entries were made in his presence as they did not pertain to the period of his posting in the District Jail, Lucknow. On a suggestion, it was admitted by DW-6 that whenever some prisoner is lodged in the jail, information is being given to his family members.

92. DW-8 is an officer of RPF, Lucknow who stated that two accused namely Laxmi Narian Pandey and Pawan Kumar Pandey were arrested and handed over to him. He lodged them in jail on the basis of the charge sheets which were submitted as Case No.7787 of 2006 and 708 of 2006 under Section 137 and 138 of the Railways Act. At that point of time, Constable Gauri Shankar Singh was on lock-up duty and all the entries in the G.D. dated 24.02.2006 and 25.02.2006 shown to him were made by Constable Gauri Shankar Singh. DW-8 had identified the signature and handwriting of Constable Gauri Shankar Singh and stated that two accused appellants, named above, were lodged in the RPF lock up. He stated that 13 accused including two accused appellants herein were lodged in the District Jail, Lucknow on 25.02.2006 and their return was also entered in the G.D. He has further stated, in the cross, that the information of lodging of the accused appellants Laxmi Narain Pandey and Pawan Kumar Pandey was sent to their home on the said date itself, i.e. 25.02.2006.

93. DW-9 is Constable Gauri Shankar Singh who was posted in R.P.F. Post (NR) on 24.02.2006 and 25.02.2006. He proved the GD no.60 dated 24.02.2006 and GD No.4 dated 25.02.2006 being in his handwriting and signatures and stated that when accused persons were lodged in the RPF lock-up, he was on duty of writing the G.D. He had entered two accused and one mobile charger found in their frisking in the G.D. No.60 of 24/25.02.2006. He handover the charge of the accused person to Constable Shiv Prasad, entry of which was at G.D. No.4 dated 25.02.2006. All other G.D. entries were not made by him nor he could identify the signature of those persons who maintained the same. DW-9, however, identified his signatures on the entries made in G.D. 57 dated 25.02.2006.

94. In cross, DW-9 stated that when an accused is brought in RPF custody, his family members are being intimated and

from the entries in the G.D. dated 24.02.2006 he stated that information was given to the family members of the accused persons on the number given by them which was entered in the G.D.

95. DW-10 is Constable Ram Surek posted in the police station RPF (NR) Charbagh, Lucknow and stated that he alongwith five other Constables took 17 accused persons to the Court of Additional Chief Judicial Magistrate (NR) Charbagh, Lucknow for their appearance in the said Court, out of which four were released whereas 13 accused persons including Laxmi Narain Pandey and Pawan Kumar Pandey were lodged in the District Jail, Lucknow. The entry of the jail gate book at serial No.63 was shown to this witness who had identified his signature therein as Exhibit Kha-19. He than stated that his return alongwith other Constable in the Police Station RPF, Charbah was entered in G.D. 57 at 18.00 hrs, which also bears his signature.

96. In cross, DW-10 admitted that he could not identify the accused persons and he had stated their names on the basis of the entries in the documents proved by him.

97. DW-11 is the T.C. Sarvendra Singh who stated that he was posted at the Railway Station Charbagh. Two persons namely Laxmi Narain Pandey and Pawan Kumar Pandey residents of village Adilpur, Police Station Atraulia, District Azamgarh were caught at the first entry gate of Charbagh Railway Station being without ticket and when brought before the concerned officer they were asked to deposit Rs. 130/- as tariff and Rs.250/- (Total rs.380/-) as penalty per person. When they did not deposit the said money, the concerned officer had filled their charge sheet and handed over to them to the Police Station RPF, Charbagh, Lucknow.

98. The attested photostat copy of the said charge sheets had been filed in the Court by DW-11 under his signature as Exhibit Kha-20 and Kha-21. In cross, DW-11 stated that his duty was at the first class entry gate of train No.3075 Jammu Tavi Howrah which reached at Charbagh railway station at about 15.15 hrs at platform No.1. He, however, did not remember as to on which platform, the said train had stopped on 24.02.2006. However, he stated that his duty was at the first class entry gate when he caught the accused-appellant Laxmi Narain Pandey and Pawan Kumar Pandey. He could not remember as to whether they were empty hands and also as to why they were caught. However, he stated that since they were charge sheeted that would mean that they were traveling without ticket. He did not remember anything told to him by the accused on that day. He further stated that the accused persons were charge sheeted for the general Bogey. He then stated that on 24.02.2006 apart from these two accused persons at gate No.1 of the platform, no other passenger was caught without ticket.

99. In cross, DW-11, however stated that he could not identify the accused persons if they were brought before him.

100. DW-13 is Deputy Jailer posted in the District Jail, Lucknow on the date of the incident and was shown various registers maintained in the jail as noted above. He stated that there were overlapping in the thumb impression of accused persons in the relevant register No.1 wherein their release was entered and

stated that in case of any doubt about the thumb impression, the prisoner would not be released. He admitted that in the relevant column of register No.1, 4 thumb impressions of Laxmi Narain Pandey and Pawan Kumar Pandey were there, where there was a lot of overlapping and in a entry like this, release could not be ordered. He then stated that when he directed for release of the accused persons, the entries in the register were not like as they are. He then stated that the registers which were produced in the Court were very important documents and that they are being kept in the custody of jail officer and no-one can touch, see or write anything on the said registers. The suggestion that all the entries in the register of the thumb impressions were made in a forged manner was denied by DW-13.

101. DW-14 Bandi Rakshak, District Jail, Lucknow had proved the entries in the hospital Mulaiza register and the identification marks of physical appearance of the accused persons noted in the gate book. He stated that according to the original hospital Mulaiza register, on physical examination of these accused persons on 26.02.2006, age, sex, weight and height and other specific identification marks were noted in the register. The attested photostat copies of the register was filed by DW-14 under his signature as Exhibit Kha-22. We may record that the identification marks noted in the relevant column of the register were tallied from the identification marks found on the persons of two accused namely Laxmi Narain Pandey and Pawan Kumar Pandey in the Court and it was noted therein that all identification marks mentioned in the register tallied with the marks on the body. On a suggestion, DW-14 admitted that he could not explain the overlapping in the thumb impression of the accused persons at the time of release and in case such a situation existed, their release from the jail was not possible. He had denied the suggestion that all these entries were made in connivance of the jail official in a forged manner and admitted that he could not identify the accused appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey, apart from the record.

102. DW-15 is the Doctor posted in the Jail who had tallied the identification marks of the accused person in the hospital Mulaiza register and stated that his signature were therein. This witness (DW-15) was recalled and he had tallied the identification marks noted in the register from the 4 identification marks found on the person of the accused appellants in the Court.

103. DW-16 is the handwriting and fingerprint expert who had taken specimen signatures and thumb impressions of the accused person namely Laxmi Narain Pandey and Pawan Kumar Pandey as Exhibit Kha-25, Kha-26, Kha-27 and Kha-28 and tallied them with their thumb impression and signature on the relevant documents. The report submitted by him was proved as Exhibit Kha-33. The affidavit filed by DW-16 wherein his report, photos and negative of the thumb impression and signatures were filed and proved was exhibited as Exhibit Kha-34. In a gruelling cross-examination by the prosecution, DW-16 was questioned on various aspects of the report given by him to demonstrate that the thumb impression and signature of the accused persons did not tally with their thumb impression and signatures on various documents filed in defence as noted above.

104. To prove the plea of alibi of accused Shyam Narain Pandey, two

witnesses DW-7 namely Sadanand Pandey and DW-12 namely Sudhakar Pandey were produced by the defence. Sadanand Pandey, a resident of District Ballia, in the witness box, stated that he came to the High Court, Allahabad in relation to his case and was staying in the City between 26.02.2006 till 28.02.2006 and on 28.02.2006 at about 7.15 PM he had signed the affidavit before the Oath Commissioner and before his affidavit was prepared, the accused appellant Shayam Narain Pandey also got his affidavit prepared in another case.

105. In cross, DW-7 stated that he knew accused appellant Shyam Narain Pandey very well as they used to meet in the High Court Allahabad when they came for Pairvi of their cases and that he met accused Shyam Narain Pandey in the chamber of an Advocate about five years prior to the date of his deposition.

106. DW-12 is Sudhakar Pandey, an Advocate of the High Court at Allahabad, who stated that accused-appellant Shyam Narain Pandey was staying in his house while doing Pairvi of his case from 26.02.2006 till 01.03.2006 and, on each day, he used to come to his house in the night at about 08.00-09.00 PM. A suggestion was given to this witness that he was resident of Ballia which was the place of residence of accused appellant Shyam Narain Pandey and since he knew him well he was making a false statement.

107. Placing the above evidence filed by the defence, it is vehemently argued by Sri Dilip Kumar, learned Senior Counsel appearing on behalf of the appellant Laxmi Narain Pandey and Pawan Kumar Pandey that the onus to prove the plea of alibi had been discharged by the appellants by bringing cogent documentary and oral evidence. It is proved that the said appellants when were traveling on 24.02.2006 from Train No.3074 Jammu Tavi and reached at the first entry gate of the platform No.1 of the Railway Station, Lucknow, were caught by the T.C. (Ticket Collector) Savendra Singh and brought to the office of Incharge who charged them for the ticket of the general bogey with penalty, for traveling without ticket. As the appellants could not deposit the fine, they were charged by the officer concerned. The charge sheet No.35257 and 35258 for two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey; respectively had been submitted and proved as Exhibit Kha-20 and Kha-21. The said charge sheets contain the description of the appellants such as their parentage, residence, post, police station and the district concerned. The time of arrest has been indicated as 15.15 hrs dated 24.02.2006. They were handed over to the RPF office, Charbagh, Lucknow on 24.02.2006 at about 16.40 hrs and the entry in that regard exists in the general dairy, Jama Talashi and Khana Khuraki register of the Railway Police Force. It was proved by DW-3 that the appellants were sent to the lock-up and from there they were also produced in the Court of Railway Magistrate under custody. On 25.02.2006, sentence of 15 days imprisonment was inflicted upon them. The entries in the Jama Talashi register (Exhibit Kha-4) proved that a mobile charger was found from Pawan Kumar Pandey in his personal search. Link evidence of DW-3 based on the G.D. entry produced by the defence is the proof of the fact that the appellants were in the custody of RPF and lodged in the lock-up from 24.02.2006 till 25.02.2006. The Constable Gauri Shankar Singh who was In-charge of lock-up proved that the appellants were in

his custody till the midnight of 24-25.02.2006 and further in the custody of Constable Shiv Raj Prasad from midnight till 08.15 AM on 25.02.2006.

108. The crime numbers allotted to the cases lodged against the appellants were also proved. The entries by RPF (NR) Charbagh further prove that 15 other accused persons alongwith two appellants were produced in the Court of Railway Magistrate in the custody of Constable Kesar Bux Singh on 25.02.2006. The G.D. entry in that regard had been proved as Exhibit Kha-4. The entries in Khana Khuraki register which is maintained about the food of the people in the lock-up prove that all the appellants were given two time meal while lodged in the lock-up. All the documents noted above were summoned by the trial court and produced by the persons in whose custody they were kept. Signatures and thumb impression of the appellants were found at the relevant places in the documents and they were tallied from the specimen signatures taken in the Court by DW-16, handwriting expert who proved that signatures and thumb impressions of both the appellants on the documents filed in defence matched with the specimen signatures and thumb impressions. The report of the Additional Chief Judicial Magistrate (NR) Charbagh, Lucknow was accompanied with register No.9 (Kha-12) and fine register (kha-13) which further prove that case No.1440 of 2006 (Case Crime No.780 of 2006) and Case No.1444 of 2006 (Case Crime No.788 of 2006) under Section 137 of the Railways Act were registered against the appellants Laxmi Narain Pandey and Pawan Kumar Pandey; respectively.

109. Register No.9 Exhibit Kha-12 contain the description such as name, parentage and residents of the accused-appellants and it is noted therein that the total penalty of Rs.880/- each was not deposited by the appellants and, therefore, they were awarded 15 days simple imprisonment. It is proved from the above document that the RPF police handed over the appellants to the District Jail, Lucknow where they were lodged till 02.03.2006. The gate book entry (Exhibit Kha-14) till 25.02.2006 at 17.31 hrs is proof of the said fact.

110. To verify the factum of admission of the appellants in the District Jail, Lucknow, the jail records were summoned which included register No.1, admission register of the convict, the register of screening of the health of the prisoners, the register No.7 release register and the gate books dated 25.02.2006 and 02.03.2006. The jail records produced before the trial court were proved by the officers who were responsible to maintain the said records. The entries in the register maintained in the jail contain the admission time and tallied the description for securing identity of the accused appellants. The identification marks noted in the jail record were tallied physically from the accused-appellants present in the trial Court.

111. DW-15, the Jail Doctor proved the record for keeping track of health of prisoners. DW-14, Bandi Rakshak proved continuous physical presence of both the appellants in the District Jail, Lucknow from 25.02.2006 till 02.03.2006. The description of relations of accused-appellants mentioned in register No.1 can be tallied from the Pariwar register which was filed in evidence by the defence as Exhibit Kha-33. Exhibit Kha-15, Kha-17 and Kha-18 on record are receipt of payment of penalty and fine which were

pasted in register No.1. The date of deposit of fine as indicated therein is 02.03.2006 for both the appellants Laxmi Narain Pandey and Pawan Kumar Pandey who were physically released only on 02.03.2006. Exhibit Kha-14 contains the names of the appellants Pawan Kumar Pandey and Laxmi Narain Pandey at serial No.1 and 4; respectively and the time of release mentioned therein is 11.36 hrs dated 02.03.2006.

112. The submission, thus, is that the defence has proved the plea of alibi with cogent evidence. All the documents produced in defence are public documents and no doubt can be raised about the genuineness of the same. In the light of steel clay plea of alibi put forth by the defence, it is proved that PW-1 and PW-2 who are related and interested witnesses are perjured witnesses as they had specifically stated the presence of two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey at the place of the incident and specific role had been attributed to them in the entire occurrence. No independent witness was produced nor any residuary evidence was filed by the prosecution. Once the plea of alibi is accepted, the entire prosecution evidence has to be thrown away as unbelievable and manufactured.

113. Pressing the plea of alibi of two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey, it is vehemently argued by the learned Senior Counsel that ample material on record had been brought by the defence and the plea of alibi had been proved. The fact that two accused appellants proved to be not present on the spot itself demolishes the entire prosecution case on the ground that the prosecution had not presented its case in a truthful manner. In a criminal trial, it is the duty of the prosecution to bring all circumstances of the case in a fair and transparent manner as any falsity in the prosecution case which goes to the root of the matter would demolish its case as a whole.

114. It is argued by Sri Dilip Kumar learned Senior Counsel for the appellants that the principle of falsus in uno falsus in omnibus though has no application in India but it can be taken into consideration as a rule of caution. The Court, therefore, is required to examine the evidence of the prosecution witnesses with extra caution as the presence of two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey at the place of the incident had been successfully disputed by the defence. A categorical plea of alibi had been taken on behalf of these appellants and the same was also proved by production of cogent documentary and oral evidence.

115. Adopting the argument of the learned Senior Counsel, Sri Durgesh Kumar Singh learned counsel for the appellant Shyam Narain Pandey also urged that the plea of alibi of Shyam Narain Pandey is proved from the testimony of DW-7 and DW-12 which evidence cannot be discarded by the Court.

116. Sri Rahul Mishra learned counsel for the complainant/first informant, in rebuttal, argued that the presence of first informant namely Atul Tripathi and another eye witnesses PW-2 namely Rajkumar Tiwari on the spot of the incident cannot be discarded for the minor contradictions/inconsistencies pointed out in their testimonies. It was proved by the eye witness PW-1 that three accused persons namely Rajesh Kumar Pandey, Pawan Kumar Pandey and Amit Kumar

Pandey shot the deceased to kill him whereas other two accused persons namely Umesh and Ramesh also opened fires from their weapons while two other accused namely Laxmi Narain Pandey and Shyam Narain Pandey were exhorting them to kill sitting in the Bolero Car. From the oral testimony of PW-1 or his statement in the first information report, it cannot be said that all five fires opened by the accused persons hit the deceased. The statement of PW-1 that two other accused namely Umesh and Ramesh also fired at the deceased while he was falling down should be read in this context only.

117. It is urged that the contention of the learned counsels for the appellants that there were material improvements in the testimony of PW-1 with regard to the reason of his presence on the spot is without any substance, in as much as, the first informant (PW-1) was confronted with his statement in the first information report and Section 161 version only to the extent that he did not narrate that his father (the deceased) told him to wait at the Kesari Chauraha. The contention is that the first information report is only an information of the incident and cannot be treated as complete narration of the occurrence. The discrepancy noted above is not so material so as to discard the testimony of PW-1 recorded in the Court. The names of all the accused persons were categorically indicated in the first information report and any suggestion otherwise is liable to be rejected.

118. The entire testimony of PW-1 is unshaken version of the incident. He has categorically assigned the role of each accused persons explaining the motive for commission of the crime. It was proved by PW-1 that he went with his father to Azamgarh but returned back early. The said statement of PW-1 is proof of the deceased having gone to the office of the District Inspector of School (DIOS). Mere fact that Board copies were not found on the spot cannot be a reason to discard the testimony of PW-1 about the reason of presence of the deceased and the witnesses on the spot. PW-2, the Peon of the institution also gave the same reason of his presence on the spot and proved it as well.

119. It is further argued that the fact that there are some inconsistencies about the post being held by the deceased at the time of his death is not relevant. It is, however, proved from the record that on a challenge made by the deceased, the appointment of accused Shyam Narain Pandey on the post of Principal was cancelled as his experience certificate was found invalid and the Board had removed him from the post of Principal. The motive assigned to accused Shyam Narain Pandey is evident from the aforesaid proven fact. The first information report and the oral evidence is proof of the existence of old dispute between the parties. The recovery memo exhibited Ka-2 of recovery of bag and Supurdiginama contains signature of the first informant (PW-1) Atul Kumar Tripathi. The letter found in the bag produced in the Court marked as Exhibit Ka-3 also contain the narration of motive assigned to the accused persons.

120. The defence has not been able to dispute the said letter as the writing or signature of the deceased over the same were proved by the prosecution. It is further submitted by the learned counsel for the first informant that in a writ petition filed by accused Shyam Narain Pandey, the deceased was a party and the said writ petition was dismissed on 25.07.2005. It is

further proved that after cancellation of the appointment of Shyam Narain Pandey, the deceased became officiating Principal and his signature were attested by the District Inspector of School. The said fact is corroborated from the testimony of PW-1 and PW-2 and the defence has failed to discredit the said witnesses in cross.

121. The presence of PW-1, the first informant on the spot is further proved by injuries in the postmortem report and the contention of the defence that five shots assigned by PW-1 to five accused persons only in view of five firearm injuries (which included three entry and two exit wound) mentioned in the postmortem report, is unacceptable. It is argued that since all the accused persons were surrounding the deceased from four sides it was possible that PW-1, the first informant, could not count the exact fires and noted the details as to whose fire hit the deceased. However, the version of PW-1 as to how the deceased was killed cannot be discarded.

122. It is proved from the testimony of police witnesses that the Investigating Officer namely the Station House Officer of the police station concerned was not present in the police station when the report was lodged as he was in the field doing investigation and reached after about ½ an hour of the lodging of the report. The police station though was only 1 KM away but the version of PW-1 that the police could not reach the spot also stood explained by the police witness. The time taken in lodging the first information report is because of the fact that the first informant, son of the deceased took time to recover from the shock and, moreover, the first information report lodged at about 07.45 PM is a prompt report. No delay can be attributed to PW-1 in lodging of the said report and there was absolutely no scope of deliberations.

123. As regards the time of receiving of the dead body at the police lines, Headquarter, Azamgarh, heavily agitated by the learned Senior Counsel for the appellants, it is argued by Sri Rahul Mishra learned counsel for the first informant that the police papers proved that the body was taken from the site of the incident at about 10.30 PM. PW-4, the Investigating Officer was consistent on this issue and had denied the suggestion that the body had reached the police lines at 10.25 AM in the next morning, and further stated that as per the information received by him, the dead body reached the mortuary at about 06.00-07.00 AM. It is further argued by the learned counsel for the first informant, that from amongst the two constable namely Janardan Singh and Komal Yadav who took the dead body to the Police Lines, Headquarter, Azamgarh from the spot of the incident, one namely Komal Yadav was summoned by the Court on the application moved by the appellants as a defence witness. However, for the reasons best known to the appellants, they got him discharged and his evidence was not recorded. The contention of the learned Senior Counsel for the appellants that the prosecution did not produce the Constables who carried the dead body to the Police Lines Azamgarh to explain the delay in receipt of the dead body at the police lines, thus, is liable to be rejected.

124. So far as the entry in Form-13 of date and time namely 28.02.2006 at 22.25 hrs (10.25 PM), it is urged that it has to be read as the time of dispatch of the dead body from the place of the incident and it is clear that the time of reaching of the body at the Headquarter had not been mentioned

therein, as admittedly the distance of Headquarter from the place of the incident was about 33 KM. The suggestion of the learned counsel for the appellants that the time mentioned in the entry in the postmortem register and G.D. of 10.45 AM dated 01.03.2006 is the time of reaching of the dead body at the police Headquarter, is without any substance, in as much as, there is no basis of the said suggestion.

125. The contention of the first information report being ante-time is without any basis, in as much as, all police papers prepared on the same date contain the proof of the first information report being lodged and the details of the case registered against the appellants can be found therein. Section 161 Cr.P.C. Statement of PW-1 (the first informant) was also recorded on the same date and the inquest report indicate that the inquest was completed by 10.25 PM. The special report under Section 157 Cr.P.C. was sent on the date of the incident i.e. on 28.02.2006 as was proved by PW-6, the Constable Moharir with the G.D. entry No.40 exhibited as Exhibit Ka-18. It was also proved that the Constable 694 Ram Surat Yadav who went to serve the special report came back on the next date and the return of the said Constable was noted in G.D. 21/ 01.03.2006 at about 15.45 hrs, which was proved by PW-6.

126. The endorsement of receiving of the special report by the Chief Judicial Magistrate dated 04.03.2006 would, therefore, be of no relevance. It is stated that the copy to the Chief Judicial Magistrate was sent through the Circle Officer and no suggestion otherwise had been given to PW-6 to confront him on the said fact. The contention of the learned Senior Counsel for the appellants about the first information report being ante-time on the basis of alleged delay in sending the special report under Section 157 Cr.P.C is, thus, liable to be rejected.

127. On the issue of delay in sending the special report, reference has been made to the judgement of the Apex Court in O**mbir Singh Vs. State of U.P.11** to argue that even the alleged delay in receiving the report by the judicial Magistrate is not fatal to the prosecution case.

128. It is, thus, argued that the prosecution has proved the place, date and time of the incident as also the manner in which the murder was caused by production of two eye witnesses who remained intact throughout their deposition in the Court. The involvement of the appellants in the crime in question is, thus, proved by the prosecution beyond all reasonable doubt.

129. On the plea of alibi, it is urged by Sri Rahul Mishra, the learned counsel for the first informant that the timing of the appellants traveling ticket-less and then going to the prison for non-deposit of the meager amount of Rs.380/- each, as fine to the Ticket Collector, is noteworthy. The route of travel taken by the appellants is not proved. No luggage was found from the possession of the appellants in frisking except one mobile charger. No evidence could be produced by the defence to explain the said fact. There is no evidence that the appellants were bereft of money or their pockets were snatched. The appellant Laxmi Narain Pandey who claimed the plea of alibi is a very well-off person who owned one intermediate college and one degree college it is difficult to believe rather it is simply unbelievable that he would prefer not to deposit the meagre money of Rs.380/- to invite imprisonment

for 15 days. For a respectable person of his stature, this story cannot be believed. It is also not explained as to why family members of appellants Laxmi Narain Pandey and Pawan Kumar Pandey did not come forward to deposit the fine, in case, it is accepted without admission that they were bereft of money, and when it has come in the evidence of defence witness that the information of the arrest was given to the family members of the appellants.

130. He contends that it is further noticeable that the fine which the appellants did not deposit earlier either before the Ticket Collector or before the Railway Magistrate and prefer to go to the prison, was deposited on the very next day of the incident i.e. 02.03.2006. Further the first information report, in the instant case, was lodged on 28.02.2006 naming both the appellants. Had they been in prison they could have brought the said fact before the Investigating Officer. No application had been given before the Investigating Officer. No plea of alibi was taken by the said appellants during the course of investigation nor any application for discharge was moved before the Court concerned at any point before the commencement of trial.

131. There is nothing on record that the plea of alibi was taken by appellants Laxmi Narain Pandey and Pawan Kumar Pandey in any proceeding prior to the submission of the charge sheet in the Court and their committal to the Sessions Court, though they had ample opportunity to do so. For the first time, plea of alibi was taken in their statement under Section 313 Cr.P.C. recorded on 01.05.2008. It is, thus, argued that the plea of alibi taken after two years of the lodging of the first information report in itself is proof of the fact it was an afterthought.

132. Further, no application was moved before the Railway Magistrate to secure the file of the case or the order of release of the appellants passed by him and the said records could not be secured by the trial Court on account of belated plea. None of the defence witnesses had identified the accused-appellants and the identification by them on the basis of papers, which were manufactured for the case, will not take the case in favour of the defence. The interpolation and overlapping in the documents proved in defence had been suggested to the defence witnesses and they could not come out with any plausible explanation. The matching of signatures and handwriting of the accused appellants Laxmi Narain Pandey and Pawan Kumar Pandey by DW-16 is of no relevance, in as much as, the matching of signatures and thumb impressions of the accused persons were not made from the admitted thumb impression or signature. The comparison made from sample signature and thumb impression taken in the Court after their accusation for involvement in the commission of murder was a baseless exercise. Even otherwise, the credibility of DW-16, the handwriting expert, had been impeached in the cross. His testimony is liable to be rejected as such.

133. Learned AGA adding to the arguments of Sri Rahul Mishra learned counsel for the first informant submits that the recovery memo of bag and Supurdiginama Exhibit Ka-2 proved by the prosecution witnesses cannot be discarded for any doubt about the entry in the case diary. The letter which was found in the bag was part of the case diary. There is no suggestion of plea of alibi to PW-1, the eye witness and the plea was taken for the first time during the course of the examination of the accused appellants under Section 313 Cr.P.C.

134. It is urged that from the version of DW-16, it is evident that he took sample signature in the Court and not much can be said about the report of matching of the said signature and thumb impression from the document presented in the defence. In any case, the plea of alibi of the defence is not proved by cogent positive evidence and the documentary evidences produced cannot be attached credence as it is admitted to the defence witnesses that none of the documentary evidences brought in the Court from the District Jail, Lucknow were sent in sealed cover. The possibility of interpolation, forgery in the defence documents, therefore, cannot be ruled out. Learned AGA has relied upon the judgement of the Apex Court in **Rajesh Singh & others Vs. State of U.P12.**

135. In sum and substance, it was argued by both the counsels for the first informant and the learned AGA that the judgement of the trial court being exhaustive appreciation of the evidence on record cannot be interfered and the appeal deserves dismissal.

136. In rejoinder, Sri Dilip Kumar learned Senior counsel for the appellants has reiterated his previous contentions about the testimonies of prosecution witnesses and the documentary evidences prepared by the formal witnesses during the course of investigation. He again presses the plea that the first information report and all other related papers including inquest were prepared ante-time for two reasons, firstly, that the prosecution had utterly failed to explain the delay in reaching of the dead body at the Police Headquarter; i.e. at about 10.45 AM, inference of which can be drawn from the material on record. And secondly, the corroborative argument for the first information report being ante-time is the delay in sending the special report which was received by the Magistrate on 04.03.2006. It was urged that no definite reason of presence of the witnesses on spot of the incident could be given by the prosecution. The fact that the deceased alighted from the bus at the site of the incident is also not proved by any material such as bus ticket or the answer books which were supposed to be brought by the deceased. The bag allegedly found besides the dead body was introduced in the case diary and not noted in the inquest in the relevant column. The recovery memo of the bag was subsequently prepared document and had been introduced at the instance of the first informant (PW-1) only to show that the deceased was traveling. The Investigating Officer (PW-4) was confronted about the interpolation in case diary of the word "Bag" which he could not explain.

137. It is contended that the defence plea of alibi is proved by the official document summoned by the Court. The report received from the Court of Railway Magistrate, Exhibit Kha-10 & Kha-11 contain entries of the criminal case registered against the appellants and their lodging in the District Jail, Lucknow. The fine register Exhibit Kha-13 is an attested copy which again proves the criminal case registered against the appellants and the proceedings undertaken against them. The identification marks on the person of the accused-appellants had been tallied in the Court. The handwriting expert report is in favour of the appellants. No fault could be attributed to his report on account of tallying of sample signature which was taken in the Court.

138. It is vehemently argued by Sri Dilip Kumar learned Senior counsel for the appellants that watertight proof of steelclay

plea of alibi negates the whole prosecution case.

139. Lastly, it was added by Sri Rahul Mishra learned counsel for the first informant that none of the registers produced by the defence witnesses, were sealed when they were brought in the Court. There were overlapping in the thumb impressions of the accused-appellants in all the defence documents especially the release register. Had this been the situation, their release from the jail was not possible which fact was admitted by the defence witnesses on confrontation.

140. Tallying of the specimen signatures of the accused persons by DW-16 will not be read in their favour as the said report cannot be a proof of the fact of genuineness of the entries in defence documents. In any case, the defence while taking the plea of alibi has to stand on its own leg and prove by cogent evidence that the accused-appellants could not be present at the place of the incident in all probabilities. There is no record of the registration of the alleged criminal case under Section 137 of the Railways Act of the Court of Railway Magistrate and the alleged release order on deposit of fine is also not on record. The manufactured documents produced by the defence are liable to be thrown as such.

Analysis:-

141. Having heard learned counsel for the parties and perused the record, in light of the arguments of the learned counsel for the parties and the material on record, following issues arise for consideration and pointwise analysis of the evidence on the same is as under:-

A. The first information report being ante-time:-

142. First ground of challenge to the conviction of the appellants is that the case of the prosecution is full of falsity since the very inception. The first information report which set the criminal action into motion itself was ante-time. To buttress this submission, the defence documents namely Exhibit Kha-1 and Kha-2, the postmortem register and the G.D. of the police lines (Headquarter) filed by D.W-1, the clerk posted in the police lines are pressed into service to assert that the body of the deceased Rajendra Prasad Tripathi was received in the police Headquarter on 01.03.2006 at about 10.45 AM. The corresponding entry has to be seen in the police paper form-13, (चालान लाश) (Exhibit Ka-5) wherein the relevant column is to record the time of reaching of the dead body at the police Headquarter and of sending the same to the dispensary/mortuary for the postmortem. As per the statement of PW-1, after half an hour of lodging of the first information report, the Investigating Officer reached the spot and started inquest within 2 to 4 minutes of arrival. The body was removed from the place of the incident at about 10.30 PM. The first Investigating Officer Kamlesh Narayan Pandey (PW-4) who prepared the inquest stated that he could not tell as to when the dead body was sent to the mortuary from the spot of the incident and stated that he gave the responsibility of sending the dead body to the mortuary, to his subordinate S.I. Lalta Yadav and left the place to arrest the accused. PW-4 further stated that he did not know as to whether the body was sent or it remained at the place of the incident throughout the whole night. In the morning, however, he got the information that the body was in the mortuary and the said information was received by him through a

staff of the police station at about 06.00-07.00 AM.

143. The postmortem doctor PW-3 stated that the papers relating to the postmortem were received by him on 01.03.2006 at about 11.15 AM and the postmortem was conducted by him at about 11.30 AM. The estimated time of death as recorded by the doctor was about ½, that means 12 hours. In the postmortem report, it was indicated that rigour mortis was present in the body. Two Constables namely Janardan Singh and Komal Yadav who took the body for postmortem were the best persons to prove as to when they had deposited the body in the police lines and how much time they had taken to cover the distance of 33 KM from the place of the incident to the police Headquarter. None of them was produced in the witness box and in view of the statement of the doctor coupled with the entry in Exhibit Kha-1 and Kha-2, it is clear that the body was sent to the mortuary at about 10.45 AM . As per the statement of PW-1, the body was dispatched from the place of the incident at about 10.30 PM, it cannot be accepted that the Constables carrying the dead body took 12 hours to travel the distance of only 33 KM. Further from the condition of the body and the opinion of the doctor, the gap in the postmortem and the time of death was about 12 hours which means that the death could be caused either around 11.30 PM or thereafter.

144. The above facts put together with the entry in form-13 Exhibit Ka-5 clearly prove that the incident had occurred around midnight or after 11.30 PM. The first information report lodged at 19.45 PM (07.45 PM), thus, becomes ante-time. All related police papers to the case prepared by the Investigating Officer, also, became ante-time at one go. As the prosecution had changed the time of the incident, its entire story becomes false. Further the check report was received by the concerned Magistrate on 04.03.2006. The delay in sending the special report in contravention of Section 157 Cr.P.C. further strengthen the case of the defence about the first information report being ante-time. The prosecution has utterly failed to establish the time of reaching of the dead body in the police Headquarter. Only inference, thus, can be drawn is that the dead body reached at the police Headquarter at 10.45 AM, in the morning of 01.03.2006 and it was straightway sent to the mortuary where it was received at 11.15 AM by the doctor who conducted the postmortem. This discrepancy in the prosecution case creates a deep dent in the prosecution story, which is liable to be thrashed away.

145. Considering the said submissions and the rebuttal by Sri Rahul Mishra learned counsel for the first informant, we may first record that in the relevant column of form-13 (Exhibit Ka-5), the time of arrival of the dead body at the police Headquarter and the time of sending it to the mortuary was required to be recorded. These entries are in the nature of check and balance to ensure transparency in the process of investigation. As per the procedure in the Criminal Procedure Code during preparation of the inquest, in accordance with Section 174 Cr.P.C., the Investigating Officer has to draw the report of the apparent cause of death describing such wounds and marks of the injuries as may be found on the body and stating in what manner or by what weapons or instrument (if any) such marks appeared to have been inflicted. After drawing up the said report (inquest report) he has to forward the body, with a view to it being

examined, to the nearest civil surgeon or other qualified medical man appointed in this behalf by the State Government. While sending the body, the state of weather and distance and other factors have to be kept in mind so as to avoid the risk of putrefaction of the body on the road which would render such examination useless. In order to check any mishandling of the dead body during its transportation from the place of the incident to the mortuary, the procedure of sending the dead body to the police Headquarter and making entry of the same in form-13 (police papers) has been prescribed, so that in case of any mishandling of the dead body during the course of transportation, responsibility can be fixed on the erring officials and any factor which may arise on account of such eventuality may be explained.

146. Section 157 Cr.P.C. mandates that the report of the commission of an offence, which an officer In-charge of the police station is empowered under Section 156 to investigate, shall be sent forthwith to a Magistrate empowered to take cognizance of such offence. The purpose for forthwith sending the report to the concerned Magistrate is to keep the concerned Magistrate informed of the investigation of the cognizable offence so that he may be able to control the investigation and if required, to issue appropriate directions. The Criminal Procedure Code, thus, provides for internal and external checks; one of them being the sending of the copy of the first information report to the concerned Magistrate at the earliest. Failure to send the copy of the first information report to the Magistrate may cast a shadow on the case of the prosecution, may raise a suspicion that the first information report was a result of consultation and deliberations and it was not recorded on the date and time mentioned in it, and may result in holding that the investigation is not fair and forthright.

147. However, the settled law in a matter of delay in sending the copy of the first information report to the Magistrate, i.e. violation of Section 157 Cr.P.C. is, that the said circumstance alone would not demolish the other credible evidence on record. It would only show the laxity or carelessness on the part of the Investigating Agency and that it was not prompt as it ought to be. However, it would depend upon the facts of the particular case that an unexplained delay may affect the prosecution case adversely. Such an adverse inference may drawn on the basis of the attending circumstances involved in a case.

148. Reverting to the facts of the instant case, we may note that the entries in form-13 Exhibit Ka-5 police paper was prepared and proved by the Investigating Officer Kamlesh Narayan Pandey who entered in the witness box as PW-4. A suggestion was given to PW-4 that at the time of preparation of the inquest, the first information report was not in existence which was categorically denied by him. Further, as noted above from the statement of PW-6, Constable Awdhesh Kumar, posted as Constable Moharir in the police station concerned, the first information report, i.e. the check report Exhibit Ka-16 was prepared on a written report given by PW-1 Atul Tripathi at about 19.45 hours (07.45 PM). The G.D. entry of the check report at Rapat No.35 was proved by bringing the original G.D. and tallying it with the carbon copy prepared in the same process, by PW-6 marked as Exhibit Ka-17. The Investigating Officer namely PW-4 who conducted the proceedings on

28.02.2006, i.e. the date of the incident, proved that the entries in form No.13 Exhibit Ka-5 were made by S.I. Lalta Yadav on his dictation at the place of the incident and the body was sent for the postmortem alongwith this paper and other related documents.

149. A perusal of form-13 indicates that in the relevant column, name of the officer who sent the dead body is mentioned as K. N. Pandey. The date and time of sending of the dead body, noted in the relevant column is 28.02.2006 at 22.25 hours (10.25 PM). The names of two Constables, the Constable No.28 Janardan Singh and Constable 484 Komal Yadav, Police Station Atraulia, District Azamgarh are also indicated in the relevant column of form-13. In the same writing, in the column for arrival of the dead body in the police Headquarter, the date 28.02.2006, time 22.25 hours is mentioned, whereas the distance of the police Headquarter from the place of the incident is indicated as 37 KM in the relevant column therein. It was noted therein that the dead body was sealed in a cloth and sent for postmortem with the police personnel alongwith relevant papers and the result be intimated.

150. This paper (form-13) is countersigned by the Inspector Police lines, Azamgarh on 01.03.2006 and besides his signature the entries of the postmortem register and G.D. report No.15 dated 01.03.2006 at 10.45 AM have been noted in the relevant column of noting the time of receipt of the dead body at the Police lines and sending it to the Mortuary. The column of receipt of the body in the police Headquarter and dispatch of the same to the dispensary was obviously required to be noted by the concerned police officer posted at the Headquarter. It seems that the concerned officer instead of making the correct entry casually extracted the entries in the postmortem register and G.D. Rapat putting his signature on the form-13, while sending the dead body for the postmortem. The time gap in receipt of the body at the police lines and sending of the same to the mortuary, thus, cannot be explained from the entries in form-13 Exhibit Ka-5.

151. However, the said lacuna found in preparation of this document Exhibit Ka-5 form 13 चालान लाश does not become a proof of the fact that the body was received in the police Headquarter at 10.45 AM or it was not dispatched from the place of the incident after inquest at about 10.25 PM as recorded in the relevant entry in form-13 signed by the Investigating Officer, (PW-4), proved to have been prepared in the handwriting of S.I. Lalta Prasad, This fact is further corroborated from the statement of PW-1, the first informant, who stated that the body was dispatched from the place of the incident at about 10.30 PM after it was sealed. The entries in the postmortem register and G.D. of the police Headquarter Exhibit Kha-1 and Kha-2 cannot be read as a proof of the time of receiving of the dead body at the police Headquarter. Those entries only show that the body was sent for postmortem from the police Headquarter at about 10.45 PM and was received by the doctor alongwith the papers at about 11.15 AM as has been proved by the Doctor PW-3 in his deposition in the Court.

152. As regards the submissions of the learned Senior Counsel for the appellants that the prosecution had failed to explain the time taken in transportation of the dead body from the place of the incident to the police Headquarter by producing the best evidence in the shape of

two Constables who carried the dead body, relevant is to note that the trial court had considered this aspect and noted in its order that the accused-appellants moved an application for summoning of Constable Komal Yadav, one of the two Constables who carried the dead body. On the said application, the trial court had summoned the said witness to depose on behalf of the accused-appellants. However, the said witness who could throw any light on this issue as he was got discharged from the Court on another application of the defence. The contention of the learned counsel for the appellants that the prosecution had suppressed the best evidence in the shape of the statement of the Constable who carried the dead body, therefore, is liable to be thrown as it is.

153. Further contention of the learned counsel for the appellant is that though the said witness namely Constable Komal Yadav was present in the Court who could throw light on the above noted fact of the case but he was not cross-examined by the Court even after he was discharged as a defence witness and it was always open for the Court to examine him as a Court witness when the witness was available.

154. We do not find any substance in this submission, in as much as, according to us, on perusal of the entries in form-13 and the other corroborative evidence on record, though the correct time of arrival of the dead body in the police Headquarter cannot be ascertained but the said fact in itself would not create any dent in the prosecution story. The lapse on the part of the officer posted in the Police Headquarter in not making correct entries in the relevant column of form-13 Exhibit Ka-5, in itself, would not make the first information report ante-time or demolish the prosecution case.

155. For the proven facts of lodging of the first informant report at 19.45 hours (07.45 PM) on the basis of the written report given by PW-1, no contrary suggestion could be given to PW-6, Constable Moharir who prepared the check report and made G.D. entries of lodging of the first information report at the police station at 19.45 hours.

156. Further, PW-6, in the examination-in-chief proved that the special report of the case was sent to the Senior Officer on 28.02.2006 through Constable 694 Ram Surat Yadav and entry of the same was made in G.D. No.40 which was proved being in his handwriting and signature as Exhibit Ka-18. The paper No.129 of the special report prepared by him being in his handwriting and signature was also proved as Exhibit Ka-18. PW-6 was confronted on the entries of G.D. by making suggestions of overwriting on the same which was explained by PW-6 by saying that the overwriting was made to make necessary correction and it was done by him. He proved that the G.D. dated 28.02.2006 from 19.45 hours on 28.02.2006 till the morning was prepared by him. The certified photo copy of the G.D. of the registration of the case was filed by PW-6 and marked as Exhibit Ka-19. It was categorically stated by PW-6, in cross, that the special report was sent to the District Magistrate, Azamgarh, Superintendent of Police, Azamgarh, Additional Superintendent of Police, Azamgarh, Sub Divisional Magistrate, Budhanpur and Circle Officer, Budhanpur, Azamgarh.

157. He further proved, in cross, that Constable Ram Surat Yadav with whom the special report was sent, returned to the police station on 01.03.2006 at 15.45 hours and entry in that regard had been made at G.D. No.21. The original G.D. dated 01.032006 was forwarded to the Circle Officer on 02.03.2006 by the Station House Officer. On the statement made by PW-6 the Constable Moharir who himself sent the special report to the Senior Officials, that the Constable returned to the police station on 01.03.2006 and the entries in G.D. No.21 proved by him, no contrary suggestion had been given by the defence. In fact this witness was not confronted on this issue.

158. From the statement of PW-6, noted above, it is, thus, proved that the special report of the incident was sent to the Senior Officials on the date of the incident itself i.e. 28.02.2006 and the entry in that regard had been made in G.D. No.40 which also could not be confronted by the defence.

159. It was brought before us by the prosecution that as per practice the special report to the concerned Magistrate is being sent through the Circle Officer. Once the special report was sent on the same day by the police official of the police station concerned (PW-6) to his Senior Officials, any delay on the part of the Circle Officer to forward the report to the concerned Magistrate or delay on the part of the Magistrate in making endorsement on perusal of the special report, would not amount to non-compliance of the provisions of Section 157 Cr.P.C. which cast a mandate on the officer In-Charge of the police station to forthwith send the report of the commission of an offence to the concerned Magistrate. In the fact of this case, it is proved by the prosecution that in compliance of Section 157 Cr.P.lC., the special report was immediately forwarded to the Senior Officials including the Circle Officer on the same day, i.e. on 28.02.2006 through the Constable of the police station concerned. Any further delay which had resulted in the endorsement of the date 04.03.2006 by the Magistrate cannot be attributed to the officer In-charge of the police station concerned.

160. Both the above arguments made by the learned counsels for the appellants to challenge the date and time of lodging of the first informant report or terming the first information report as ante-time, are liable to be rejected. From the evidence of PW-6 and PW-4 as also the relevant papers produced and proved in the Court, it is established that the first information report of the incident was registered at the police station, Atraulia, District Azamgarh on 28.02.2006 at about 19.45 hours, which was at a distance of 1/2 KM from the place of the incident. On receipt of the said report, police reached at the place of the incident and the Investigating Officer who was in the field also reached at the spot and conducted inquest of the dead body. The inquest and all other relevant papers were got prepared by the Investigating Officer (PW-4) through his assistant S.I. Lalta Yadav, under his supervision.

161. The dead body was then sealed and sent for the postmortem through Constable 484 Komal Yadav and Constable 28 Janardan Singh to the police Headquarter at about 10.25 PM. The dead body in sealed state alongwith police papers was received by the doctor namely PW-3 who conducted autopsy at about 11.15 AM on the next date i.e. 01.03.2006. The postmortem was conducted on

01.03.2006 itself at about 11.30 AM. The opinion of the doctor in the postmortem report about the estimated time of death being half day does not fix the time of death to 11.30 PM or thereafter rather the doctor who conducted the postmortem namely PW-3 stated that the proximate time stated by him was only estimated time and the death could have been caused on 28.02.2006 at about 06.00 PM.

162. On this submission of the doctor in his examination-in-chief, he was confronted in cross, wherein he had categorically denied that his statement that the death could have been caused at about 06.00 PM on 28.02.2006 was wrong and was made only to give shape to the instant case.

163. The contention of the learned counsel for the appellants that even as per the postmortem report, the death could not have been caused at about 06.00 PM as per the noting in the check FIR, therefore, is liable to be rejected.

164. In the entirety of the evidence on record, all arguments pertaining to the FIR being ante-time are liable to be turned down.

B. Presence of the witnesses on the spot:-

165. There are two eye witnesses of the incident. PW-1 Atul Tripathi is the son of deceased Rajendra Prasad Tripathi whereas PW-2 Rajkumar Tiwari was a peon in Maruti Inter College, the institution wherein deceased Rajendra Prasad Tripathi was a lecturer. Both the witnesses stated that they were present on the spot and described the occurrence having seen from their own eyes.

166. To demolish the presence of eye witnesses on the spot, it is argued by the learned Senior counsel for the appellants that the reason for the presence of the witnesses (PW-1 & PW-2) near the Kesari Chauraha, the place of the incident, was not proved by the prosecution. As per the statement of these witnesses, the deceased went to the office of the District Inspector of School, Azamgarh on the fateful day and while returning from the said office by a roadways Bus he alighted at the Kesari Chauraha. The witnesses namely PW-1 and PW-2 were present on the spot on the instructions of the deceased as they were to help him alighting the bus with answer books of the Board examination. From the record as also the statements of these witnesses, it is evident that no answer book was found besides the dead body. In the inquest report, there is no mention of any article found besides or from the dead body. As per the prosecution, the deceased was traveling by a roadways bus, the bus ticket or pass to prove the factum of traveling was also not brought in evidence by the prosecution. PW-1, in cross, admitted that no bus ticket was found from the bag allegedly recovered besides the dead body by the police and no travel pass was found from the clothes of the deceased, PW-1 stated only Rs.250/- were taken out by the police from the pocket of pant of his father but no memo was prepared of the said recovery. Further, PW-1 was not even sure as to the post which his father was holding on the fateful day or the charge of which was about to be given to him on 01.03.2006. In one breath, PW-1 stated that his father was supposed to be given the charge of the Examination Controller and, in the second, that he was given the charge of the Principal of the institution. It is admitted by PW-1 that he had not seen any certificate or any document pertaining to

handing over charge of the office to his father. He admitted that he could not come to know as to whether the Board copies or any other material was received by his father from the office of the District Inspector of Schools.

167. Allegedly, a memo of recovery of bag found besides the dead body had been prepared by the Investigating Officer and proved as Exhibit Ka-2. The recovery memo records that one typed application signed by deceased Rajendra Prasad Tripathi dated 25.02.2006 and one service book as also a letter dated 17.02.2006 addressed to the District Inspector of School, Azamgarh were found inside the bag. All these documents including the bag were handed over to the son of the deceased namely PW-1. It has come in the evidence of PW-4 that the relevant column No.6 in the inquest of description of articles found besides the dead body was blank, only explanation given by him was that it was left by mistake. PW-4 was also confronted that there was an interpolation in the case diary dated 28.02.2006 about the recovery of bag and the application found in it as they were not mentioned in the case diary initially and an interpolation about these articles, no plausible explanation could be furnished by PW-4, Investigating Officer. It is urged that the Court had also observed that the word "bag" was interpolated in between two words namely "मिट्टी कब्जे" in the case diary which made no sense and this fact further proves that the memo of recovery of bag Exhibit Ka-2 was prepared later as an afterthought and entered in the case diary by interpolation so as to give color to the case of the prosecution by adding the proof of the deceased alighting from the bus at the Kesari Chauraha.

168. The contention is that the blank space in the inquest which was to be mandatory filled up by the Investigating Officer to corroborate the recovery of the bag from besides the dead body creates a serious doubt about the presence of the eye witnesses. Once the prosecution has failed to prove the reason of presence of the eye witnesses on the spot, the entire story of the deceased alighting the bus and the prosecution witnesses present on the spot to receive him falls short of relevant details. In any case, the prosecution had not brought any evidence on record to prove that the deceased went to the office of the District Inspector of Schools and returned by a roadways Bus at the time when the incident had occurred. The statement of PW-1 that he accompanied to his father to Azamgarh and returned back early had also been made just to fill the blanks noted above.

169. It is submitted that PW-1 was further confronted as to the residence of other two witnesses namely Krishna Kumar Tiwari and Arun Kumar Pandey who allegedly accompanied the eye witnesses PW-1 & PW-2. It has come in the evidence of PW-1, in cross, that the witnesses were residents of different villages and no plausible reasons of their presence on the spot could be given by the prosecution. Even otherwise, those two persons who allegedly accompanied the eye witnesses (PW-1 & PW-2) did not enter in the witness box.

170. Much emphasis has been laid to the fact that there was a bus stop about 250 paces towards the west from the Kesari Chauraha and there was no reason for the bus to stop at the busy crossing. It was also argued that on the date of the incident someone else was holding the charge of the Principal and hence the suggestion of enmity of the accused persons including

Shyam Narain Pandey with the deceased was without basis.

171. For another motive brought by PW-1 i.e. for enmity of the deceased with accused Laxmi Narain Pandey about money received from M.P. fund, it was argued that the allegation about the said dispute was a concocted story. It is known to all that any amount received in the college account from the government or from a public fund would be deposited in the joint account of the Manager and the Principal which is to be operated with their joint signatures. It was, thus, not possible for the deceased Rajendra Prasad Tripathi to transfer the said money on his own to the Chief Development Officer. This story was created by PW-1 only to implicate the Manager Laxmi Narain Pandey.

172. The defence had also given a suggestion in the cross-examination of PW-1 that the deceased went to the house of Paras Nath Mishra, Ex-Principal, who died on the same date and while he was returning back, some unknown persons out of enmity had caused his murder. It was placed by the learned Senior Counsel for the appellants that the house of Paras Nath Mishra was nearby the place of the incident.

173. With regard to PW-2, another eye witness, it was argued that his credentials are doubtful in as much as, he admitted that he was a life convict in a case alongwith the accused Laxmi Narain Pandey. It is urged by Sri Durgesh Singh learned Advocate that PW-2 had been brought in picture by the prosecution in order to falsely implicate Shyam Narain Pandey who was previously Principal of the institution and with whom PW-2 had grudges. On confrontation, in cross, PW-2 admitted that his salary was stopped by the accused appellant Shyam Narain Pandey and he was suspended and finally four days before his superannuation, he was terminated on account of long unauthorized absence. It is submitted that the reasons for false implication of appellant Shyam Narain Pandey at the instance of PW-2 are reflected in the cross-examination of PW-2. Further, PW-1 admitted that PW-2 was very close to the deceased. Being an interested and inimical witness, the testimony of PW-2 is liable to be discredited.

174. The record also indicates that PW-2 was pressurized by the family members of the deceased to depose against the appellants and he had entered in the witness box after receipt of money. Several contradictions in the testimony of PW-2 were brought before the Court to vehemently argue that the presence of PW-2 was highly improbable at the spot of the incident and no plausible reason could be given by PW-2 for his presence on the spot. There is also a suggestion of political rivalry of PW-2 with appellant Laxmi Narain Pandey on account of election for the post of Gram Pradhan held in the year 1999-2000. PW-2 was also contradicted with his statement under Section 161 Cr.P.C to demonstrate that he did not state therein the motive of causing murder or enmity of Laxmi Narain Pandey with the deceased. The contention is that the statement of PW-2 that Laxmi Narain Pandey used to pressurize the Principal of the institution namely the deceased herein, in money matters is nothing but an improvement on material facts. Further, the place where the witnesses were allegedly waiting for the deceased though had been shown in the site plan but the Chowki or wooden bench on which they were sitting

according to PW-2, was not shown by the Investigating Officer therein. PW-2 admitted that he did not meet the Investigating Officer at the spot soon after the incident and his statement was recorded after 20-25 days of the occurrence.

175. With the above, it was vehemently argued by the learned Senior Counsel for the appellants that the statements of eye witnesses PW-1 and PW-2 were lacking in material details as to the reason of their presence on the spot. It is further contended that PW-1 had given a detailed description of the manner in which his father was killed but did not give the registration number of the vehicle which was allegedly used in the killing. The place of the incident which was Kesari Chauraha was main Chauraha of Atraulia town and the police station was nearby, about 1 KM from the place of the incident, when the accused persons were carrying grudges and planned to kill the deceased, they could have chosen some other place rather than a busy crowded place to commit the crime in such a daring manner, exposing themselves. The entire family, father and five sons, had been implicated in order to eliminate the whole family because of the alleged enmity of the deceased with two co-accused, appellants Laxmi Narain Pandey and Shyam Narain Pandey.

176. The oral testimonies of the eye witnesses, therefore, are full of embellishments, exaggerations and improbabilities, their presence on the spot is liable be discarded as such.

177. To deal with the submissions on the issue of presence of eye witnesses at the spot, we may record, at the outset, that from the own version of the defence, there is no dispute about the place of the occurrence where the dead body of Rajendra Prasad Tripathi was found, which was Kesari Chauraha, Atraulia located at a distance of about ½ KM from the police station Atraulia wherein the first information report was lodged. The place of the incident is also proved from the suggestion given by the defence that the deceased was killed while he was coming from the house of Paras Nath Mishra, the Ex-Principal of the institution who died on the same date, and that his house was nearby the place of the incident.

178. As concluded in the preceding paragraphs, the first information report of the incident was a prompt report lodged by the son of the deceased namely Atul Tripathi who had entered in the witness box as PW-1. The written report given in the handwriting of PW-1 was proved as Exhibit Ka-1. The first information report was lodged within 1 hour and 45 minutes of the occurrence and the period taken in lodging the report had been explained by PW-1, in cross, when he stated that he went near his father after the accused persons fled away in the Bolero car and the people present on the spot kept hold of him for about 10-15 minutes while he was crying. His mother and sister then came on the spot and they also kept crying. He then went to the place known as Samadhi Sthal Balakdas which was about 10-12 feet on the north side of the road from the place of the incident. It took about twenty minutes to scribe the report and then he left for the police station on foot where he reached within 15 minutes. The police personnel came to know about the murder only when he gave the report and after lodging the same they came alongwith him to the place of the incident. Nothing contrary could be brought in the testimony of PW-1 about writing the report and going to the police

station to lodge the same. For the son who had witnessed the murder of his father, this explanation, in cross, about the time taken in going to the police station seems convincing. In a categorical statement, PW-1 stated as to how the murder had been caused. He had given categorical details as to how the accused persons came in a Bolero Car and five of them got down, gheroed the deceased and killed him while two of the appellants were exhorting others to kill.

179 It has come in the evidence of PW-2 that the Bolero car was without a number plate and the said fact is further corroborated from the statement of the Investigating Officer recorded in the recovery memo where he stated that the confiscated Bolero car, which was the case property exhibited as material Exhibit Ka-8, did not carry any number plate, i.e. it had no registration number.

180. Appreciating the testimony of PW-1, it may be noted that he had given orientation of the place of the incident, the motive for causing the murder, reason of his presence and that of other witnesses on the spot and the manner in which the murder was committed by the appellants. The manner of occurrence narrated by PW-1, son of the deceased is corroborated from the testimony of PW-2 to whom the suggestion of enmity is with one of the appellants namely Shyam Narain Pandey. The motive stated by PW-1 for commission of the crime had been reiterated by PW-2 in his own way. The fact that the salary of PW-2 was withheld or he was suspended or he was terminated prior to his superannuation had nothing to do with six other appellants namely Laxmi Narain Pandey and his five sons. There was no suggestion of enmity of PW-2 with any of these appellants except appellant Shyam Narain Pandey. Even it has come in the cross-examination of PW-2 that he was someway related to accused Laxmi Narain Pandey and had been his accomplice in a crime wherein he was convicted alongwith appellant Laxmi Narain Pandey and later acquitted in an appeal by the High Court. There is no reason for PW-2 to falsely implicate the accused persons namely Laxmi Narain Pandey and his sons. The suggestion of political rivalry of Laxmi Narain Pandey with PW-2 Rajkumar Tiwari is too remote.

181. The contradictions in the testimonies of PW-1 and PW-2, pointed out by the learned counsel for the appellant, are minor which do not go to the root of the matter and cannot be given undue credence. Both the witnesses namely PW-1, son of the deceased and PW-2, the Peon of the institution concerned stated that they were present on the spot of the incident on the instructions of the deceased and were waiting for him when he alighted from the roadways bus and was killed by the accused persons near the Kesari Chauraha. Mere fact that no bus ticket or pass to prove the factum of traveling of the deceased by roadways bus or no recovery memo of money was prepared by the Investigating Officer would not be a reason to disbelieve the factum of the deceased alighting from the roadways bus on the spot. It is possible that in the entire commotion, the Investigating Officer did not notice to confiscate the bus ticket as admittedly, he did not notice the articles found besides the dead body in the relevant column of the inquest.

182. This crucial evidence might have been left from being noticed by the Investigating Officer because of lack of

promptness or agility on his part but for this reason it cannot be said nor it can be accepted that the deceased did not travel from the roadway bus or did not go to Azamgarh. The fact that the prosecution could not establish the reason for the deceased going to Azamgarh on the fateful day as no answer book was found besides his dead body is not so material so as to thrash-away the entire prosecution case. The suggestion that the recovery memo of bag was prepared as a afterthought is not acceptable as it was proved by PW-4, the Investigating Officer that the recovery memo Exhibit Ka-2 that one rexin bag was found besides the dead body, was prepared in the presence of witnesses including PW-1. It was proved that when the bag was opened a service book, a typed letter dated 17.02.2006 and also an application dated 25.02.2006 were inside. After preparation of the memo of recovery, the bag and the service book were given in the custody of the first informant (PW-1). The bag was produced in the Court and was shown to PW-4 who identified the same which was found besides the dead body, it was marked as Material Exhibit Ka-1. PW-2 also proved that the application found inside the bag as Material Exhibit Ka-3.

183. On confrontation, PW-4, the Investigating Officer stated that he did not think it wise to deposit the bag as case property in the Maalkhana and that is why a सुपुर्दगीनामा was prepared and it was handed over to the first informant with the instruction to produce it in the Court whenever summoned.

184. As regards the interpolation in the case diary about the recovered articles being bag, PW-4 stated that the suggestion that bag was added later by interpolation was wrong. Further from the articles found inside the bag, it seems that a letter was written by the deceased to the District Inspector of School for release of his salary which was withheld for sometime as also stated by PW-1. It was also proved by PW-1 that a dispute about Principalship was going on between the accused Shyam Narain Pandey and the deceased. The appointment of accused Shyam Narain Pandey on the post of Principal was cancelled on account of the complaint made by the deceased, whereafter, Shyam Narain Pandey was removed by the Commission. No inconsistency in the statement of PW-1 & PW-4 could be found with regard to the recovery of bag besides the dead body and preparation of its recovery memo and handing over the same to the eye witness PW-1.

185. For the arguments of the learned Senior Counsel for the appellants, the genuineness of recovery memo Exhibit Ka-2, for the mere reason that no entry of the bag was made in the inquest or the bag was given in the Supurdigi of PW-1, cannot be doubted.

186. Be that as it may, mere fact that the reason as to why the deceased traveled to Azamgarh or whether he had gone to the office of the District Inspector of School, Azamgarh on the fateful day could not be established by the prosecution by the evidences such as bus ticket or any material brought from the office of the District Inspector of School, would not be fatal to the prosecution story. It is proved that there was a dispute related to holding of the post of the Principal in the institution concerned and the deceased was trying hard to get appointment on the post of Principal being the Senior-most Lecturer in the institution concerned. The description in the testimony of PW-1 & PW-2, the eye witnesses of the

occurrence, corroborated by the surrounding circumstances of the case such as lodging of the prompt report by PW-1 and the description given by him about the occurrence supported by the testimony of PW-2 is categorical proof of the presence of these two witnesses on the spot.

187. The suggestion of false implication of the appellants at the hands of PW-1 for the enmity projected by the prosecution, cannot be read in favour of the defene, in as much as, two eye witnesses, in the instant case, fall in the category of wholly reliable witnesses and further the suggestion of false implication of the appellants for the proved enmity is unacceptable, in as much as, it is not acceptable that the son of the deceased who had seen the occurrence would let go the real assailants scot free so as to falsely implicate the appellants with whom there is direct enmity of the eye witnesses namely PW-1. The proof of enmity is only with the deceased who was working on the post of Lecturer in the institution of which one of the appellant namely Laxmi Narain Pandey was the Manager and wherein another appellant Shyam Narain Pandey held the post of Principal for sometime. All other appellants are sons of Manager Laxmi Narain Pandey who were carrying grudges with the deceased on account of his actions to hold the post of the Principal of the institution concerned.

188. In the instant case, the trial court had given an exhaustive finding on the credibility of evidence of the eye witnesses. Learned counsel for the appellant pointing out the discrepancies in the ocular account of two witnesses is invoking jurisdiction of the High Court being the first appellate court to reappraise the evidence.

189. In this regard, we would like to refer to the decision of the Apex Court laying down the legal principle in the matter of appreciation of evidence of witnesses by the first appellate court so as to impeach the credit of the witness. The principles narrated in the celebrated decision of the Apex Court in the **State of UP vs. M.K. Anthony13** are that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differs with individuals.

190. In the above context, it was held in **Leela Ram (D) Through Duli Chand vs State Of Haryana And**

another14 that the High Court is within its jurisdiction being the first appellate court to re-appraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There is bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eye witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

191. The previous decision in **Rammi @ Rameshwar Vs. State of M.P15** was taken into account in **Leela Ram (D) Through Duli Chand14** to note the observations therein as:-

"In a very recent decision in Criminal Appeal No. 61 of 1999 (Rammi alias Rameshwar v. State of Madhya Pradesh) with Criminal Appeal No. 33 of 1999 (Bhura Alias Sajjan Kumar v. State of Madhya Pradesh) this Court observed :

24. "When eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny".

This Court further observed :

25 "It is a common practice in trial courts to make out contradictions from previous statement of a witness for confronting him during cross- examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of inconsistent former statement. But a reading of the Section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the Section is extracted below :

" 155. Impeaching credit of witness. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him.....

(1)-(2)

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

26. A former statement though seemingly inconsistent with the evidence

need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted"would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose, i.e. to "contradict" the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness, (vide Tahsildar Singh and Anr. v. State of U.P., AIR (1959) SC 1012)".

192. In paragraph Nos.11 & 12 of Leela Ram (supra), it was further observed:-

"11. The court shall have to bear in mind that different witnesses react differently under different situations : whereas some become speechless, some start wailing some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

12. It is indeed necessary to note that hardly one conies across a witness whose evidence does not contain some exaggeration or embellishments - sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give slightly exaggerated account. The Court can sift the chaff from the corn and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness - If this element is satisfied, they ought to inspire confidence in the mind of the Court to accept the stated evidence though not however in the absence of the same".

193. Reverting to the instant case, on evaluation of the evidence of both the eye witnesses, in entirety, the discrepancies pointed out by the learned Senior Counsel for the appellants in their testimonies are found to be minor variations or infirmities in the matter of trivial details which do not touch the core of the case so as to reject the evidence as a whole. Attaching too much importance to the technical errors committed by the Investigating Officer in not noticing the bus ticket as a proof of travel of the deceased from Azamgarh or in not mentioning the bag as an article found besides the dead body in the relevant column of the inquest, in the attending circumstances of the present case, is impermissible, in as much as, absence of these details would not go against the general tenor of the evidence given by the witnesses which is found consistent and credible.

194. No inconsistencies from the previous statements of the eye witnesses

(recorded under Section 161 Cr.P.C.) could be pointed out during their cross-examination by the defence. The statement of PW-1, the son of the deceased was recorded by the Investigating Officer soon after completion of the inquest at the spot of the incident. The narration of PW-1 of the manner of causing the murder of his father by the appellants in the written report scribed by him, in his first statement recorded under Section 161 Cr.P.C. and his deposition (both in examination-in-chief and cross-examination) in the Court is consistent and is not at variance on any material particular or details. It cannot be said that the discrepancies pointed out by the learned counsels for the appellants would make the eye witnesses especially PW-1, the son of the deceased as an untrue witness.

195. The testimony of PW-2 is corroborative to the version of PW-1 both of whom were present on the spot together to receive the deceased who was coming by a roadways bus from the District Headquarter Azamgarh. On consideration of their evidence from the point of view of trustworthiness of the eye witnesses, it inspires confidence in the mind of the Court and removes all doubts sought to be created by the learned counsels for the appellants so as to disbelieve the evidence of such witnesses who are otherwise trustworthy. No such discrepancy could be pointed out by the defence which would shake the basic version of the prosecution case so as to discard the version of the eye witnesses about their presence on the spot.

196. The arguments of the learned Counsels for the appellants noted above to discredit the presence of eye witnesses (PW-1 and PW-2) at the spot of the incident are, thus, liable to be rejected.

C. Ocular Vs. Medical Evidence:-

197. It is argued by the learned Senior Counsel for the appellants that the statement of PW-1 as to the manner of causing firearm injuries to the deceased is in complete contradictions with the medical evidence, which goes to the root of the matter so as to discard the presence of PW-1 on the spot. It is submitted that in the examination-in-chief, PW-1 stated that five accused persons namely Rajesh Kumar Pandey, Amit Kumar Pandey, Pawan Kumar Pandey @ Babloo, Ramesh Kumar Pandey and Rajesh Kumar Pandey had encircled the deceased and all of them were all carrying firearms. Three out of five namely Pawan Kumar Pandey @ Babloo, Rajesh Kumar Pandey and Amit Kumar Pandey had opened fires at the deceased. While the deceased was falling down getting hit by the fires, two accused namely Ramesh Kumar Pandey and Umesh Kumar Pandey also fired whereas only three firearm wounds of entry were found on the person of the deceased as indicated in the postmortem report, proved by the doctor PW-3.

198. In cross on confrontation, PW-1 stated that total five fires were opened by the accused persons and accused Ramesh Kumar Pandey and Umesh Kumar Pandey also opened fires when the deceased was falling down.

199. As per the submissions of the learned Senior Counsel for the appellants, the number 5 had been fixed by the informant PW-1 so as to implicate five accused based on the number of injuries noted in the postmortem report. Out of 5 injuries in the postmortem report, 3 are entry wounds whereas 2 exit wounds correspond to 2 entry wounds of the firearm. There is no explanation as to

whether fires allegedly opened by the appellants Ramesh Kumar Pandey and Umesh Kumar Panddy also hit the deceased. There is no recovery of weapons from the possession or on the pointing out of the appellants Ramesh Kumar Pandey and Umesh Kumar Pandey and there is no recovery of empty cartridges from the place of the incident. The falsity in the statement of PW-1 evident from the records proves that he was not present on the spot.

200. Placing the statement of PW-1 recorded on 18.09.2006, it is argued that when this witness gave such a graphic details about the directions in which each assailants was standing while encircling the deceased, he could not have missed the number of fires opened by the appellants and that whose fires hit the deceased.

201. To deal with the above submissions, suffice it to note that in the statement of PW-1, it has come that all five accused persons who encircled the deceased after getting down from the Bolero car, opened fires at the deceased and the first three fires were made by appellants Pawan Kumar Pandey @ Babloo, Rajesh Kumar Pandey and Amit Kumar Pandey. Three firearm entry wounds with blackening and tattooing have been found near the right and left ear and right shoulder of the deceased. The position of all three wounds as indicated in the postmortem report show that three fires were made at the deceased from both sides and they were close range and his right and left parietal & temporal bone of the head were found broken and brain was ruptured.

202. The categorical statement of PW-1 is that while his father was falling down after being hit by three fires opened by appellants Pawan Kumar Pandey @ Babloo, Rajesh Kumar Pandey and Amit Kumar Pandey, two other appellants Ramesh and Umesh also opened fires. The fact that their fires did not hit the deceased or no empty cartridges could be recovered from the spot of the incident would not be a reason to discard the presence of PW-1 who gave a clear and categorical detail as to whose fires hit the deceased. A careful reading of the statement of PW-1 makes his version clear that three fires opened by appellants Pawan @ Babloo and Rajesh and Amit hit the deceased.

203. Even otherwise, it is settled law that in case of any inconsistencies or contradiction between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and unless the oral evidence is totally irreconcilable with the medical evidence, the oral evidence would have primacy. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all that the oral evidence is liable to be discarded. Reference **State of U.P. vs. Hari Chand16 and Darbara Singh versus State of Punjab.17**

204. In view of the above discussion, we find that the inconsistencies pointed out by the learned Senior Counsel for the appellants in the medical evidence vis-a-vis ocular evidence of PW-1 is not a relevant factor so as to discard or disbelieve the ocular evidence. The arguments of the learned Senior Counsel for the appellants in this regard are, thus, liable to be rejected.

D. Ballistic Report:-

205. Placing the ballistic report, it is submitted by the learned Senior Counsel that the recoveries made from the accused

appellants Amit Kumar Pandey and Rajesh Kumar Pandey of the weapons namely 315 bore and 303 bore country made pistols, live cartridges and empty cartridge found in the chamber of the weapon could not be proved by the prosecution. The bullet found from inside the dead body could not be matched from any of the recovered weapon, even the recovered cartridges also did not match with the weapons recovered from the possession of appellants Amit Kumar Pandey and Rajesh Kumar Pandey. It is, thus, argued that it proves that the recovery of the firearms was planted by the Investigating Officer. The ballistic report rather supports the defence theory that the deceased was hit by some unknown persons in the dead of night and the implication of the appellants in the crime is false.

206. To deal with this submission, suffice it to note that mere fact that the ballistic report did not support the recovery made by the prosecution would not be a reason to discard the ocular evidence which is supported by the medical evidence, in as much as, two firearms wounds brain cavity deep were through and through as the entry wound 3 cm above left ear correspond with the exit wound at the right eyebrow which both were brain cavity deep. Whereas entry wound at 2 cm above right ear correspond with the exit wound which was 1 cm above the injury No.1. The bullet which was found from the liver of the deceased correspond to the entry wound found at 06. cm below right shoulder margin of which were inverted. It has come in the evidence that three accused persons had fired at the deceased and the fact that recovery of the weapons used in causing murder could not be made or the prosecution could not connect recovered firearms with the occurrence, cannot be given undue importance so as to discard the uncontroverted oral testimony of the eye witnesses namely PW-1 and PW-2.

E. Motive:-

207. On the question of motive, it is proved by the prosecution witness that the deceased was Senior most Lecturer in the institution concerned and he was trying hard to hold the post of Principal of the institution concerned. The accused-appellant Laxmi Narain Pandey was against the deceased and was supporter of co-accused Shyam Narain Pandey. The appointment of Shyam Narain Pandey though was made by the Commission but it was cancelled on the complaint made by the deceased about the genuineness of his testimonials. It has come in evidence that the testimonials of appellant Shyam Narain Pandey, which were the basis of his appointment to the post of Principal were found forged and hence his appointment was cancelled in the year 2005 by the Commission. Both the witnesses of fact proved that there was a dispute between the Manager Laxmi Narain Pandey and the then Principal Rajendra Prasad Tripathi, i.e. the deceased herein in relation to some money received from the M.P. Fund, utilization of which could not be made as per the wishes of the Manager Laxmi Narain Pandey.

208. The recovery of bag material Exhibit 1 was proved by the Investigating Officer PW-4 wherefrom an application material Exhibit Ka-3 was recovered. The contents of the said application had been extracted by the trial court in paragraph No.55 of its judgement. A perusal of which further indicates that the deceased Rajendra Prasad Tripathi wrote the said application against the Manager stating that the

Manager of the institution was making all efforts to harass him and prayed that he may be restrained from interfering in the affairs of the institution concerned. The memo of recovery of bag and Supurdignama dated 28.02.2006 Exhibit Ka-2 bears signature of PW-1 namely Atul Kumar Tripathi who in the cross-examination had proved his signatures on the said document. The signature and writing of the deceased on Material Exhibit Ka-3 the application, was also proved by PW-1 by stating that he was well acquainted with the writing and signatures of his father and the signatures on document Exhibit Ka-3 were of his father which was seized by the police on the spot.

209. Nothing contrary could be culled out from the testimony of PW-1, the son of the deceased and PW-4 as also the Investigating Officer who proved recovery of bag and the application as Material Exhibit Ka-1 and Material Exhibit ka-3 found besides the dead body. The correctness of the allegations made in the application form namely Material Exhibit Ka-3 are not relevant for our consideration in the present case. The said document, coupled with other circumstances of the case noted above, proves the motive for commission of the crime. It is settled that motive though is not of much importance in a case of positive ocular evidence, i.e. of eye witnesses account, but the motive if proved or established is a very relevant and important aspect to highlight the intention of the accused and is relevant to show that the person who had the motive to commit the crime actually committed it. However, it is equally settled that such evidence (of motive) alone would not ordinarily be sufficient to record conviction.

E. Flaws in the investigation:-

210. Several flaws in the investigation were pointed out by the learned Senior Counsel for the appellants such as delay in sending the dead body to the police lines and flaw in preparation of recovery memo of bag allegedly found besides the dead body have been dealt with in the foregoing paragraph of this judgement. Several inconsistencies in the statement of the IIIrd Investigating Officer namely PW-10 were pointed out by the learned Senior Counsel to assert that the prosecution had falsely implicated the accused appellants in a zeal to solve the crime merely on account of the alleged enmity of the deceased with the accused persons.

211. Dealing with the same, suffice it to note that it is now a well settled principle that any irregularities or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on this issue. Reference may, however, be made to the decision of the Apex Court in State of State of Rajasthan vs. Kishore18 which laid down the above proposition.

F. Trial Court Finding:-

212. For the above discussion, we do not find any error in the finding returned by the trial court on the above noted issues, in holding that the prosecution had proved lodging of the first information report in a prompt manner, the presence of the witnesses on the spot and the motive assigned to the accused appellants to cause the murder. No infirmity could be found in the finding returned by the trial court on the above issues.

G. Plea of Alibi of the accused-appellants:-

213. We are now left with the plea of alibi taken by three appellants.

214. The appellants who have pleaded alibi, are Laxmi Narain Pandey, Pawan Kumar Pandey and Shyam Narain Pandey. In his statement under Section 313 Cr.P.C. noted above Laxmi Narain Pandey stated that he was lodged in the District Jail, Lucknow on the date and time of the incident whereas Pawan Kumar Pandey another appellant taking the plea of alibi stated that he was lodged in the District Jail, Lucknow alongwith his father on the date and time of the incident. The appellant Shyam Narain Pandey in his statement under Section 313 Cr.P.C. stated that he left for his village on 03.07.2005 after leaving the college and used to reside therein. Between 26.02.2006 and 01.03.2006 he used to go to Allahabad High Court and stayed in Allahabad city for the preparation and pairvi of a rejoinder affidavit.

215. The appellants had produced 15 defence witnesses (DW-2 to DW-16) and number of documentary evidences in support of their plea of alibi.

216. Before adverting to the evidence produced by the defence/appellants, it would be worthwhile to note that in a criminal case wherein an accused makes an effort to take shelter under the plea of alibi, it has to be raised at the first instance and also be subjected to strict proof of evidence by the Court trying the offence. Such a plea cannot be allowed lightly inspite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction inspite of his plea of alibi.

217. While discussing the law relating to plea of alibi, the first and foremost principle is that the burden of substantiating such a plea and making it reasonably probable is upon the accused. The plea of alibi is not one of the general exception contained in Chapter IV IPC. It is a rule of evidence recognized under Section 11 of the Evidence Act. Section 11 of the Evidence Act' 1872 provides that when facts not otherwise relevant are relevant if they are inconsistent with any fact and issue or relevant fact if by themselves or in connection with other facts they make the existence or non-existence of any fact or issue or relevant fact highly probable or improbable.

218. It is settled that the burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in the discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving his defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence.

219. Further, when the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such

a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. The burden of the accused is undoubtedly heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court.

220. Reference be made to the decisions of the Apex court in **State of Uttar Pradesh Vs. Sughar Singh & others19, Binay Kumar Singh Vs. State of Bihar20, Jayantibhai Bhenkarbhai Vs. State of Gujarat21, Jitendra Kumar Vs. State of Haryana22, Darshan Singh Vs. State of Punjab23** wherein above stated legal position has been discussed.

G(i). Plea of alibi of Shyam Narayan Pandey:-

221. In the instant case, plea of alibi of appellant Shyam Narain Pandey is supported by the evidence of two witnesses namely DW-7 Sadanand Pandey and DW-12 Sudhakar Pandey. Sadanand Pandey admittedly, was a resident of District Ballia which was the native village of the appellant Shyam Narain Pandey. As per the statement of DW-7, he met appellant Shyam Narain Pandey between 26.02.2006 till 28.02.2006 when the latter was staying at Allahabad for doing pairvi in his case filed in this Court (Allahabad High Court). The statement of DW-7 was recorded on 02.04.2009. His version in his deposition in the Court is only based on his memory and is not supported by any material on record. In cross, DW-7 admitted that he never went with appellant Shyam Narain Pandey for doing pairvi of his case and he met him in Allahabad only on few days. He also admitted that he came to know about the present criminal case about a year prior to his deposition. It is also admitted by PW-7 that he was not related to the appellant Shyam Narain Pandey. He also did not state that he knew Shyam Narain Pandey from before he met him at Allahabad in the year 2006 or ever met him thereafter. In this scenario, it is difficult to believe that DW-7 who was a litigant in another case could remember after a period of three years as to whom he met in the chamber of an Advocate at Allahabad.

222. DW-12 is an Advocate practicing in the Allahabad High Court. Admittedly he did not file Vakalatnama or appeared on behalf of appellant Shyam Narain Pandey in any matter in Allahabad High Court. It is admitted by DW-12 that some other Advocate was engaged by Shyam Narain Pandey. The statement of DW-12 that the appellant Shyam Narain Pandey used to stay in his house from 26.02.2006 till 01.03.2006 cannot be corroborated from any other circumstance or material brought on record. In cross of DW-12, it has come that his native village was Ballia and appellant Shyam Narain

Pandey was also a resident of District Ballia, DW-12 being acquaintance of appellant Shyam Narain Pandey as admitted in his testimony cannot be believed to support the plea of alibi of Shyam Narain Pandey in absence of any other supporting evidence or surrounding circumstance to prove that there was no possibility of presence of appellant Shyam Narain Pandey at the place of the incident on the date and time stated by the prosecution witnesses.

223. As noted above, no documentary proof of presence of appellant Shyam Narain Pandey on the date and time of the incident in Allahabad had been produced and the statement of defence witnesses (DW-7 and DW-12) are bereft of any supporting evidence. It may be noted that neither the Oath Commissioner who verified the affidavit allegedly sworn by appellant Shyam Narain Pandey or the Advocate who was appearing on his behalf in the High Court had been produced in evidence.

224. For the aforesaid, the plea of alibi of appellant Shyam Narain Pandey is liable to be rejected. No infirmity in this regard can be found in the findings of the trial court.

G.(ii). Plea of alibi of Laxmi Narain Pandey and Pawan Kumar Pandey:-

225. The appellants Laxmi Narain Pandey and Pawan Kumar Pandey pressed the plea of alibi, i.e. the proof of their absence on the spot of the incident at the date and time indicated by the prosecution or in another words to prove their presence at another place by leading a positive evidence which is required to be scrutinized by this Court.

226. The contention is that both the abovenamed appellants were lodged in the District Jail, Lucknow on 25.02.2006 and were released only on 02.03.2006 and on 24.02.2006 they were lodged in RPF lock-up at the RPF post Charbagh (NR) Lucknow. This plea is supported by a number of documentary evidences brought by the defence witnesses who are police officers of RPF and Jailer of the District Jail, Lucknow. Some of the documentary evidences brought on record were summoned by the trial court.

227. DW-11 is the Ticket Collector who stated that while he was posted at the Railway Station, Charbagh, he caught both the appellants at the first class entry gate of Train No.3040 Jammu Tavi Howrah which reached at the Charbagh Railway Station 15.15 hours at platform No.1. From the testimony of this witness, it is evident that he did not identify both the appellants personally rather his version is supported by two documents namely Exhibit Kha-20 and Kha-21. Both these documents are certified copies of the alleged charge sheets prepared on 24.02.2006 in the handwriting and signature of one Atul Kumar who was posted as In-charge CTC in the office of VICTC. These documents are stated to be photostat copies of the original charge sheet and had been attested and filed by DW-11.

228. It is not known as to in what capacity these document were brought by DW-11 for being filed in the Court in support of the plea of the defence that two appellants namely Laxmi Narain Pandey and Pawan Kumar Pandey were arrested by DW-11 at the Charbagh Railway Station and charge sheeted as they were traveling without ticket and that they did not deposit the charge of general bogey with penalty

i.e. Rs.380/- per person which was demanded by DW-11 for the offence of traveling without ticket. The Exhibit Kha-20 & Kha-21 for the above reasons cannot be relied to hold that the appellants were arrested by DW-11 on 24.02.2006 at the gate No.1 of the platform No.1 of the Charbagh railway Station, Lucknow.

229. Further documents relied by the appellants in support of the above plea are G.D. entries dated 24.02.2006 and 25.02.2006 which had been filed as Exhibit Kha-3 and Kha-4 and proved in the Court by DW-3, the Head Constable posted in RPF. It was stated by DW-3 that those documents were brought by him pursuant to the order of the Court. DW-8 is a police personnel of RPF who stated that these two appellants were arrested and handed over to him and he lodged them in the District Jail, Lucknow on the basis of the charge sheet prepared against them under Section 137 and 138 Railways Act.

230. DW-9 is a Constable posted in RPF who proved the entry in the G.D. Exhibit Kha-3 and Kha-4 being in his handwriting and signature and stated that when the accused persons were lodged in the RPF lockup, he was on duty to write the G.D. and on frisking of the two appellants, one mobile charger was found from the possession of the appellant Pawan Kumar Pandey.

231. DW-3 also brought the original Khuraki register from 03.11.2005 to 17.11.2006 and filed it in the Court which was proved as Exhibit Kha-7. A copy of Jamatalashi register (the proof of frisking of the accused) before lodging them in the lockup had also been brought on record as Exhibit Kha-7. It may be noted that it has come on record that none of the documents produced in defence by the officers posted in the RPF post (brought under the order of the Court) were brought in sealed cover. G.D. entries dated 24.02.2006 at G.D. No.60 Exhibit Kha-3 records that both the accused who were caught at the first class entry gate by Ticket Collector Sarvendra (DW-1), on interrogation could not produce any proof of traveling and stated that they were traveling from Train No.3074 down, from Moradabad and as they did not have money and when asked to deposit the passengers tariff, they denied. From this story narrated in the G.D. Exhibit Kha-3, pertinent is to note that this entry cannot be accepted as true as there was no proof of traveling of the appellants by Train No.3074 down from Moradabad. The appellants were admittedly residents of District Azamgarh. They both were well-off persons belonging to a reputed family as on the date of the incident, appellant Laxmi Narain Pandey was the Manager of two institutions, one Intermediate and another Degree College. There is no explanation as to why these appellants would travel from Moradabad that too without ticket and how were they bereft of money.

232. The record brought by the defence show that the appellants were without luggage as nothing but a mobile charger could be found in their frisking as is recorded in Exhibit Kha-6, the alleged register of frisking of appellant Pawan Kumar Pandey. From a bare perusal of the document filed as Exhibit Kha-6 it is clear that the entry of the name of Pawan Kumar Pandey son of Laxmi Narain Pandey is not in chronological order. This documents filed to prove the arrest and lodging of the appellants in the RPF lockup at Charbagh, Railway Station, Lucknow, therefore, cannot be believed.

233. DW-10 is the Constable posted in RPF, Charbagh who stated that he took two appellants alongwith 13 persons to the Court of Additional Chief Judicial Magistrate (NR), Charbagh, Lucknow for their appearance in the Court and DW-10 stated that out of 17, 4 accused persons were released as they deposited the fine and two appellants herein including others (total 13 in number) were lodged in the District Jail, Lucknow. His signature on the entry of the Jail gate book had been identified by DW-10 as Exhibit Kha-19.

234. In cross, it is admitted by DW-10 that he could not identify the accused persons from their appearance and he could only depose on the basis of the relevant registers brought in defence. We may note at this juncture that the entire record of the Court of Additional Chief Judicial Magistrate (NR) Charbagh had been weeded out as is evident from the record and no proof of appearance of the appellants in the Court of Additional Chief Judicial Magistrate (NR) Charbagh on 25.02.2006 could be brought or found. The evidence of DW-10, therefore, cannot be believed.

235. Now the remaining documentary evidence and the defence witnesses had been produced to prove the lodging of the appellants in the District Jail, Lucknow.

236. Before appreciating the documents relied by the learned Senior Counsel in that regard, we may note that Exhibit Kha-5 is the certificate of the Medical Officer, District Jail, Lucknow which is countersigned by the Superintendent, District Jail, Lucknow and the said document is dated 31.08.2006. This document was produced by the Deputy Jailer, District Jail, Lucknow who entered in the witness box as DW-4. The certificate dated 31.08.2006 records that in a fire accident on 15.03.2006 the entire record of the Jail Hospital such as admission register and all other documents were destroyed. This certificate was given on 31.08.2006 (as noted above) in relation to some queries made with regard to another prisoner who was admitted in the District Jail, in the month of January, 2006.

237. We may further record that DW-2 is Bandi Rakshak, District Jail, Lucknow who brought the register No.1 (kaidi register) and register No.7 (Doctari Mulaiza register) in the Court. It may further be noted that these documents were not brought in a sealed cover as was admitted by DW-5, the Jailer, District Jail, Lucknow.

238. DW-6 is the Jailer who was posted in the District Jail, Lucknow at the relevant point of time. He was produced to prove the entries in the gate book/ gate register and register No.1 Kaidi register as also the register No.7 (release register). It is admitted by DW-6 that none of the entries were made in his presence as they do not pertain to the period of his posting in the District Jail, Lucknow.

239. DW-13 is the Deputy Jailer posted in the District Jail, Luckow on the date of the incident and he was shown various registers allegedly maintained in the jail and admitted that there were overlappings in the alleged thumb impressions of the accused persons in the relevant register No.1, both against the names of Laxmi Narain Pandey and Pawan Kumar Pandey. On confrontation about the overlapping of thumb impression found in the relevant column of register No.1, DW-13 stated that when he directed for release

of the accused appellants from jail, the entries in the register were not like this.

240. Hospital Mulaiza register which had been produced by DW-14, Bandi Rakshak, District Jail, Lucknow was placed before us to state that all identification marks mentioned in the said register tallied with the identification marks found on the body of the accused persons, on comparison in the trial court. DW-15 is the doctor who stated that he had tallied the identification marks of the accused persons noted in the Hospital Mulaiza register. It is not clear as to how this document which is known as Hospital Mulaiza register, wherein the health record of the prisoner and their identification marks were noted could be believed when it was not produced in the sealed cover. It may be noted that different officers of the District Jail, Lucknow posted at different point of time were produced in the Court by the defence to prove the entries in the documents/registers brought by DW-2 pursuant to the order of the trial Court.

241. It was admitted by DW-4 that only the Jailer, District Jail, Lucknow was authorized to produce the document in the Court and the Jailer, District Jail, Lucknow when entered in the witness box as DW-5 stated on oath that none of the documents sent by him through DW-2, as summoned by the Court, were in sealed cover. The excuse was that there was no such order of the Court.

242. For the above, none of the documents produced in defence to prove the plea of lodging of the appellants Laxmi Narain Pandey and Pawan Kumar Pandey in the District Jail, Lucknow are believable. Moreover, once we have discarded the evidence of proof of arrest, the documents of arrest of the appellants at the railway Station, Charbagh, Lucknow and the factum of their lodging in the lockup of the RPF post (NR) Charbagh, Lucknow on 24.02.2006, all other documents of proof of their lodging in the District Jail, Lucknow are liable to discarded.

243. We may further record that none of the defence witnesses had identified the accused appellants personally and the entire plea of alibi is based on the documentary evidences, genuineness of which is highly doubtful and could not be proved by the defence witnesses. None of the documents are to be believed as genuine documents so as to accept them as a strict proof of plea of alibi of the appellants. As regards Exhibit Kha-12 and Kha-13, the extract of register No.9 and fine register; respectively, which were sent by the Court clerk of the office of the Additional Chief Judicial Magistrate, (NR) Charbagh, Lucknow by the letter dated 16.03.2009 (Exhibit Kha-11), which were found in the envelope Exhibit Kha-9, reference of which finds place in the statement of DW-13, suffice it to note that as per the report of the Court clerk, the record of cases lodged under Section 137 Railways Act bearing No.1435 of 2006 to 1448 of 2006 had been weeded out under the order of the Presiding Officer dated 05.06.2006. As a result of which, the entries in Exhibit Kha-12 and Kha-13 placed before us could not be verified from the own showing of the defence that the record of the office of the Additional Chief Judicial Magistrate, (NR) Charbagh, Lucknow was not available when they were summoned by the trial court.

244. For the aforesaid, we are afraid to accept the plea of alibi raised by the appellants Laxmi Narain Pandey and Pawan Kumar Pandey on the basis of

documentary evidences filed by the defence witnesses (DW-2 to DW-15). As regards the evidence of DW-16, same is liable to be rejected as the genuineness of the documents brought in the Court in defence about the arrest and detention of the appellants Laxmi Narain Pandey and Pawan Kumar Pandey firstly in RPF lockup and then in the District Jail, Lucknow is found unbelievable.

245. T here is one more aspect of the matter. As per the plea taken by the two appellants named above, they deposited the fine on 01.03.2006 in the Court of the Railway Magistrate and were released from the District Jail, Lucknow on 02.03.2006. The incident occurred on 28.02.2006 and named FIR was lodged on the said date itself. All other co-accused except Shyam Narain Pandey are immediate family members of accused Laxmi Narain Pandey and Pawan Kumar Pandey being sons of Laxmi Narain Pandey. It is noticeable that the plea of alibi had not been taken at any point of time prior to the statement of the said accused appellants recorded under Section 313 Cr.P.C. before the trial Court. Neither the plea of alibi was taken during the course of investigation nor at the stage of commital. No application for discharge of these appellants had been filed on the plea of alibi. No application had been moved before the competent court to plead that the implication of the appellants in the criminal case was false as they could not remain present on the spot of the crime having been lodged in the District Jail, Lucknow. Had it been done, appropriate enquiry at the inception of this criminal case could have been conducted and appropriate order could have been passed to summon or seal the record of the Court of Railway Magistrate wherein the proceedings under Section 137 Railways Act were allegedly conducted.

246. These facts raise a serious doubt about the genuineness of the plea of alibi.

247. Further, looking to the circumstance and the financial capacity of the appellants, it is difficult to believe that they would not deposit the fine of Rs.880/- per person for traveling without ticket and choose to go to the jail for 15 days. Further it has come in the evidence of the defence witness DW-3 that the information was given to the family members of the arrested accused appellants when they were lodged in jail. It is, thus, difficult to accept that none of the family members of the appellants came forward to deposit the fine or they did not take care to know the whereabouts of the appellants who allegedly remained in jail for 15 days.

248. The exhaustive findings recorded by the trial court on each and every issue relating to the plea of alibi are found justified in the facts and circumstances of the present case in view of the discussion made above.

249. For the above discussion, the plea of alibi taken by the appellants Laxmi Narain Pandey and Pawan Kumar Pandey in their statements under Section 313 Cr.P.C. and the proof brought in the shape of defence witnesses and the documentary evidences filed by them is a concocted story, putforth by the said appellants by carefully constructing the record with the help of the staff of the Railway Police Force and the District Jail, Lucknow.

250. The presence of appellants Laxmi Narain Pandey and Pawan Kumar Pandey at the place of the occurrence on the date and time stated by the prosecution witnesses is found proved in view of the consistent, reliable and trustworthy

testimony of eye witnesses namely PW-1 and PW-2. Rejecting the plea of alibi of appellants Laxmi Narain Pandey, Pawan Kumar Pandey and Shyam Narain Pandey, we find that the prosecution had proved the involvement of all the appellants in the occurrence beyond all reasonable doubt.

251. No other point has been pressed.

252. The judgement and order dated 07.08.2012 passed by the Additional Sessions Judge, Court No.2 Azamgarh in Session Trial No.435 of 2006 arising out of Case Crime No.65 of 2006 under Section 147, 148 149, 302, 120-B, 504, 506 IPC and Section 7 Criminal Law Amendment Act, Police Station Atraulia, District Azamgarh is hereby affirmed.

253. The accused appellants Pawan K

254. The appellant Ramesh Kumar Pandey had died in April, 2021 and the appeal on his behalf has been abated vide order dated 02.02.2022.

255. The accused persons Shyam Narain Pandey, Laxmi Narain Pandey, Umesh Kumar Pandey are on bail. Their bail bonds are cancelled and sureties are discharged. They shall surrender forthwith before the concerned court and be taken into custody and sent to jail to serve their sentence.

256. The appeals are, accordingly, **dismissed**.

257. Certify this judgement to the court below immediately for compliance.

258. The compliance report be submitted through the Registrar General, High Court, Allahabad.

(2022)06ILR A781
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No.4098 of 2004

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

Counsel for the Appellant:
Sri SK.Tiwari, Sri Shashank Shekhar Giri

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/201-Challenge to-conviction- FIR lodged as per the story narrated by PW-1 and PW-2 but they did not see the deceased going along with the accused-Hence, FIR becomes doubtful-Statements of PW-1, PW-2, PW-3 & PW-4 clearly shows that the accused was a person of unsound mind at the time of incident- As per opinion of the doctor, the cause of death was coma as a result of ante mortem injury-there was no eyewitness-there are discrepancies in the testimonies of the witnesses- death was caused by some hard and blunt object-Trial court overlooked this part of testimony-the instant case purely rests on circumstantial evidence-DW-1 clearly stated that her husband was suffering from mental illness-prosecution witness of mental witness of appellant found to be substantiated from the medical report called by the Court itself-No cogent evidence on record which proves the guilt of the accused-benefit of doubt has to go to the accused/appellant.(Para 1 to 53)

B. To examine the guilt of the accused, we must appreciate the evidence adduced by

the prosecution. The present case being a case of circumstantial evidence, it is a well settled law that where there is no direct evidence against the accused, the inference of the guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.(Para 21 to 28)

The appeal is allowed. (E-6)

List of Cases cited:

1. Padala Veera Reddy Vs St. of A.P. (1990) AIR SC 79

2. St. of U.P. Vs Ashok Kumar Srivastava (1992) 1 SCR 37

3. Sanatan Naskar & anr. Vs St. of W.B. (2010) 8 SCC 249

4. Sharad Birdhichand Sharda Vs St. of Mah. (1984) Cri. L.J. 178

5. Hanumant Vs St. of M.P.

6. Tufail @ Simmi Vs St. of U.P.

7. Ramgopal Vs St. of Mah.

8. Shivaji Sahabrao Bobade & anr. Vs St. of Mah.

9. The King Vs Horry

10. Deonandan Mishra Vs St. of Bih.

11. Sampath Kumar Vs Inspr. of Police Krishnagiri (2010) Cri, LJ 3889 SC

12. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537

13. Ratan Lal Vs St. of M.P. (1970) Law Suit SC 495

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.

&

Hon'ble Shamim Ahmed, J.)

1. This appeal is directed against the judgment and order dated 22.07.2004 passed by Additional Sessions Judge Fast Track Court Maharajganj in Session Trial No. 19 of 2002, State Vs. Suresh Chandra, arising out of Crime No. 128 of 2002, under Sections 302 and 201 I.P.C., Police Station Farenda, District Maharajganj, convicting the appellant and sentencing him to undergo imprisonment for life under Section 302 IPC, undergo three years rigorous imprisonment under Section 201 IPC and to pay fine of Rs. 2000/- and in default of payment of fine to further undergo six months imprisonment. All the sentences were directed to run concurrently.

INTRODUCTORY FACTS

2. The prosecution case, in brief, is that a written report dated 03.02.2002 was given by Ram Kishore, S/o Shiv Harsh resident of Gram Ranipur Chauraha, P.S. Purandarpur District Maharajganj with the averment that his nephew Suresh Chandra, S/o Mewa Lal, who was slightly deranged for about a week, went missing since night of 01.03.2002, without telling anyone. On the next day, he came at around 12:00 o'clock in the noon and took his younger son Amarnath and went out of the house quietly. The first informant along with other family members searched Amarnath in the village and nearby places but his whereabouts could not be known. When the first informant was searching Amarnath in the morning at about 8.00 a.m. on 03.02.2002, the other family members enquired from the appellant about his son Amarnath, whereupon he started doing maarpeet with them. When the villagers

took the appellant to one side and asked about the child, the appellant told that he had murdered his own son. On being further enquired, the appellant told that he had thrown the dead body of the child in the gutter of the railway line near Bargadwan village. When the first informant along with other villagers went there, the dead body of son of Suresh Chandra namely Amarnath was found lying in the water. Leaving the dead body on the spot, the first informant went to lodge the report.

3. On the basis of the aforesaid written report, a first information report was registered on the same day, i.e., 03.02.2002 being Crime No.128 of 2002 for the offence under Section 302 and 201 IPC at the Police Station Farenda District Maharajganj. The investigation of the case was entrusted to S.I. Ganesh Prasad Shukla. On 03.02.2002, brief details of offence was made in the G.D. (Ext. Ka.4). On 03.02.2002 itself, a special report was forwarded from P.S. Farenda, carbon copy of which is Ext. Ka.5. The Investigating Officer went to the spot and prepared Panchnama of the dead body which is Ext. Ka.6. The dead body of deceased Amarnath was found on the banks of railway gutter. Thereafter, inquest of the body was conducted in the presence of witnesses and for finding out the exact reason of death, Photo Nash (Ext. Ka.7), Police Paper No.13 (Ext. Ka.8), letter to Inspector Gorakhpur (Ext. Ka.9), letter sent to CMS Gorakhpur (Ext. Ka.10) were prepared and the body was sent for post mortem examination after giving custody to Constable Surendra Nath Maurya and Constable Pawan Kumar Singh. The Investigating Officer inspected the spot on 03.02.2002 and prepared site plan (Ext.Ka.11). The return of SHO was disclosed in the Rapat and accordingly, Rojnamcha was prepared, which is Ext. Ka.12.

4. The written report of the first informant was mentioned in Parcha No.1 of case diary on 03.02.2002. The written report of informant, Nakal Rapat, Nakal Panchnama and the statement of inquest witnesses namely, Uma Shankar Chaurasia, Jai Prakash Sharma, Sri Vindeshwari, Sri Bechan and Sri Ram Kishore. Thereafter statement of neighbours namely Krishna Dev Mishra, Sri Ori Lal, Rajman Yadav and Sri Nibu Lal and the statements of Shopkeeper Ram Kewal and villager Shakir under Section 161 CrPC were mentioned in Parcha No.2 of case diary on 04.02.2002. The statements of other witnesses were mentioned in Parcha Nos. 3 to 6 of the case diary.

5. After recording statements of witnesses and collection of evidence, charge-sheet no.35 of 2002 for offence under Section 302 and 201 IPC was submitted against accused Suresh Chandra and the case was remitted to the Court of Sessions for trial.

6. During the course of investigation, post mortem was conducted on 04.02.2002 by Dr. R.A.N Rai at District Hospital, Gorakhpur. According to the post mortem report, contused traumatic swelling of size 6.0 cm x 4.0 cm on back of head on entering haematoma was present underneath. There was haematoma on membrane and brain all over. In the opinion of doctor, the cause of death was coma as a result of ante mortem injury. The proximate time of death was about two days back and was caused due to some hard blunt object.

7. The Chief Judicial Magistrate, Maharajganj vide order dated 07.05.2002

remitted the case to the Court of Sessions for trial. Thereafter, the Sessions Judge, Maharajganj vide order dated 11.07.2002 transferred the case to the court of Additional Sessions Judge, Maharajganj. The trial Court framed charges against accused Suresh Chandra for the offence under Section 302 and 201 IPC. The accused pleaded not guilty and claimed to be tried. Thereafter, the case was transferred to the court of Additional Sessions Judge (Fast Track), Maharajganj by Sessions Judge, Maharajganj vide order dated 01.07.2003 for disposal.

PROSECUTION EVIDENCE

8. To bring home the guilt of the accused appellant, the prosecution examined as many as twelve witnesses, viz.- informant Ram Kishore(P.W.1), Dharmraj (P.W.2), Uma Shankar Chaurasia (P.W.3), Bindeshwari Pandey (P.W.4), Krishnadev (P.W.5), Rajman Yadav (P.W.6), Dr. R. N. Rai (P.W.7), Sub Inspector Ganesh Prasad Shukla (P.W.8), Smt. Gyanwati Devi (P.W.9), Bechu Prasad Chaurasia (P.W.10), Indrawati (P.W.11), Vijaylaxmi (P.W.12).

9. After completion of the prosecution evidence, the statements of the accused appellant was recorded under Section 313 Cr.P.C. He was confronted with the incriminating evidence adduced against him during the course of trial, which he denied and pleaded innocence and stated that he was falsely implicated. In defence the accused appellant produced his wife as a witness, Smt. Meena Jaiswal (D.W.1).

TRIAL COURT FINDINGS

10. The trial court after examining the evidence available on record believed the evidence of prosecution witnesses trustworthy and reliable, hence, by means of the impugned judgment and order convicted and sentenced the accused appellant for the offence as stated hereinabove.

11. Hence, this appeal at the behest of the convicted appellant.

12. Heard Sri S. K. Tiwari, learned counsel for the appellant and Sri Patanjali Mishra, learned AGA for the State-respondent and scanned the entire record and considered the arguments advanced.

SUBMISSIONS ON BEHALF OF APPELLANT

13. Learned counsel for the appellant has submitted that the accused-appellant has been convicted and sentenced under Sections 302 and 201 I.P.C. without there being any concrete evidence against him. The judgment of the trial court is based on surmises and conjectures. It is a case of circumstantial evidence and without there being a chain of circumstances, the appellant has been convicted.

14. To substantiate the aforesaid submission, it has been argued by the learned counsel for the appellant that the informant Ram Kishore (P.W.1) had lodged the first information report against the appellant merely narrating a false story. No one had seen the alleged incident and there is no eye witness account of the alleged incident. There are discrepancies in the testimonies of the witnesses.

15. Learned counsel for the appellant further submitted that in the postmortem of the deceased a contused swelling of size 6.0 c.m. x 4.0 c.m. on the back side of head

was found and on entering haematoma was present underneath and there was haematoma on membrane and brain all over. In the opinion of doctor cause of death of the deceased was due to coma. The death was about two days back and was caused by some hard and blunt object.

16. Learned counsel for the appellant further argued that the case rests on circumstantial evidence but none of the circumstances from which inference of guilt against the accused appellant can be drawn could be established by the prosecution. The mental condition of the appellant was not sound, he was a person of unsound mind at the time of the alleged incident and was suffering from mental disorder and was in fact insane within the meaning of Section 84 I.P.C.

17. Learned counsel for the appellant has also argued that motive to commit murder of deceased Amarnath was not proved by the prosecution but even then, the trial court has convicted the accused appellant by misappreciation of the evidence adduced by the prosecution.

SUBMISSIONS ON BEHALF OF STATE RESPONDENT

18. Learned counsel appearing for State-respondent, on the other hand, submitted that though the case rests on circumstantial evidence, but the chain of circumstances was established on the basis of cogent evidence available on record which clearly indicate involvement of the accused-appellant in the commission of the crime in question.

19. It is pointed out that the accused-appellant committed murder of Amarnath (deceased) who was his own son and threw his body. The dead body of the deceased Amarnath was discovered at the pointing out of the accused appellant. All these circumstances established the guilt of the accused appellant in committing the murder of the deceased.

ANALYSIS

20. We have heard learned counsel for the parties and gone through the material brought on record. It is manifestly clear that the trial Court has convicted the accused appellant merely on the basis of testimonies of the witnesses.

21. To examine the guilt of the accused appellant, we must appreciate the evidence adduced by the prosecution. The present case being a case of circumstantial evidence, it is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case 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. In other words, 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 probability, the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved by cogent evidence.

22. In the case of **Padala Veera Reddy v. State of A.P. : AIR 1990 SC 79,** wherein the Hon'ble Supreme Court laid down the guiding principle with regard to **appreciation of circumstantial evidence:-**

"(1) the circumstances from which an inference of guilt is sought to be

drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

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

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of 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 the case of **State of U.P. v. Ashok Kumar Srivastava : [1992] 1 SCR 37,** the Apex Court pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

24. In the case of **Sanatan Naskar and Anr. v. State of West Bengal** reported in **(2010) 8 SCC 249,** the Hon'ble Supreme Court propounded as under:-

"13. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard. "

25. In regard to **appreciation of circumstantial evidence**, the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharshtra : 1984 Cri. L.J. 178** was pleased to observe in paras-150 to 158, which are quoted below:-

"150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

151. Before discussing the cases relied upon by the High Court we would

like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The fundamental and basic decision of the Apex Court is **Hanumant v. The State of Madhya Pradesh.(1)** This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of **Tufail (Alias) Simmi v. State of Uttar Pradesh(2) and Ramgopal v. State of Maharashtra(3**). It may be useful to extract what Mahajan, J. has laid down in **Hanumant's** case **(supra):**

"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 far 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."

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in **Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra** where the following 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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus deliciti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in **The King v. Horry**,(l) thus:

"Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression, morally certain by 'such circumstances as render the commission of the crime certain'.

156. his indicates the cardinal principle' of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. The State of Bombay(2) Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases Tufail's case (supra), Ramgopals case (supra), Chandrakant Nyalchand Seth v. The State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19.2.58), Dharmbir Singh v. The State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4.11.1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration(l). Mohan Lal Pangasa v. State of U.P.,(2) Shankarlal Gyarasilal Dixit v. State of Maharashtra(3) and M.C. Agarwal v. State of Maharashtra(4)-a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in **Deonandan Mishra v. The State of Bihar(5)**, to supplement this argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation-such absence of explanation of false explanation would itself be an additional link which completes the chain."

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation."

26. In regard to motive, in the case of **Sampath Kumar v. Inspector of Police Krishnagiri : 2010 Cri. L.J. 3889 (SC),** the Apex Court was pleased to observe in para 15 which is quoted below :-

"15. .....One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt."

27. In the case of **Bhagwan Jagannath Markad v. State Of Maharashtra : (2016) 10 SCC 537** the Hon'ble Apex Court summarized the principles for the appreciation of the credibility of witness where there are discrepancies or infirmaries in the statement:

"19. While appreciating the evidence of a witness, the Court has to assess whether read as a whole it is truthful. in doing so the court has to keep in mind the deficiencies, drawback and infirmaries to find out whether such discrepancies shake the truthfulness. ...Only when discrepancies are so incompatible as to effect the credibility of the version of witness , the Court may reject the evidence. ...The Cout has to sift the chaff from the grain and find out the truth. A statement may be partly rejected accepted."

28. In the case of **Ratan Lal vs. State of Madhya Pradesh : 1970 LawSuit (SC) 495,** the Hon'ble Apex Court was pleased to observe in paragraphs-14 and 15 as under:

14. We are inclined to agree with the conclusion arrived at by the learned Magistrate. We hold that the appellant has discharged the burden. There is no reason why the evidence of Shyam Lal, D.W.1, and Than Singh, D.W.2, should not be believed. It is true that they are relations of the appellant, but it is the relations who are likely to remain in intimate contact. The behaviour of the appellant on the day of occurrence, failure of the police to lead evidence as to his condition when the appellant was in custody, and the medical evidence indicate that the appellant was insane within the meaning of Section 84, I.P.C.

15. We accordingly allow the appeal and acquit the appellant of the offence under Section 435, I.P.C., because at the time of the incident he was a person of unsound mind within the meaning of Section 84 of the Indian Penal Code. His bail bond shall stand cancelled.

Appeal allowed.

29. For the sake of convenience, in the present case the testimonies which have been relied upon by the trial court are being referred hereinafter, which would go to show that **there are material contradictions in their statements**, which cannot be thrown away lightly.

30. PW-1 Ram Kishore who is the informant of the case and the grand-father of deceased Amarnath, stated that the incident occurred 1-1/2 years back. He further stated that the incident occurred near the bridge of railway line at the distance of one kilometre towards the south

of Purandarpur. He also stated that prior to one week of the incident his nephew Suresh had gone mad and he went somewhere one day before the incident and on the next day he came at 12 o'clock and took his son Amarnath whose age was 8 years and went out of the house. The accused appellant took his son Amarnath from the school itself. Thereafter he came to know only after the children of the school had told him that the accused-appellant Suresh had taken away Amarnath. The first informant along with other family members searched Amarnath in the village and nearby places but his whereabouts could not be known. On the next day at about 7.00 a.m. The accused-appellant himself came to the house and started behaving with the family members like a mad. After some time when the family members and other villagers enquired from the appellant about his son, Amarnath, he started maarpeet with them and abused them. When the villagers cajoled and asked about his son, he told that he had murdered his son and thrown his dead body down the gutter of railway line. This witness in his cross-examination stated that Suresh had gone mad one week prior to the incident and during his madness he tried to kill them also. He further stated that the appellant was not having the ability to understand the consequences of the act done by him. He was also not having the ability to differentiate between legal and illegal acts and stated that P.W.1 was not present on the spot at the time of the alleged incident.

31. PW-2, Dharmraj, who is the uncle of accused Suresh Chandra and younger brother of PW-1, has reiterated almost the same statement which was made by PW-1 Ram Kishore. He stated that on 2nd February, 2002 the son of Suresh Chandra, namely Amarnath fallen sick due to fever. Suresh Chandra took his son saying that he was going for his treatment. Thereafter, the whereabouts of Amarnath could not be known to anyone. On suspicion of some untoward incident, the family members started searching him. On the day of the incident deceased Amarnath had gone to the school in the state of fever itself and after school was over, the accused-appellant took his son from the school. Thereafter, on the next day, in the morning at about 7:00-8:00 o'clock, the accused-appellant came home and on being enquired about his son Amarnath, he told that he had murdered his son and thrown his dead body down the gutter of the railway line. In the cross-examination, PW-2 stated that when the accused-appellant was in the state of madness, during that period he used to assault his family members or neighbours with bricks and danda. During the period of fits of insanity, on many occasions, the accused-appellant had been tied with string. Once before the incident, the accused-appellant had assaulted a person with bricks, due to which he sustained injuries in his head. P.W.2 stated that the Investigating Officer had not recorded his statement regarding this incident. When the statement under Section 161 CrPC of this witness was read over to him, he stated that he did not give the statement and he could not tell as to how it was recorded.

32. PW-3, Uma Shankar Chaurasia stated that on 03.02.2002 when he was informed that the dead body of a boy was lying in a ditch near the gutter of the railway line in village Bargadwan Ram Sahai, he went at the spot and came to know that the body was sent to the police station, where the Investigating Officer took his signature on a blank paper. He stated that the inquest was not conducted

before him. In the cross-examination, this witness stated that his signature was taken on a blank paper at the police station. When his signature on the inquest was shown to him he admitted that when the Investigating Officer took his signature, the paper was blank and stated that his signature was taken at the police station.

33. PW-4 Vindeshwari Pandey stated that he did not know Suresh of Raniyapur and inquest of deceased Amarnath, son of Suresh, was not conducted before him. He admitted that at the back side of the paper No. 8Ka/2 which is inquest his signature were there, which he did recognize, but stated that when his signature was taken at the last page of the inquest, it was blank and nothing was written on it. This witness stated that the Investigating Officer took his signature, naked dead body was lying in the jeep, but he did not enquire about the dead body from the Investigating Officer. He further stated that he met the Investigating Officer at the side of the railway line of the village and at that time it was 12:00-1:00 o'clock in the day.

34. PW-5 Krishna Dev Mishra stated that accused Suresh is the resident of Ranipur Chauraha and his father was Mewa Lal, who was working in BSF Military. Suresh is the only son of Mewa Lal. Accused Suresh was not doing any job and used to roam around the whole day. He stated that Dr. V.P. Chaurasia resides in Ranipur Chauraha itself; Suresh went to the doctor with his son for his treatment, but he did not remember the date and did not know as to where Suresh had gone along with his son after treatment. On the next day, when he met Suresh, but he did not meet Amarnath. On being asked about the deceased Amarnath from accused Suresh, he told that the deceased Amarnath went there from where he came. The dead body of Amarnath was found lying near the bridge of the railway line but he did not go to see it. In the cross-examination, this witness stated that accused Suresh had gone mad about 10-12 months prior to the incident, his mental condition was not sound. The accused-appellant used to assault people randomly. In a day itself, sometimes he remained in sound mental condition and sometimes in unsound state and when he was in sound state, he used to speak properly. P.W.5 further stated that the accused-appellant had committed the murder when he was in unsound state of mind and was not having the ability to make out difference between legal and illegal acts.

35. PW-6, Rajman Yadav, stated that his shop of scrape was at the distance of 20-25 paces from the house of Suresh. Deceased Amarnath was the son of Suresh. The dead body was found lying near the gutter of the Bargadwa railway line. The age of the deceased Amarnath might be 7-8 years. The son was killed by his father accused Suresh who thrown the dead body in the water. He did not know as to why the accused killed his son, but the accused-appellant was of unsound mind. On the day, before to the day, when the dead body of child Amarnath was found, the accused Suresh took the deceased to Dr. Chaurasia at Ranipur Chauraha and thereafter, the child Amarnath did not return to his home. In the cross-examination, this witness stated that when Suresh was in sound mental condition, he used to treat his wife, children and neighbours properly but when he was in unsound state of mind, he some times used to beat people randomly. When accused Suresh had taken deceased Amarnath to the clinic of Dr. Chaurasia, the doctor had given him a dose of medicine.

36. PW-7, Dr. R.A.N. Rai stated that, on 04.02.2002, he was posted as Assistant at the District Hospital, Gorakhpur. On 04.02.2002, he conducted the post mortem of the body of Master Amarnath whose age was 7 years. The injuries found the dead body were contused traumatic swelling 6.0 cm x 4.0 cm on back of head on internal examination haematoma was found present underneath. There was haematoma on membrane and brain all over. The doctor stated that, in his opinion, the cause of death was due to coma as a result of ante-mortem injuries. The proximate time of death was about two days prior to the postmortem and the injury was caused by some hard blunt object. The post mortem examination report was prepared by him, which was exhibited as Ext.Ka.2.

37. PW-8 Ganesh Prasad Shukla, who was the S.I. Kotwali Chowki Incharge Collectrate Maharajganj, stated that he was the prior investigating officer of the case and, thereafter, on 06.02.2002, the investigation was entrusted to S.H.O. Sri Arun Kumar Singh, but due to injury in his finger the reports of the proceedings were written by him. In the cross-examination, this witness stated that according to law, the investigation of the case started only after registration of the first information report. It was clearly mentioned in the first information report that the accused was of unsound mind and during the course of the investigation he enquired about the mental condition of the accused from his family members and witnesses but no one told him about any unsound mental condition, that is why he did not get his medical done to ascertain the fact of unsoundness of the accused. P.W.8 further stated that the informant had given his statement during the course of the investigation that accused Suresh was of unsound mind. Except the informant, none of the other witnesses said about the accused being of unsound mind. He had recorded the statement of a neighbour Krishna Dev Mishra, who also stated one week prior to the incident, accused Suresh was not in the sound mental condition. On being confronted that once the mental condition of accused was disclosed by the witnesses, why did he not take steps to ascertain the mental condition of the accused, this witness offerred an explanation that the investigation was entrusted to him only for a period of three days w.e.f. 03.02.2002 to 05.02.2002 and, thereafter, the investigation was handed over to S.H.O. He stated that during three days of investigation he only made searches for accused Suresh Chandra, due to which the mental condition test of the accused or expert opinion could not be done/ obtained. This witness further stated that when the accused was arrested, the investigation was with the S.H.O. and that he was present at the time of the arrest.

38. PW-9, Smt. Gyanmati Devi, grandmother of the deceased, stated that she had only one son namely accused Suresh and two daughters Neelam and Poonam. Poonam was married but Neelam was unmarried. The deceased Amarnath was the son of accused Suresh and at the time of the incident, the accused-appellant was not in sound mental condition and he had cut his fingers also. Due to his madness, the accused was locked in a room inside the house. She came to know, thereafter, that someone had killed her grand-son and thrown his dead body. The people started asking from her as to why her son was locked in the room while her grand-son was killed. She further stated that Meena, her daughter-in-law was at home at that time and on the day of the incident, deceased Amarnath went

somewhere on his own. She further stated that on the day of the incident deceased Amarnath was suffering from fever and Meena went to Dr. V.P. Chaurasia with Amarnath and after taking medicines, she returned back home while the child Amarnath went outside. On confrontation she stated that on 02.02.2002, accused Suresh did not got to Dr. V.P. Charuasia with his son Amarnath for his treatment and she never came to know that after taking medicines, Suresh had gone somewhere else. He suggestion in this regard had been given categorically denied by P.W.9. A further suggestion was given to P.W.9 that the accused-appellant Suresh had suspicion that the child was not his son as the child's face did not resemble with his face and killed him for that reason, was categorically denied by P.W.9. She also refused the suggestion that accused Suresh came back on 03.02.2022 in the morning and told that he killed his son Amarnath. The suggestion that she was making a false statement in order to save her son (accused Suresh) was also denied.

39. PW-10 Dr. Bechu Prasad Chaurasia stated that, on 02.02.2002 at about 12 o'clock in noon, when he was in his clinic, the wife of Suresh, whose name he did not recollect, came with her son Amarnath and after taking medicines for fever of her son, she along with her son went away. In the cross-examination, he stated that he knew Amarnath and Suresh because they were his neighbours. He came to know that some one had committed murder of Amarnath. He denied the suggestion that when Suresh came to his clinic for treatment of Amarnath, his mental condition was not sound. He further denied that he was making a false statement being neighbour.

40. PW-11, Indrawati stated that accused Suresh Chandra was her nephew, he had two sons and two daughters, and out of them one son Amarnath was killed by someone and his dead body was thrown down the gutter near the Bargadwan Ram Sahai. She stated that on the day of the incident due to fever, Suresh had taken Amarnath to show him to Dr. V. P. Chaurasia for taking medicines.

41. PW-12, Vijay Laxmi stated that deceased Amarnath was her brother and she did not know as to who had committed his murder. Her brother Amarnath was suffering from fever on the day of the incident and her mother went to Dr. V.P. Chaurasia for taking medicine and thereafter, she returned back home. Thereafter, her brother Amarnath had gone somewhere and could not be found. In the cross-examination, she denied the suggestion that on 03.02.2002 at about 8.00 a.m., in the morning, her father came to home. On being confronted with the portion of her statement recorded under Section 161 CrPC that she had stated therein that on 03.02.2002 at about 8.00 a.m., when her father came home alone, the family members started enquiring about her brother Amarnath, the appellant (her father) then told that he had killed him, this witness replied that she had not given such a statement and she did not know as to how it was written by the Investigating Officer. She further added that on the day when the dead body of deceased Amarnath was found, her father was already at home, but she could not remember as to from how many days before the incident, he was at home. She denied the suggestion that she was making a false statement in order to save her father.

42. After completion of the prosecution evidence, the statement of accused Suresh Chandra was recorded under Section 313 Cr.P.C. on 22.6.2004. The accused produced a witness namely Smt. Meena Jaiswal, his wife as D.W.1, in defence, apart from the documents to prove his innocence. Smt. Meena Jaiswal (D.W.1), in her deposition, stated that the deceased Amarnath was her youngest son. One year prior to the murder of her son mental condition of his husband, i.e., the accused-appellant, was not sound, he used to behave like a person of unsound mind. When her son was murdered then also the mental condition of her husband was not good and was locked inside the house. Whenever his mental condition would be fine he would behave like a fit person and his behaviour was good with her and her son. D.W.1 further stated that one day before the incident she went with her son for taking his medicines, her husband did not go for medicine. When she went for medicine, mental condition of her husband was not good and he was locked inside the house. At about 7:00 p.m. her son went outside to play on his own, and, thereafter, his dead body was found. His husband was not well, therefore, no one asked him about her son and she did not ask her husband about her son even after 3-4 days of his death, the reason being that mental condition of her husband was not good. D.W.1 has denied the suggestion since her husband had suspicion because the face of the child did not resemble his face and that is why on the pretext of taking medicine of his son, her husband had taken away her son and committed his murder and thrown away his dead body. D.W.1 also denied she is making a wrong statement in order to save her husband.

43. Analysing the evidence on record, it my be noted that it is true that the F.I.R. of the incident was lodged as per the story narrated by P.W.1-Ram Kishore and P.W.2-Dharmaj, but they did not see the deceased going along with the accused-appellant before the murder of the deceased or the dead body was found. P.W.1-Ram Kishore and P.W.2-Dharmaj had completely denied in their testimonies that they had seen the deceased along with the accused appellant before the murder of the deceased, hence the very basis of lodging of the F.I.R. against the accused/ appellant becomes doubtful and creates suspicion on the prosecution story.

44. So far as the statements given by P.W.1, P.W.2, P.W.3 and P.W.4 are concerned, wherein they have clearly stated that the accused-appellant was a person of unsound mind and was insane at the time of the alleged incident, we may record that not only the Investigating Officer, but the trial court also overlooked this part of the testimony while convicting the accused-appellant. Had the accused Suresh suffering from any mental illness, it could not be ignored. The trial court was under obligation to verify the truth in the testimony of witnesses that the accused-appellant was of unsound mind and was insance.

45. The deposition of D.W.1-Smt. Meena Jaiswal also could not be ignored when she had categorically stated that her husband, the accused-appellant, was of unsound mind at the time of the alleged incident and was locked inside the house when his son had gone missing and died. This testimony of D.W.1 was conveniently overlooked by the trial court while convicting the accused-appellant. It has completely ignored this fact that D.W.1, who is the wife of the accused-appellant and the deceased was whose son, had clearly stated that her husband was

suffering from mental illness and he was of unsound mind at the time of the alleged incident. The testimony of D.W.1 carries a weight because of the fact that cannot be ignored she is the real mother of the deceased and her denial about involvement of the accused was categorical.

46. We have further perused the report dated 29/30.03.2022 submitted by the Senior Superintendent, Central Jail, Varanasi, pursuant to the order dated 04.03.2022 passed by this Court. The said report contains two enclosures, one a diagnosis by the doctor of the Mental Hospital, Varanasi and the second, report of the Medical Superintendent, Central Jail, Varanasi, which indicate that appellant, Suresh Chandra, S/o Mewa Lal, aged about 60 years, is suffering from mental disorder and still needs treatment for the said disease.

47. The instant case purely rests on circumstantial evidence. In order to sustain conviction, a complete chain the circumstantial evidence must be formed which is incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard-and-fast rule can be laid to say that the particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done by the Court in the facts and circumstances of each case.

48. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists an eyewitness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or ***factum probandum***. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, at 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 one on one hand and inference of facts to be drawn from them on the other hand. 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 facts lead to an inference of guilt of the accused person should be considered.

49. It would be significant to add that while dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering in the mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof.

50. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistence 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.

51. The present case, which undoubtedly, is a case of circumstantial evidence, is to be looked into in the backdrop of the aforesaid legal principles. In the circumstances before us, we find that

the prosecution has completely failed to prove beyond reasonable doubt complete chain of event and circumstances which unerringly point towards the involvement and guilt of the appellant. The prosecution also failed to establish any motive to the accused appellant for committing murder of the deceased, who is the son of the appellant. It was the duty of the prosecution that the appellant was medically examined at the time of his arrest, in which they failed.

52. In the aforesaid facts and circumstances of the case and particularly that the suggestion of the prosecution witness of mental illness of the appellant is found substantiated from the recent medical report, called buy this Court, we are of the considered view that there are various lacunae in the case of the prosecution in establishing the chain of circumstantial evidence against the accused appellant. Further, there is no cogent or clinching evidence on record which proves the guilt of the accused-appellant beyond reasonable doubt. Henceforth, we hold that the prosecution has failed to produce evidence to complete the chain of circumstances and guilt of the appellant beyond all reasonable doubt, the benefit undoubtedly has to go to the accused-appellant Suresh. The impugned judgment of conviction is, thus, found unsustainable and is liable to be set aside. The appellant is entitled to acquittal by giving him benefit of doubt.

53. Accordingly, the appeal is **allowed**. The impugned judgment and order of conviction and sentence dated 22.07.2004 passed by Additional Sessions Judge Fast Track Court Maharajganj in Session Trial No. 19 of 2002, State Vs. Suresh Chandra, arising out of Crime No. 128 of 2002, under Sections 302 and 201 I.P.C., Police Station Farenda, District Maharajganj, is hereby set aside.

54. The appellant, **Suresh Chandra,** is acquitted of the charges under Sections 302 and 201 IPC. The appellant shall be released from the jail 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.

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

56. The compliance report be submitted to this Court through the Registrary General, High Court, Allahabad.

(2022)06ILR A796
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Criminal Appeal No.4209 of 2013
AND
Criminal Appeal No.4003of 2013

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

Counsel for the Appellant:
Sri Rajesh Pathik, Sri Mukesh Joshi, Sri Manish Joshi, Sri Rahul Saxena

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34-

Challenge to-Conviction-dead body of the deceased was found in the house of appellant-murder was a case of honor killing-Neither the plea of love affair between PW-5 and deceased is proved nor the story that she was brought by PW-5 to the village is supported with any evidence-Even the story that the appellant assaulted PW-5 physically is not proved-For a charge of murder to be proved on the basis of circumstantial evidence, the evidence must be conclusive-The prosecution has miserably failed to establish the charge framed against the appellants of murdering their only daughter-Many facts are left unexplained-none of the ingredients of proving the charge by way of circumstantial evidence existed.(Para 1 to 36)

The appeals are allowed. (E-6)

List of Cases cited:

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

2. Hanumant Vs M.P. (1952) AIR SC 343,

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Appellants in these two appeals are the parents of deceased, who have been convicted for murdering their only daughter Rehana, under Section 302 read with Section 34 IPC vide judgment and order dated 12.8.2013, passed by the Additional District and Sessions Judge, Court No.6, Moradabad, in Sessions Trial No.439 of 2011 (State Vs. Mustqeem & Khursheeda) arising out of Case Crime No.538 of 2010, Police Station Asmauli, District Moradabad and sentenced to imprisonment for life alongwith fine of Rs.15,000/- each and to undergo three months' additional imprisonment on failure to deposit the fine.

2. Sharafat (PW-1) the Village Chowkidar of Village Mawai Thakuran informed the Station House Officer of Police Station Asmauli on 24.11.2010, by means of a written report (Exhibit Ka-1), that Rehana, aged about 15 years (hereinafter referred to as "deceased'), daughter of Mustqeem son of Hameed Teli (hereinafter referred to as "appellant no.1') has died due to unknown reasons in the night of 23/24 November, 2010 and her dead body is lying in her house. Aforementioned report further states that he (PW-1) heard in the village that deceased had gone to her relatives place in Village Shahpur Sirpuda from where she returned alongwith a resident of the village namely Bhoora (PW-5), son of Mewaram Prajapati (PW-2), and was at her home and that matter is suspicious. Accordingly, necessary action be taken. The written information was entered in GD of concerned police station and is recorded as GD entry No.5 at 5.30 a.m. The scribe of the written report is Pooran Singh, the Village Pradhan (DW-2). On the basis of aforementioned information the inquest of the deceased was conducted.

3. Sub-Inspector Laxmi Shankar on receiving the aforesaid information reached the spot and found relatives of deceased alongwith other villagers to be present at the house of appellants. He thereafter proceeded to get the inquest (panchayatnama) of the deceased conducted. At the time of inquest certain injuries were found on the body of the deceased. However, no opinion could be given by panch witnesses regarding the nature of death i.e. whether the same is homicidal or suicidal. The concerned Sub-Inspector thereafter prepared the inquest report (Exhibit Ka-6) at 6.30 a.m. on 24.11.2010 at Village Mawai Thakuran

itself. Having completed the aforesaid formality Sub-Inspector prepared the detailed report and dispatched the dead body for postmortem.

4. The postmortem report is Exhibit Ka-2. According to the autopsy surgeon the cause of death of deceased is asphyxia due to throttling. Age of deceased as per medical opinion was found to be 15 years. The autopsy surgeon found following four ante-mortem injuries on the body of the deceased:-

"(1) Multiple abraded contusion (3cm x 2cm Rt. side and 4 cm x 3cm Lt. side) just below the angle of mandible on both side of neck.

(2) Multiple abraded contusion (3cm x 2cm) in the front of neck 6 cm above the sternal notch.

(3) Abraded contusion 1cm x ½cm on the dorsum of Lt. wrist joint.

(4) Abraded contusion 4cm x 1cm on the mid of front of Rt. leg."

5. Investigation was concluded and ultimately chargesheet No.37 of 2011 was submitted. Appellants (parents of the deceased) were arrested on the charge of murdering their daughter. After submission of chargesheet cognizance was taken by the court concerned. The case was committed to the court of sessions as offence was triable by the court of sessions. The then Additional Sessions Judge, Court No.6, Moradabad charged the appellants with murder of their daughter, as a result of honour killing, under Section 302/34 IPC, vide order dated 5.5.2011. The appellants denied the charge and demanded trial.

6. Prosecution in order to bring home the charge so framed adduced documentary evidence i.e. written report (Exhibit Ka-1), postmortem report (Exhibit Ka-2), panchayatnama (Exhibit Ka-6), chargesheet (Exhibit Ka-5). The prosecution has also adduced Sharafat (PW-1), Mewaram (PW-2), Dr. Ramvir Singh (PW-3), Harendra Singh (PW-4) and Bhoora as PW-5. Sub-Inspector Dayachand Sharma appeared as PW-6, while previous Investigating Officer Ravi Kumar was produced as PW-7. The accused appellants were then examined under Section 313 Cr.P.C. Raeesuddin and Pooran Singh have also been adduced as defence witnesses on behalf of accused, whereafter the trial was concluded. The Sessions Court has found the accused appellants guilty of committing offence under Section 302/34 IPC vide judgment dated 12.9.2013, whereafter the present appeals have been filed.

7. Records reveal that prosecution case is not based on any eye witnesses account but the charge of murder against the appellants is attempted to be proved on the basis of circumstantial evidence.

8. Before adverting to the evidence adduced by the prosecution to establish the guilt of appellants beyond reasonable doubt, we would like to be reminded of the words of wisdom expressed by the Supreme Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116*, which has consistently been followed since then. The Court reiterated its earlier decision in Hanumant Vs. Madhya Pradesh, AIR 1952 SC 343, which held that for proving a case based purely on circumstantial evidence 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. It must be such as to show that within all human probability the act must have been done by the accused. In paragraphs 152 to 154, the Supreme Court in Sharad Birdhichand Sarda (supra) observed as under:-

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. The State of Madhya Pradesh.(1) This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh(2) and Ramgopal v. Stat of Maharashtra(3). It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra):

"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 far 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."

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 & Anr. v. State of Maharashtra where the following 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."

9. It is in the light of above principles that this Court has to examine the question as to whether the prosecution has discharged its burden of proving the guilt of accused appellants of committing offence under Section 302/34 IPC beyond reasonable doubt.

10. Apart from the documentary evidence, referred to above, the prosecution has adduced seven witnesses i.e. PW-1 Sharafat Ali (Chowkidar), who first saw the dead body; PW-2 Mewaram, the father of Bhoora with whom the deceased is said to have returned in the evening/night to her village; PW-3 Dr. Ramvir Singh, who had conducted the postmortem of the deceased; PW-4 Constable Harendra Singh, who was working as Clerk in Police Station Asmauli and has verified GD Entries containing the information with regard to suspicious death of Rehana; PW-5 Bhoora, who is said to have taken the deceased to the village and was later reportedly beaten by the father of the deceased Mustqeem alongwith his associates; PW-6 Dayachand Sharma, who had partly conducted the investigation after transfer of the previous Investigating Officer. PW-7 Ravi Kumar, who was the Station House Officer on the date when the intimation of the incident was received at the police station concerned. PW-1 Sharafat Ali; PW-2 Mewaram and PW-5 Bhoora, who are the witnesses of fact have turned hostile.

11. PW-1 Sharafat has admitted that on 24.11.2010 a Tehrir (written report) was written on his instructions by Pooran Singh, the Village Pradhan. He, however, has denied any knowledge of the person with whom the deceased returned to her village. He claims to have gone to the house of deceased at about 3.00-4.00 a.m. and has proved the written report, which contains his thumb impression. He has however denied having informed the Investigating Officer about return of deceased alongwith Bhoora or staying of deceased and Bhoora in the village school or the factum of appellants having brought the deceased to her house. He has also denied having informed the Investigating Officer about the appellants having murdered the deceased. This witness was subsequently declared hostile.

12. PW-2 Mewaram has also denied any knowledge about the death of deceased or the appellants having killed her. He has, however, admitted that appellant no.1 Mustqeem had come to his house. This witness was also declared hostile. PW-2 has been cross-examined by the Government Counsel and has deposed that he had heard in the village that the appellants had murdered their daughter. He has denied having seen the appellants committing the murder. He has specifically stated that his son Bhoora was taken by appellant no.1 and his relatives to Village Shahpur Sirpuda and that the appellant no.1 alongwith his relatives came to his house in the night and took Bhoora, who was also beaten. The act of taking Bhoora from his house is alleged to be between 12.00-1.00 a.m. in the night by appellant no.1 and four others, whereafter this fact was informed to the police, whereafter the police reached the house of appellant no.1 and her dead body was found. He has denied any affair of deceased with his son but has stated that

his son was taken by the appellant no.1 alongwith others.

13. PW-3 Dr. Ramvir Singh is the autopsy surgeon, who has proved the postmortem report. PW-4 Constable Harendra Singh was clerk in the police station and has entered the written report in the General Diary. PW-5 Bhoora has also not supported the prosecution story and was declared hostile. He has, however, denied the suggestion that on account of his affair with deceased she was done to death by appellants. In his cross-examination he has complained of him being beaten by appellant no.1 and four others. He has also testified that he was taken on a bike but was saved by the villagers and relatives of the appellants. The statement about his having been beaten is not substantiated by producing any injury report etc. nor any complaint in that regard is shown to have been lodged. PW-6 Sub-Inspector Dayachand Sharma was the Investigating Officer of the case.

14. PW-7 Ravi Kumar is the Station House Officer, who states that information about the incident was received from PW-1 at about 5.30 a.m. on 24.11.2010 and he had instructed the Sub-Inspector to prepare the inquest etc.

15. The appellants have been examined under Section 313 Cr.P.C. and have stated that they have been falsely implicated.

16. The accused appellants have produced Raeesuddin as DW-1, who has alleged that the appellants stayed at his house on 23.11.2010 night and at about 5.00 in the morning on 24.11.2010 the information about murder of deceased was received, whereafter the appellants left his house. According to him the Baraat had returned on 23.11.2010 in the evening and that the deceased or her mother had not gone with the marriage party. He has denied the version that the deceased was seen going with PW-5 Bhoora. DW-2 is the scribe, who has proved the written report.

17. The trial court on the basis of aforesaid averments has come to the conclusion that the appellants have strangulated their daughter and her death is due to honour killing.

18. The prosecution case apparently is that the deceased had left village Shahpur Sirpuda alongwith Bhoora without any knowledge of the parents. Having returned from Barat (marriage procession of the relative), the appellants rushed to their Village Mawai Thakuran and while Bhoora was beaten for having brought appellants' daughter, the deceased was done to death as the appellants suspected of her having affair with Bhoora. Since Bhoora and Rehana belong to different religion, as such, the appellants took it as an act which would bring disrepute to the family and accordingly Rehana was done to death. The parents (appellants) suspected affair between deceased and Bhoora and that was the cause for the honour killing of their daughter.

19. There are only three witnesses of fact i.e. PW-1, PW-2 and PW-5 all of whom have turned hostile. None of the witnesses of fact have disclosed anywhere that the deceased was having an affair with Bhoora. Although in statement under Section 161 Cr.P.C., PW-1 had asserted that the deceased returned to her Village alongwith Bhoora, but in his statement before the Court he has categorically stated that he has no knowledge as to with whom

she returned to her village. He has denied the suggestion that any disclosure was made by him in his statement under Section 161 Cr.P.C. regarding return of deceased with Bhoora.

20. PW-2 also has denied having any knowledge about the murder of deceased. He has merely stated that Mustqeem had come to his house and he had heard in the village that the appellants for the fear of bad name had killed the deceased. He has also asserted the fact that Bhoora was taken in the night and was beaten by Mustqeem and his relative. PW-2, however, has specifically denied any affair between deceased and his son Bhoora.

21. Bhoora (PW-5) has denied that he was called by deceased or that both of them came on a tempo to Asmauli or that the deceased had refused to go with her parents and stayed at the school of Rakesh in the village. He has also denied the appellants having made inquiries about the deceased from him and he was declared hostile. He has further denied the suggestion that the deceased was killed on account of love affair between him and the deceased.

22. None of the witnesses of fact have supported the premise of affair between deceased and Bhoora. Specific suggestions made in that regard to PW-2 and PW-5 have been denied. No other independent witness has been adduced by the prosecution to support the plea of love affair between deceased and Bhoora. Only statement supporting the prosecution version is the statement of PW-2 that he had heard in the village that the appellants had killed their daughter. This part of the statement is a hearsay statement and neither it has been disclosed as to from whom it was heard nor the persons alleged of having said so are produced as evidence.

23. The prosecution version that the deceased returned alongwith Bhoora has also not been proved by the prosecution. PW-1 has denied his disclosure allegedly made to the investigating officer of Bhoora having brought the deceased to the Village. He has clearly denied that he saw Bhoora and Rehana returning to village from Shahpur Sirpuda or the information that Rehana stayed in School of Rakesh in the village and that the appellants brought the deceased to their home from the School.

24. In light of the above, it is apparent that neither the plea of affair between deceased and Bhoora is proved by any evidence, nor the story that she was brought by Bhoora to the village is supported with any evidence.

25. Sri Rahul Saxena for the appellants submits that it is a case of no evidence and the judgment of conviction under challenge is without any basis or evidence and is entirely based on conjectures and surmises.

26. In a case of circumstantial evidence the circumstance, from which the conclusion of guilt is to be drawn, must be fully established. The primary circumstance relied upon by the prosecution of there being a love affair between deceased and Bhoora; Bhoora having brought deceased to the village and the deceased staying in school of Rakesh in the village is not proved, at all. This is the prime motive attributed to the appellants for honour killing of their daughter. In the absence of any cogent evidence brought on record to support the plea of affair or any improper

act on part of the deceased which may bring bad name to the family, we are not impressed by the alleged motive of honour killing.

27. The only circumstance which has been established by the prosecution is the fact that appellant Mustqeem came in the night and took Bhoora and he was physically assaulted. This version of PW-2 and PW-5, however, is not supported by any medical evidence to suggest that Bhoora was physically assaulted, nor any police report etc. has been produced which may go to show that any complaint was made with regard to Bhoora having been forcibly taken by appellant and inflicting him injuries. This statement in itself is not strong enough to infer that the deceased had a love affair with Bhoora and her murder was a case of honour killing.

28. There is another aspect important enough to warrant deliberation at this stage. It remains undisputed that the dead body of the deceased was found in the house of appellant Mustqeem and, therefore, the onus was upon him to explain the circumstance in which the dead body was found at early hours in the day in his house.

29. Admittedly, Mustqeem is the owner of the house and by virtue of Section 106 of the Evidence Act, the appellant Mustqeem had the burden to prove the fact which is specially within his knowledge. However, we find that in the examination of the accused under Section 313 Cr.P.C., he has not been confronted with the circumstance of dead body appearing in his house or the fact that he was expected to prove the fact specially within his knowledge. Failure of the prosecution to confront the accused on this aspect under Section 313 Cr.P.C. would have to necessarily exclude this aspect of the matter from consideration. Paragraphs 143 to 145 of the judgment of the Supreme Court in Sharad Birdhichand Sarda (supra) are relevant in this regard and are reproduced hereinafter:-

"143. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4,5,6,8,9,11,12,13,16, and 17. As these circumstances were not put to the appellant in his statement under 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Fateh Singh Bhagat Singh v. State of Madhya Pradesh this Court held that any circumstance in respect of which an accused was not examined under 342 of the Criminal procedure code cannot be used against him ever since this decision. there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under s.342 of the or s.313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra(2) this Court held thus:

"The fact that the appellant was said to be absconding not having been put to him under section 342, Criminal Procedure Code, could not be used against him."

144. To the same effect is another decision of this Court in Harijan Megha Jesha v. State of Gujarat (3) where the following observation were made:

"In the first place, he stated that on the personal search of the appellant, a chadi was found which was blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant.':

145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decision of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under s.313 of the Criminal Procedure Code have to be completely excluded from consideration."

30. Learned AGA has stressed that the statement of appellant supported by DW-1 that Mustqeem stayed with his relatives at Shahpur Sirpuda on the night of 23.11.2010 and came only next morning to his village is inconceivable and against natural conduct of a father of not making any attempt to trace his missing daughter. Though the argument in that regard appears to be weighty, and would render the defence version weak but merely for such reason the lacuna on part of prosecution in failing to establish the charge, based on circumstantial evidence, cannot be made good.

31. Law is settled that any weakness in the defence case would not obviate the prosecution from establishing the charge based on circumstantial evidence. For a charge of murder to be proved on the basis of circumstantial evidence, the evidence must be conclusive. Failure of prosecution to adduce evidence in that regard cannot be made good by the plea of falsity of defence case in that regard.

32. The five golden principles enumerated in paragraph 153 of the judgment in Sharad Birdhichand Sarda (supra), once are applied on the facts of the present case, it would leave no room of doubt for the Court that the prosecution has failed to discharge its burden of proving the guilt of the accused appellants beyond any reasonable doubt. The circumstances from which the conclusion of guilt is to be drawn is not established. The evidence available on record is not consistent with the hypothesis of the guilt of the accused. The chain of evidence to prove the guilt of accused is clearly broken and the possibility of an alternative hypothesis, except the one, putforth by the prosecution, cannot be ruled out.

33. The plea of learned AGA that it being a case of honour killing the parents must be dealt with severally does not appeal to us. It is settled aspect of criminal jurisprudence that a case can be said to be proved only when there is explicit evidence and no person can be punished for moral conviction.

34. In light of the above deliberations and upon minute examination of the evidence brought on record, we find that the prosecution has miserably failed to establish the charge framed against the appellants of murdering their only daughter. Many aspects in the admitted facts of the case are left unexplained that is how the deceased returned to her village; whether she returned alone or somebody came with her, who killed her; what has been the motive to kill her. The appellants cannot be held guilty of the charge of

murder unless the prosecution by adducing cogent evidence discharges the burden of proving their guilt beyond reasonable doubt.

35. The trial court on the basis of above evidence appears to have drawn its finding of guilt against the appellants wholly on assumptions. Even in the absence of any evidence of affair between the deceased and PW-5 or the deceased having been brought by PW-5 etc., it proceeded to hold that the charge of murdering the deceased on account of honour killing has been proved. We cannot approve of the conclusions drawn by trial court after minutely examining the evidence on record. We find that none of the ingredients of proving the charge by way of circumstantial evidence existed and, therefore, the findings of guilt returned by the trial court will have to be held as based only on assumptions. Doubt or suspicion howsoever strong against the accused cannot be a substitute for the charge to be proved against the accused in a criminal trial.

36. In such circumstances, we are of the considered opinion that the judgment and order dated 12.8.2013, passed by the Additional District and Sessions Judge, Court No.6, Moradabad, in Sessions Trial No.439 of 2011 (State Vs. Mustqeem & Khursheeda) arising out of Case Crime No.538 of 2010, under Section 302/34 IPC, Police Station Asmauli, District Moradabad cannot be sustained and is liable to be set aside. The prosecution has failed to prove the charge of murder against the appellants beyond reasonable doubt and, therefore, the sentence and conviction of accused appellants is set aside. The appellants are acquitted from the charges of offence under section 302 read with 34 IPC and they shall be set at liberty forthwith, if they are not wanted in any other case.

37. The appeals are, accordingly, allowed. No order is passed as to costs.

(2022)06ILR A805
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Appeal No.4319 of 2012

Manoj Kumar Sharma ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri C.K. Bhardwaj, Sri Amit Daga, Sri Abhishek Kumar Jaiswal, Sri Shyam Babu Vaish

Counsel for the Respondent:
G.A., Sri Ram Jee Saxena

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 300,302 – murder , Section 304 - culpable homicide.

Appellant went to tube-well for watering his field - deceased argued to first water his field - did not allow appellant to take water from tube-well - fought and deceased sustained firearm injuries - first informant (brother of deceased) reached at his tube-well - saw his brother deceased lying blood soaked on a cot - injured told first informant that appellant shot two fires on him through his gun - shot injured by his licensee gun . **(Para -3,4)**

(B) Criminal Law - Indian Penal Code, 1860 - Section 304 - culpable homicide not amounting to murder - held - incident occurred in a sudden fight - without any premeditation in the state of anger - offence

committed by the appellant - fall within the meaning of "culpable homicide not amounting to murder" under section 304 of the code . **(Para -69)**

(C) Criminal Law - Indian Penal Code, 1860 - Distinction between two parts of Section 304 (Part I and Part II) - Part I is founded on the intention of causing the act by which the death is caused – Part II - attracted when the act is done without any intention but with the knowledge that the act is likely to cause death - intent required should not be linked with the seriousness of the injury - held - appellant was overpowered by an uncontrollable fit of anger so much so that he was deprived of his power of self control - being drawn in a web of action reflexes, he fired at the deceased - Fact do not commend to conclude that appellant had intention to eliminate his brother though he had the knowledge of the likely fatal consequence thereof **.(Para -54,68,72,73)**

HELD:-Intention probably was to merely cause bodily injury - conviction of the appellant ought to be moderated to one under Section 304 Part I of the Code, "Culpable homicide not amounting to murder", punishable in the first part (Part I) of Section 304 of the Code.
Appellant guilty of offence under Section 304 Part I, altered the offence from that of Section 302 IPC to one under Section 304 Part I of the Indian Penal Code. **(Para -74,76)**

Criminal Appeal partly allowed.(E-7)

List of Cases cited:-

1. Pardeshiram Vs St. of M.P. , 2021 (3) SCC 238

2. Khuman Singh Vs St. of M.P., 2020 (18) SCC 763

3. Udiya Vs St. of M.P., 2019 (15) SCC 65

4. Atul Thakur Vs St. of H.P.& ors., 2018 (20) SCC 496

5. Surain Singh Vs St. of Punj., 2017 (5) SCC 796

6. Ravindra Shalik Naik & ors. Vs St. of Mah., 2009 (12) SCC 257

7. Vineed Kumar Chauhan Vs St. of U.P., 2007 (14) SCC 660

8. Sridhar Bhuyan Vs St. of Orissa, 2004 (11) SCC 395

9. Parkash Chand Vs St. of H.P. B, 2004 (11) SCC 381

10. Vineet Kumar Chauhan Vs St. of U.P., 2007 (14) SCC 660

11. St. of A. P. Vs Rayavarapu Punnayya & Anr.,1976 (4) SCC 382

12. Virsa Singh Vs St. of Punj., 1958 SC 465

13. Rajwant Singh Vs St. of Kerala, AIR 1966 SC 1874

14. Aradadi Ramudu @ Aggiramudu Vs St. through Inspector of Police, Yanam, 2012 (5) SCC 134

15. St. of U.P. Vs Indrajeet, 2000 (7) SCC 249

16. Satish Narayan Sawant Vs St. of Goa, 2009 (17) SCC 724

17. Arun Raj Vs U.O.I., 2010 (6) SCC 457

18. Rampal Singh Vs St. of U.P., 2012 (8) SCC 289

19. Phulia Tudu Vs St. of Bihar, 2007 (14) SCC 588

20. Mohinder Pal Jolly Vs St. of Punj., 1979 (3) SCC 30

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

1. Heard Sri Amit Daga learned Advocate for the appellant and Sri Patanjail Mishra learned AGA for the State respondent.

2. This appeal is directed against the judgement and order dated 24.09.2012 passed by the Additional Sessions Judge, Court No.8, Bulandshahar in S.T. No.221 of 2010, arising out of Case Crime No.348 of 2009, under Section 302 IPC, P.S. B.B. Nagar, District Bulandshahar, whereby the appellant Manoj Kumar Sharma son of Ved Prakash Sharma, resident of village Dhakoli, Police Station B.B. Nagar, has been convicted for the offence under Section 302 IPC and sentenced for life imprisonment.

3. The first information report of the incident occurred on 11.12.2009 at about 02.00 PM, was lodged by Vikas Sharma son of Ved Prakash Sharma, brother of the accused-appellant Manoj Kumar Sharma. It may also be noted herein that deceased Rajeev Kumar Sharma was brother of the first informant as also the accused-appellant herein. It was stated in the report that on 11.12.2009 at about 02.00 PM, the informant received a call on his mobile from Smt. Savita wife of Manoj, the appellant-herein. She told that the appellant went to the tube-well for watering his field but deceased Rajeev Kumar was arguing by stating that he would first water his field and did not allow the appellant to take water from the tube-well. On the said issue, they fought and Rajeev sustained firearm injuries. Savita asked the first informant to take the injured Rajeev to the hospital.

4. On getting this information, the first informant reached at his tube-well at Kharkali Jungle and saw his brother Rajeev Kumar Sharma lying blood soaked on a cot. The injured told the first informant that Manoj Kumar Sharma (the appellant herein) shot two fires on him through his gun. One Sri Bhagwan @ Kallu and other passerby tried to save him and intercepted Manoj but he did not listen to anyone and shot the injured by his licensee gun. The injured begged him to take to the hospital. The first informant alongwith other villagers took the deceased to B.B. Nagar Community Hospital but he succumbed to his injuries on the way. While keeping the dead body at the Government Hospital, the first informant went to lodge the report.

5. The check FIR based on the written report lodged on 11.12.2009 was proved by PW-4, the Constable Clerk posted in the police station B.B. Nagar, being in his handwriting and signature as Exhibit Ka-2. The G.D. entry report No.31 at 15.45 hrs of the said report was proved by bringing the original G.D. in the Court and filing the certified carbon copy of the same, by PW-4, being in his handwriting and signature as Exhibit Ka-3.

6. In cross, PW-4 stated that he could not tell the time of sending the special report to the senior officials. However, the special report was received on 14.12.2009 by the concerned court but the date of sending of the same from the police station was not noted. On further confrontation, he stated that no memo or information of the incident was received from the hospital.

7. The inquest of the dead body was conducted at the Community Health Center, B.B. Nagar which is evident from the inquest report proved by PW-7 as Exhibit Ka-12. The related papers to the inquest prepared for sending the dead body for the postmortem had been proved as Exhibit Ka-13 to Exhibit Ka-19. The postmortem report was proved by the doctor entered in the witness box as PW-5. He stated that he conducted the postmortem on 12.12.2009 at about 11.30 AM. The body was received in the sealed state. On

external examination, the deceased appeared to be aged about 32 years, a strong built male. The rigor mortis was present over the entire body. The injury found on the person of the deceased as indicated in the postmortem report are:-

"Firearm wound of entry size 5.0 cm x 3.0 cm x chest cavity deep left side back of chest just lateral to inferior angle of left scapula. Margins inverted and black.

Firearm would of entry size 3.0 cm x 2.5 cm x chest cavity deep on left side back of chest 3.0 cm above from injury No.1. Margins inverted and black. No tattooing present. On exploration, 4, 5 and 6 ribs of left side of back were found fractured, Left lung, pleura, heart and pericardium were lacerated. 800 ML blood was found in the left chest cavity. 2 wed pieces and 10 small metallic pellets from left lung and left side chest cavity."

8. As noted above, on internal examination, 4th 5th 6th left ribs were found fractured. Left lung, pleura, heart and pericardium were lacerated. 800 ML blood was found in left chest cavity. 2 wed pieces and 10 small metallic pellets from left lung and left side chest cavity. There was 200 ML fluid in the stomach. Small intestine and large intestine were filled with gases and water.

9. The cause of death had been stated as hemorrhage and shock due to antemortem injuries. PW-5 stated that the death was caused by the firearm injuries sustained by the deceased. The postmortem report was proved being in his handwriting and signature by PW-5 as Exhibit Ka-4. The proximate time of death as stated therein is 02.00 PM on 11.12.2009. It was further stated by PW-5 that two gun shot injuries sustained by the deceased were sufficient to cause his death. The wed pieces, pellets and clothes were sealed and handed over to the Constable who brought the dead body. PW-5 was cross-examined by the defence on the issue that looking to the nature of injuries, there was possibility of immediate death. The doctor, on contradiction, stated that two gun shot injuries could not occur by one bullet. A suggestion was also given to PW-5 that the deceased was shot while lying on his left side.

10. The Investigating Officer had entered in the witness box as PW-6 and stated that as soon the case was registered, he received the investigation, recorded the statement of the first informant, went to the Community Health Centre, B.B. Nagar where the body of deceased Rajeev Kumar Sharma was found lying on a cot. The inquest was conducted by PW-7 on his instruction. After completion of the inquest, he went to the spot of the incident alongwith the first informant and prepared the site plan on his pointing out, which was proved as Exhibit Ka-5 in his handwriting. PW-6 stated that he again went to the Community Hospital to ensure that the dead body was sent for the postmortem and then went to the site of the incident wherefrom he made recoveries of two empty cartridges 12 bore and the blood soaked rope of the cot from the spot of the incident. The blood stained and plain earth were also collected and all the said recovery memos were proved as Exhibit Ka-6, Ka-7, Ka-8 and Ka-9, being in the handwriting and signature of PW-6.

11. The statement of Smt. Akhilesh, PW-3 (wife of the deceased) was recorded on 13.12.2009. On 15.12.2009, on the report of the informer, the accused was

arrested at about 12.40 PM. One SBBL gun license No.47954 was recovered from the possession of appellant Manoj and the safe custody receiver receipt of the gun store was also seized. The recovery memo was prepared and signed by the accused and the witnesses, proved as Exhibit Ka-10. The statement of the accused-appellant had then been recorded. On 18.12.2009 the statement of another witness Shri Bhagwan @ Kalu (PW-2) was recorded. After recording the statement of other witnesses on 21.12.2009, the incriminating articles recovered from the spot were sent to FSL on 24.12.2009. On completion of the investigation, the charge sheet was submitted and proved as Exhibit Ka-11.

12. The Investigating Officer (PW-6) was confronted on the issue as to whether he recorded statement of Savita, wife of the appellants, on whose information, the first informant went to the spot of the incident. He was further confronted as to whether he ascertained that the deceased was in a position to speak after receiving injuries. PW-6 was further confronted with the injuries shown in the postmortem report to further assert that looking to the nature of injuries, it was not possible for the injured to speak. A suggestion was given that the FIR was based on a concocted story to which he replied by saying that whatever was written by the first informant, it was noted by the Constable Clerk.

13. PW-6 was then confronted with the statement of the first informant recorded in the site plan wherein it was noted that blood was found below the cot wherein deceased was lying when the first informant met him. PW-6 replied that blood was found at one spot only at the site of the incident and not at any other place and denied the suggestion that the deceased was hit while lying on the cot. PW-6 was further confronted on the delay in recording the statement of the witnesses namely Akhilesh and Sri Bhagwan @ Kalu and that the copy of the first information report was not sent with the body sent for the postmortem and also that the special report was not sent by him. It is stated by PW-6 that the special report of the occurrence was sent to the CJM through proper channel and the delay in noticing the same might be because of the concerned engagement of the officer in some other work.

14. On the arrest of the accused and recovery of gun, PW-7, the officer who prepared the recovery memo was crossed who stated that the recovery memo of gun as Exhibit Ka-10 was prepared on the spot and denied the suggestion that the accused Manoj had surrendered in the police station and the gun was recovered from Choudhary Gun House, Hapur. The suggestion that no license or cartridges were recovered from the accused Manoj was also denied. PW-7 denied the suggestion that the entire recovery proceeding was forged.

15. The ballistic report Exhibit Ka-20 shows that two empty cartridges recovered from the spot were tallied with the SBBL gun seized by the police. The clothes of the deceased were found blood stained. Human blood was found on the clothes of the deceased, pieces of rope of cot, pellet and wed pieces found from inside the dead body. The blood stains on earth were disintegrated.

16. The prosecution had produced three witnesses of fact, the first informant as PW-1, an eye witness of the occurrence namely Shri Bhagwan @ Kalu as PW-2; another eye witness Smt. Akhilesh Sharma wife of the deceased as PW-3.

17. PW-1 , the first informant, in the examination-in-chief, reiterated the version of the written report submitted by him. He then stated that his tube-well was existing in the jungle of Kharkali Gaon and when he reached at the tube-well, his brother was lying blood soaked on a cot who told him that appellant Manoj shot him from his licensee gun. The injured Rajeev was taken to the Community Hospital in a 'Jugaad' and he succumbed to his injuries on the way. The written report was scribed by him and submitted in the P.S., B.B. Nagar, proved as Exhibit Ka-1.

18. In cross, PW-1 described the distance of the place of the incident with his village as 700 meter and location of the tube-well in the field. He also described the topography of the place of the incident with the location of his agricultural field and that of his brothers, Rajeev Sharma (deceased) and Manoj (appellant). It was stated by PW-1 that there was a room wherein tube-well was installed and there were trees near the tube-well. He then stated that they were four brother and total 44 bighas of land of the joint family had been partitioned between them. The land of accused Manoj was at the east of the tube-well whereas chak of Rajeev (deceased) was at the north abetting the main road. PW-1 then described the vocation of himself and his three brothers and stated that he was a teacher in a primary institution situated at a distance of 3 km from his village and the school timing was 10.00 AM to 04.00 PM at the time of the incident. Being a Coordinator of Nyay Panchayat, on temporary basis, alongwith teaching work he was doing inspection of the primary institutions. On the day of the incident, he left his home at about 09.30 AM and went to three primary institutions to make inspection. The suggestion that he was not in the village at the time of the incident had been repelled by him. PW-1 then described as to how he had proceeded after the incident, i.e. that he firstly went to the Hospital and then to the police station. PW-1 stated that no information of the death was sent from the Hospital and he wrote the first information report in the Hospital. The suggestion that he reached the Hospital at around 04.00 PM was categorically denied.

19. About relationship of brothers, PW-1 stated that the brothers had normal relationship and there was no enmity between deceased Rajeev and accused Manoj. No fight had occurred between them prior to the incident and all brothers used to address each other as 'Bhaiya' and they never abused each other. The suggestion that he reached at the place of the incident after about 1 hour of death of his brother Rajeev had been categorically denied by PW-1. He then categorically admitted that he did not mention anything told to him by witnesses Akhilesh and Sri Bhagwan in the first information report. A suggestion of enmity of PW-1 with accused Manoj about a compassionate appointment after death of their father was denied by PW-1. It was admitted by PW-1 that witnesses Bhagwan and Akhilesh were related to each other and he denied that the wife of the deceased Akhilesh never went to the field and she and Bhagwan were falsely projected as a witness at his instance.

20. PW-1 further stated that he went to the spot of the incident alongwith the police after lodging of the first information report, got the site plan prepared and recovery of the empty cartridges, blood stained earth was made by the police in his presence.

21. PW-2, Sri Bhagwan @ Kalu was acquaintance of the family. He stated that while he was going to his village via Kharkali on a bicycle, when he reached at the Pakka road near the tube-well of deceased Rajeev at around 02.00 PM, he saw an oral altercation between Rajeev and Manoj. They were arguing on the issue of watering their fields. The wife of Rajeev namely Akhilesh was present. The oral altercation turned into physical and they both got entangled. He and Akhilesh tried to intervene and then Manoj shot two fires from his gun at Rajeev and fled from the spot. Rajeev was crying to take him to the Hospital but since he (PW-2) was afraid he left the place to go to his home. After two days, he came to know that Rajeev had died.

22. In cross, PW-2 stated that he left his house at around 01.00 PM and went to Dhakoli for taking tractor trolley on rent. However, he could not get it and, therefore, was going back to his village Bhasauli via Kharkali. The distance between Dhakauli and Kharkali was stated by PW-2 as 2-2-1/2 KM. He stated that the Investigating Officer recorded his statement and on confrontation with the same, PW-2 stated that wrong reason for going to Kharkali was narrated by the Investigating Officer and he did not know as to why that was written. The relationship of Smt. Akhilesh with this witness (PW-2) was admitted but he stated that Akhilesh was not her real bua (Aunt). He described as to how the incident had occurred and stated that when Manoj fired the shot, Rajeev was at a distance of 2 paces and it was so instant that he could not warn Rajeev. Both the gun shots hit at the back of the injured.

23. On further confrontation, PW-2 stated that he went away from the place of the incident by telling Akhilesh that she should call her family members and he did not have any phone. Savita and Manoj were living in B.B. Nagar and Savita was not present on the spot. He then stated that he was so shaken by the incident that he did not intimate the police. After reaching his home, he told about the incident to his family members who went to B.B. Nagar but he did not go there.

24. The suggestion that he was not present on the spot was denied by PW-2. He admitted that he left Rajeev on the field and did not know as to who took him and PW-1, Vikas Sharma, was not at the spot, by the time he left the place.

25. PW-3 Smt. Akhilesh is the wife of the deceased. She admitted relationship of the accused with the deceased and stated that the appellant was quarrelsome (झगड़ालू) by nature and, therefore, he had separated about 11-12 years ago and was living separately. She then described as to how the incident had occurred and in her statement, it has come that the altercation between the deceased and the appellant occurred on the issue of watering their fields from the tube-well. She then stated that after the deceased was hit at the back he fell down and her brother-in-law (Vikas) namely PW-1 and other villagers took the injured to B.B. Nagar in a 'Jugaad', her husband died on the way.

26. In cross, PW-3 admitted that after the incident they all were living together i.e. the first informant, deceased and her son who was studying in the school. Deceased Rajeev was an agriculturist and used to go to his field daily and she used to carry his food if he would go without having it. PW-3 stated that she also used to go to the field around 10.00-11.00 AM or

thereafter, or sometime with the deceased depending upon the work. She did not remember that on the date of the incident whether her husband (deceased) ate his food. PW-3 then stated that only the agricultural land of Manoj (the appellant) had been separated and all other lands were in partnership and her husband Rajeev used to take care of the entire field with one help. She also used to go to the field with Rajeev to help. The topography of the place of the incident, the location of the tube-well was narrated by PW-3. PW-3, during cross, was shown certain photographs of their chak which she identified and proved as Material Exhibit Kha-2 & Kha-3.

27. She stated that PW-3 Sri Bhagwan was not his real nephew but was related to her. The suggestion that PW-2 Sri Bhagwan was not present on the spot was denied by PW-3. She stated that the police had recorded her statement and then stated that no-one came on the tube-well to save her husband rather they were crying from the distance. After PW-2, Sri Bhagwan fled away from the spot other people came in from the road and she did not know anyone. Some villagers lifted her husband, put him on the cot lying there at a distance of 2 to 4 paces from the place where Rajeev was standing and when he was put on the cot, lot of blood was oozing out from his wound. She could not tell the time when the first informant had reached at the spot and denied the suggestion that she took her husband to the B.B. Nagar Hospital with villagers named as Dharampal and Jogpal. PW-3 stated that she was shaken by the incident but she spoke and she did not know as to whether Rajeev was carrying mobile. The suggestion that she was not present on the spot and was making statement at the instance of PW-1, the first informant was categorically denied by PW-3. She also denied the suggestion that PW-2 Shri Bhagwan was not present at the spot and was making deposition at their instance.

28. Placing the oral testimony of the prosecution witnesses and the documentary evidences on record, it is argued by Sri Amit Daga learned counsel for the appellant that both the eye witnesses of the incident are not reliable. The first informant PW-1 is not an eye witness. He though stated that telephonic information of the incident was given by Savita wife of the appellant but the prosecution had not disclosed as to how the factum of the incident came to the knowledge of Savita, who according to the own case of the prosecution witness (Investigating Officer) was not present on the spot. The statement of PW-1, the first informant, that the deceased told him that accused Manoj had killed him by opening gun shots is improbable, looking to the gravity of the injuries sustained by the deceased where heart, pericardium and lungs were found lacerated as bullet had reached straight-way into the heart cavity. The only probability which can be inferred that the deceased had died on the spot.

29. As regards PW-3, wife of the deceased, it is stated that her presence on the spot was not natural as she admitted during the course of the examination that she would not go to the agricultural field regularly. In her statement it has come that she used to go to the field only to bring food of the deceased and when questioned, she stated that she did not remember as to whether her husband ate food on that day. Looking to the status of the family of the deceased, it is improbable that PW-3, his wife would go to the field to help in the agricultural work. Even otherwise, the

statement of PW-3 under Section 161 was recorded on 13.12.2009, after two days of the incident.

30. It is argued that the prosecution had introduced one more witness projecting him as an eye witness who is PW-2, nephew of PW-3, wife of the deceased. As per own testimony of PW-2, he was crossing the road besides the field of Rajeev (deceased) by chance and at around 02.00 PM when he reached on the road near the tube-well, he heard oral altercation between Rajeev and Manoj. According to PW-2, he went on the spot, tried to intercept and the incident of firing occurred in his presence. The conduct of this witness is to be noticed to assess the truthfulness of his testimony of witnessing the incident. Admittedly, this witness did not go the house of the deceased to inform about the incident nor he took the deceased to the hospital and left his Aunt, Akhilesh (PW-3) and his injured uncle Rajeev at the place of the incident. The statement of PW-2 that he fled the scene of the occurrence because of the fear is not acceptable and shakes his presence on the spot.

31. Moreover PW-3, another eye witnesses stated, in cross, that other people who were near the place of the incident did not come to the tube-well and they were shouting to save the deceased from the place where they were standing. They only came when PW-2, Sri Bhagwan @ Kallu had fled away from the spot. For the fact that PW-2 was related to the wife of the deceased (PW-3), there is a strong possibility of introducing him as an eye witness at the instance of PW-1 & PW-3.

32. It is argued that even otherwise, PW-2 can only be kept in the category of a chance witness as his presence on the spot was not natural. In this scenario, his testimony would require corroboration from the other material circumstances of the case and can be relied upon only if it inspires confidence of the Court on appreciation with due circumspection and adequate corroboration. The recoveries made by the Investigating Officer are also challenged on various grounds.

33. Lastly, it is argued that as per own case of the prosecution, there was no preanimosity between the accused-appellant and the deceased. It is the case of the prosecution that the incident had occurred during a sudden quarrel between two brothers over a trivial issue of watering their fields from the common tube-well. Both the alleged eye witnesses stated that the appellant and deceased were engaged in oral altercation and they were shouting at each other, which later turned into physical and while they were entangled, two fires were shot by the appellant from his single barrel licensee gun. The seat of both the injuries are at the left side back of the chest and both the injuries are at a short distance of 3 cm, which further show that there was no intention of the accused-appellant to kill the deceased. Moreover, the incident had occurred in the heat of passion when the appellant being elder brother lost his cool as his younger brother started arguing with him and then became physical. It has come in the evidence of PW-3, the alleged eye witness that when the appellant went to the field he told the deceased to allow him to water his field from the common tube-well but the deceased did not agree to that by saying that he was already watering his field and let him finish it first and that the appellant should wait.

34. The contention is that for the above sequence of events proved from the

prosecution evidence, the present case does not fall beyond the scope of the offence under Section 304 Part-II; i.e. of causing injuries with the knowledge that it was likely to cause death but without any intention to cause death or to cause bodily injury as is likely to cause death. The contention is that the conviction of the appellant under Section 302 IPC is a result of misappropriation of the evidence and misapplication of law. The appellant, at the worst, can be convicted and punished for the offence 304 Part-II, maximum sentence for which is 10 years. In the alternative, it is submitted that in any case, the offence committed by the appellant cannot travel beyond Section 304 Part-I. The appellant has already suffered incarceration for a period of 12 years as he is lodged in jail since the date of the arrest i.e. 15.12.2009. The prayer is that the Court may sustain the conviction but reduce the sentence to the period already undergone.

35. To substantiate the above submissions, reliance is placed on the decisions of the Apex Court in **Pardeshiram Vs. State of Mahdya Pradesh1, Khuman Singh Vs. State of Madhya Pradesh2, Udiya Vs. State of Madhya Pradesh3, Atul Thakur Vs. State of Himachal Pradesh & others4 Surain Singh Vs. State of Punjab5, Ravindra Shalik Naik & others Vs. State of Maharashtra6, Vineed Kumar Chauhan Vs. State of Uttar Pradesh7, Sridhar Bhuyan vs. State of Orissa8, Parkash Chand vs. State of H.P. B9.**

36. Learned AGA, on the other hand, defended the judgement of the trial court with the assertion that it is established that the appellant had committed the murder with full knowledge and intention by the single barrel licensee gun which he was carrying at the place of the incident and he had opened two fires, one after the other. There is ample evidence against the appellant and the prosecution has succeeded in proving its case beyond reasonable doubt that the appellant is the perpetrator of the crime. In light of the oral testimony of the prosecution witnesses (PW-2 and PW-3) and the promptness of the FIR, there is no scope of interference in the judgement of conviction and sentence passed by the trial court. It was a day light murder committed by elder brother on a trivial dispute with regard to watering of his field.

37. It is argued that the injuries inflicted by the appellant were sufficient to cause death in the ordinary course of nature and in this circumstances, the appellant cannot argue that he is not guilty of murder. A person who inflicts injuries like the present case, cannot seek shelter of law by saying that the injuries were accidental or otherwise unintentional. No such inference can be drawn from the facts and circumstances of the present case. The argument of the learned counsel for the appellant that the offence committed by the appellant would fall within the meaning of Section 304 Part-A or Part II is without any substance. There is no question of reduction of sentence as the circumstances of the present case clearly proves that the appellant had committed murder of his brother with full knowledge and intention that the gun shot opened by him would cause death to his brother. The ingredients of Section 300 IPC are attracted and the punishment under Section 302 IPC for causing murder has rightly been inflicted by the trial court.

38. On merits, it is argued that both the eye witnesses are consistent about the

manner of occurrence and that the deceased was killed by the appellant by opening two gun shots on a trivial issue. The first information report is a prompt report of the incident and the first informant also proved that the deceased had fixed the appellant being the only perpetrator of the crime. The contention is that in any case, no leniency can be shown to the appellant and the appeal deserves dismissal.

39. Having heard learned counsel for the parties and perused the record, we may note that as regards the place of occurrence of the incident and the manner in which the incident had occurred, they stand proved with the statements of the prosecution witnesses and other material circumstances on record. The presence of PW-3, wife of the deceased at the spot cannot be doubted, in as much as, the incident had occurred around 02.00 PM when normally wives of agriculturists would go to the field to bring their food. PW-3, in a natural manner stated that she would normally go to the field at around 10.00-11.00 AM after finishing her household work and would bring the food of her husband, if he had not taken food at home. She also stated that she normally used to help her husband in agricultural work like cutting of the weed and spraying of manure. It has also come in the evidence that out of four brothers, the agricultural land was divided and the share of appellant Manoj was separated. Amongst the remaining three brothers, deceased Rajeev was an agriculturist whereas other two brother were engaged in their jobs. Their fields as such were being looked after by deceased Rajeev. From the statement of PW-3, it is evident that the deceased was looking after about 33 bighas of land which came in the share of three brothers as 11 bighas was separated for the appellant Manoj. Looking to the enormous nature of work being done by the deceased Rajeev, the statement of PW-3 that she was helping her husband in agricultural work cannot be discarded.

40. Even otherwise, it has been proved by the prosecution evidence that PW-1, the first informant took the deceased to the hospital with the help of other villagers through a vehicle known as 'Jugaad' and the inquest of the dead body was conducted in the Community Health Centre, B.B. Nagar. As per the inquest report, the body was kept on a cot in the Community Health Centre. The first information report of the incident was lodged within 1 hour 45 minutes of the occurrence after the deceased had succumbed to his injuries. The Investigating Officer went to the spot and prepared the documentary evidences of the occurrence after making inspection of the site. Two empty cartridges were recovered from the spot which did tally with the SBBL gun seized from the possession of the appellant. As per the statement of the doctor, the injuries caused to the deceased were sufficient to cause his death. Nothing contrary could be culled out from the cross examination of the witnesses (PW-2 & PW-3) to demolish their presence on the spot or doubt the prosecution story in any manner. The occurrence of the incident resulting in the homicidal death of the deceased Rajeev at his field near the tube-well at around 02.00 PM stands proved.

41. It is also proved that the appellant herein namely Manoj Kumar Sharma is the perpetrator of the crime and the death was caused during an altercation between the appellant and the deceased. The suggestion given by the defence to the witness to establish that it was an accident are found without any substance. The presence of the

eye witnesses on the spot cannot be doubted and could not be disputed successfully by the defence. In the said scenario, the argument raised by the learned counsel for the appellant that the crime committed by the appellant would not fall within the meaning of Section 300 IPC and can only be said to be an offence of "culpable homicide not amounting to murder" attracting punishment under Section 304 IPC, is to be examined.

42. The question is as to whether the act of the appellant in causing death of the deceased would amount to 'murder' within the meaning of Section 300 IPC or it is a case of 'culpable homicide which will not amount to murder' attracting punishment under Section 304 IPC. Further question is as to in which part of Section 304 IPC, the offence in question would be punishable, in case, the Court reaches at the conclusion that it was a case of 'culpable homicide not amounting to murder' and not 'murder'.

43. In order to ascertain the same, we are required to go through the legal principles governing the distinction between the provisions under Sections 300 and 302 of the Code on the one hand and Section 304 Part I and Part II of the Code on the other. Section 299 of the Code which deals with the definition of culpable homicide is also to be taken note of.

44. Sections 299 and 300 of the Indian Penal Code deal with the definitions of 'culpable homicide' and 'murder'; respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death:- (i) with the intention of causing death, or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from the reading of this provision, the first part of it emphasises on the expression "intention' while the latter upon "knowledge'. As has been noted in a catena of decisions, both these words denote positive mental attitudes of different degrees. The mental element in "culpable homicide', i.e. the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the above three stated manners, it would be "culpable homicide'.

45. Section 300, however, deals with "murder'. Though there is no clear definition of "murder' in Section 300 of the Code but as has been held by the Apex Court and reiterated in Rampal Singh vs. State of Uttar Pradesh2, "culpable homicide' is the genus and "murder' is its species and all "murders' are "culpable homicides' but all "culpable homicides' are not "murders'.

46. Another classification that emerges from the Code is "culpable homicide not amounting to murder", punishable under Section 304 of the Code. There are decisions which also deal with the fine line of distinction between the cases falling under Section 304, Part I and Part II.

47. Dealing with a matter, wherein the question for consideration was whether the offence established by the prosecution against the appellant therein was "murder" or "culpable homicide not amounting to murder", the Apex Court in V**ineet Kumar Chauhan vs. State of Uttar Pradesh10** considered its earlier decision in the **State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another11**, wherein the then Justice R.S. Sarkaria brought out the points of distinction between the two offences under

Sections 299 and 300 IPC, reiterating the law laid down in **Virsa Singh Vs. State of Punjab12 and Rajwant Singh Vs. State of Kerala13**. It was held therein that whenever a Court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder"; on the facts of a case, it will be convenient for it to approach the problem in three stages:- (i) the question to be considered, at the first stage, would be whether the accused has done an act by doing which he has caused the death of another; (ii) proof of such connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 IPC is reached; (iii) the third stage is to determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable.

48. Further, if this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304 IPC. It was, however, clarified therein that these were only the broad guidelines to facilitate the task of the Court and not cast iron imperative.

49. In **Aradadi Ramudu alias Aggiramudu vs. State through Inspector of Police, Yanam14,** the question was for modification of sentence from Section 302 to Section 304 Part II. While answering the same, the Apex Court had considered the above noted decisions in **Virsa Singh (supra)** as also other decisions in line namely **State of U.P. v. Indrajeet15; Satish Narayan Sawant vs. State of Goa16** and **Arun Raj vs. Union of India17** to note that for modification of sentence from Section 302 to Section 304 Part II, not only should there be an absence of the intention to cause death, but also an absence of intention to cause such bodily injury that in the ordinary course of things was likely to cause death. [Reference Paragraph 16]

50. Noticing the above noted decisions, in R**ampal Singh Vs. State of Uttar Pradesh18** the Apex Court had considered the distinction between the terms "murder" and "culpable homicide not amounting to murder". The observation in State of **Andhra Pradesh Vs. Rayavarapu Punnayya (supra)** was noted in paragraph '13' of **Rampal Singh (supra)** as under:-

"13. In the case of State of A.P. v. Rayavarapu Punnayya, this Court while clarifying the distinction between these two terms and their consequences, held as under: -

"12. In the scheme of the Penal Code, "culpable homicide' is genus and "murder' its species. All "murder' is "culpable homicide' but not vice versa. Speaking generally, ..."culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called "culpable homicide of the first degree'. This is the

greatest form of culpable homicide, which is defined in Section 300 as "murder'. The second may be termed as "culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

51. The guidelines laid down in its earlier decision in **Phulia Tudu vs. State of Bihar19** had been noted therein to reiterate that the safest way of approach to the interpretation and application of these provisions (Sections 299 and 300) is to keep in focus the key words used in the various clauses of these sections. In paragraph '17', it was noted that :-

"17. Section 300 of the Code states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to "murder". It is also "murder" when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to "culpable homicide amounting to murder". The Explanations spell out the elements which need to be satisfied for application of such exceptions, like an act done in the heat of passion and without pre- mediation. Where the offender whilst being deprived of the power of self-control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself, "culpable homicide would not amount to murder". This Exception itself has three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case."

52. It was observed in paragraph '21' in **Rampal Singh (supra**) that Sections 302 and 304 of the Code are primarily the punitive provisions. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is, thus, an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, i.e. (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional and the maximum sentence only extends to imprisonment for 10 years. The first clause of Section 304 includes only those cases in which offence is really "murder", but mitigated by the presence of circumstances recognized in the Exceptions to Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular.

53. In paragraph '22' **Rampal Singh (supra)**, it was observed that where the act is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the Exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed. (emphasis added)

54. It was, thus, held therein that the distinction between two parts of Section 304 (Part I and Part II) is evident from the very language of this section. While Part I is founded on the intention of causing the act by which the death is caused, the other is attracted when the act is done without any intention but with the knowledge that the act is likely to cause death.

55. It was further observed therein that it is neither advisable nor possible to state any straight-jacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merit. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with the clear demarcation as to under what category of cases, the case at hand falls and accordingly, punish the accused.

56. Referring to an earlier d**ecision in Mohinder Pal Jolly vs. State of Punjab20, it was noted in** Rampal Singh (supra) that the distinction between two parts of Section 304 has been stated with some clarity therein which reads as under:-

"24. A Bench of this Court in the case of Mohinder Pal Jolly v. State of Punjab [1979 AIR SC 577], stating this distinction with some clarity, held as under :

*"11. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause "fourthly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefo*re, *that the appellant could be convicted only under Part II of Section 304 and not Part I."*

57. As a guideline as to how the classification of an offence into either Part of

"25. .....xxxxxxxxxxx.....This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and

nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the "principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, "culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law.....xxxxx....."

58. The following observations in paragraph '16' of the decision in **Aradadi Ramudu alias Aggiramudu (supra)** have been quoted in para '34' to state that while answering the question for modification of sentence from Section 302 of the Code to Part II of Section 304 of the Code, it has to be kept in mind that:-

"not only should there be an absence of the intention to cause death, but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death."

59. Keeping in mind the above guidelines laid down by the Apex Court, in the facts of the present case, the first step in analysis, would be to examine as to whether the appellant had committed an offence punishable under the substantive provisions of Section 302 of the Code, i.e. "culpable homicide amounting to murder".

60. To return a finding on the issue, we have to determine as to whether the act by which the death has been caused would fall in any of the four Clauses detailed in Section 300 of the Code.

61. Analyzing the facts of the instant case, it is to be seen that both the accused and the deceased were real brothers. The witnesses had testified that there was no past enmity or acrimony between the two brothers. As per the statement of PW-1, the first informant, who was also one amongst four brothers, relationship between brothers was cordial. There was no animosity between accused Manoj and deceased Rajeev. No fight had occurred between them prior to the incident. The brothers used to respect and address each other as 'Bhaiya' and they never used abusive language while talking. The partition of the agricultural property after death of their father had occurred with their consent and they all got equal shares in the total land of approximately 44 bighas. The land of appellant-Manoj was adjacent to the field of deceased Rajeev and they had common tube-well which was located in the field of Rajeev, which lie abetting the main Pakka road which runs North-South as indicated in the site plan. The crop of wheat was sown in the fields of both deceased Rajeev and accused-appellant Manoj, as per the statement of the wife of the deceased namely PW-3. She stated that appellant came to the field around afternoon and told his brother Rajeev (deceased) that he wanted to water his field. But Rajeev did not agree to that and replied that since his

field was being watered, it should be completed first. On this trivial issue, oral altercation started between two brothers and they both got entangled in a physical fight.

62. It has also come in the evidence of PW-3 that appellant Manoj was hotheaded and because of him the agricultural fields were partitioned. The entire incident, thus, had occurred when the deceased (Rajeev) refused to allow his elder brother, the appellant Manoj to water his field first. It is evident that the common tube-well was situated in the field of deceased Rajeev and it appears that in this circumstance, the appellant became furious. While they were arguing and fighting with each other, the appellant who was carrying his licensee gun opened the gun shots. It is established that there was a heated exchange of words between two brothers and they got entangled in physical altercation before the appellant opened the gun shots.

63. The evidence when examined in its entirety, establish that the appellant had committed the offence without any premeditation in a sudden fight in the state of anger and the entire incident happened within a very short span of time. The oral altercation between two brothers took an ugly turn when they got entangled in a physical altercation. Though appellant Manoj opened two gun shots at his brother but the site and distance of both the injuries show that two shots were opened one after the other without understanding the consequence of his action while he was in the heat of passion.

64. It has also come in the evidence of PW-1 that the wife of the appellant namely Savita gave telephonic information to the first informant immediately after the incident though she was not present on the spot. As per the deposition of PW-1, she stated that in a dispute relating to watering of the field, during fight between two brothers, Rajeev had sustained gun shot injuries and she also told the first informant to take deceased Rajeev to the Hospital. This information was passed on immediately after the incident as is evident from the statement of PW-1, the first informant, another brother of the deceased, and when he went on the spot, Rajiv (deceased) was alive.

65. As noted above, it has come in the testimony of eyewitness (PW-2) that the wife of the appellant namely Savita was not present in the field at the time of the incident. On a question which was posed by the learned counsel for the appellant as to who had informed Savita about the incident, the answer can be given from the circumstances which clearly show that it was the appellant himself who intimated his wife to inform his another brother Vikash Sharma, who was present in the village, to take his injured brother to the Hospital. This fact goes to show that the appellant felt remorse and though he himself did not take the deceased to the hospital but inform his another brother immediately through his wife so that the life of his deceased brother be saved. At the cost of repetition, it is to reiterate that no eyewitness stated that Savita (wife of the appellant) was on the spot. As per the statement of PW-1, Savita even told him that the wife of Rajeev namely Smt. Akhilesh was present at the time of the fight between two brothers.

66. In the above emerging circumstances in light of the statement of PW-1 (brother of the deceased and the appellant), it is evident that the appellant

had committed the offence while he was deprived of the power of self control by grave and sudden provocation for the reason that his younger brother did not accede to his request. But the death cannot be said to have been caused by mistake or accident or without the appellant being the party to the said provocation. The act of the appellant of "culpable homicide" causing the death of his brother during fight on a trivial issue, however, would not fall in any of the clauses of Section 300 of the Code as the intention of the appellant to cause death or such bodily injuries which he knew would cause death of his brother or sufficient in the ordinary course of nature to cause death, is not proved.

67. The mere fact that the appellant was carrying his licensee gun when he went on the spot to water his field cannot be taken as his intention or plan to kill his brother. The relations between the brothers being cordial, the tube-well being common, the crop of wheat having been sown in the fields of both the brothers (deceased and the appellant) and the urgency shown by the appellant to water his field vis-a-vis refusal by deceased Rajeev are the circumstances which would have to be considered cumulatively for objective determination whether the appellant intended to kill or to inflict bodily injury to his brother.

68. As held in **Virsa Singh (supra),** the intent required should not be linked with the seriousness of the injury. Rather the requirement is that the prosecution must establish that the injuries inflicted are sufficient to cause death in the ordinary course of nature. Once the prosecution discharged this burden, the person who inflicted injuries can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise, unintentional. Whether the injuries are serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the accused intended to inflict the injuries in question. The question whether the intention is there or not is one of fact and not of law. Whether the conclusion should be one way or the other is a matter of proof.

69. The Court, thus, reaches at the answer to the first question that the appellant had not committed an offence within the meaning of Section 300 IPC, i.e., "culpable homicide amounting to murder", which is punishable under Section 302 of the Code. The incident had occurred in a sudden fight, without any premeditation in the state of anger, the offence committed by the appellant, thus, would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 of the Code.

70. A further question then would be whether the appellant is guilty under Part I or Part II of Section 304.

71. As is evident from the record, the appellant opened two fires on his brother which hit at the left side of the chest of the deceased and the situs of both the injuries was same, they are only at a distance of 3 cm from each other. When the appellant opened fires during the physical altercation upon his brother there was no weapon in the hands of his brother, it, therefore, cannot be said that the death was caused by mistake or accident or without overt act of the appellant. The gun is a dangerous weapon and it is obvious that the appellant was aware that the use of such a weapon cause death. It is, thus, proved that there

was knowledge on the part of the appellant that if gun shot was opened, the possibility of the deceased being killed could not be ruled out. But merely by the said fact, it cannot be said that the appellant had caused gun shot injuries to his brother with the aim or intention to kill him. The aforesaid fact itself is not conclusive to hold that there was an intention on the part of the appellant to kill the deceased.

72. The circumstance, however, proved that the intention probably was to merely cause bodily injury as the injuries were caused by the appellant without premeditation in a sudden fight in the heat of passion upon a sudden quarrel with his brother and as is established from the prosecution evidence, out of remorse after the incident, the appellant also made an effort to save his brother by conveying the occurrence to his another brother through his wife. The only inference which could be drawn in the peculiar facts and circumstances on record is that the intention probably was to merely cause bodily injury.

73. Having regard to the root cause of the incident and the events that sequentially unfolded thereafter, we are of the comprehension that the appellant was overpowered by an uncontrollable fit of anger so much so that he was deprived of his power of self control and being drawn in a web of action reflexes, he fired at the deceased. The fact do not commend to conclude that the appellant had intention to eliminate his brother though he had the knowledge of the likely fatal consequence thereof.

74. On overall consideration of the facts situation and also the subsequent reaction of the appellant, we are of the considered view that the conviction of the appellant ought to be moderated to one under Section 304 Part I of the Code, "Culpable homicide not amounting to murder", punishable in the first part (Part I) of Section 304 of the Code.

75. As we found that in this case, though there may be an absence of the intention to cause death but it is not where there is also an absence of intention to cause such bodily injury as is likely to cause death which in the ordinary course of things is likely to cause death , we do not agree with the arguments of the learned counsel for the appellant that the offence committed by the appellant would fall in the Second Part (Part-II) of Section 304 IPC.

76. Having held that the appellant is guilty of offence under Section 304 Part I, we partially accept this appeal and alter the offence from that of Section 302 IPC to one under Section 304 Part I of the Indian Penal Code.

77. Further considering the facts of the case in particular, according to us, it would meet the ends of the justice if the sentence for the offence is reduced to the period already undergone, as the appellant has suffered incarceration for more than 12 years. The judgement under the appeal is modified in the above terms.

78. The appellant is in jail. He is hereby ordered to be set at liberty forthwith, if he is not required to be detained in connection with any other crime.

79. The appeal is **allowed in part.**

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

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

(2022)06ILR A824
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 5453 of 2007

Rajendra Prasad Sharma @ Toni @ Sonu ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Mayank Bhushan, Sri Akash Mishra, Sri Prashant Kumar Srivastava, Sri Vikram Singh Srivastava (Amicus Curiae)

Counsel for the Respondent:
G.A.

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 302 – murder - case based on circumstantial evidence - prosecution must fully establish the circumstances from which the conclusion of guilt is to be drawn - circumstances so established should be conclusive in nature and tendency - must form a chain of circumstances so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused - such chain of circumstances must be consistent only with the hypothesis of the guilt of the accused - must exclude every possible hypothesis except the one sought to be proved by the prosecution.(Para - 27)

Appellant was a tenant of a one room accommodation - owned by PW-1 (landlord) - foul odour emitting from the room was sensed - tenants including landlord got the lock broken to discover the body - noticed dead body of a girl dressed in a bridal attire lying on a cot - body of deceased in the room of appellant - no direct evidence of offence - chain of circumstantial evidence pointed to the guilt of accused-appellant - ruled out involvement of a third person – trial court convicted accused / appellant – hence appeal.

(B) Criminal jurisprudence - fundamental principle - 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 - in a criminal trial, suspicion, howsoever grave, cannot substitute proof - in case of circumstantial evidence - if two views are possible - one pointing to the guilt of the accused - other his innocence - accused entitled to have the benefit of one which is favourable to him. (Para - 21)

(C) Indian Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge - burden lies on the prosecution to prove the guilt of the accused - burden is not in any way modified by the rule of evidence contained in Section 106 of the Evidence Act - false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused - it cannot be used as a link to complete the chain. (Para -24-27,31)

HELD:-Prosecution evidence raises strong suspicion against the accused-appellant but fails to carry the suspicion to the level of proof. Benefit of doubt goes to appellant. Appellant acquitted of charge for which he has been tried and convicted. Judgment and order of trial court set aside. **(Para -33,34)**

Criminal Appeal allowed. (E-7)

List of Cases cited:-

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

2. Shatrughna Baban Meshram Vs St. of Mah., (2021) 1 SCC 596

3. Shivaji Sahabrao Bobade & anr. Vs St. of Mah., (1973) 2 SCC 793

4. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

5. Shivaji Chintappa Patil Vs St. of Mah., 2021 (5) SCC 626

6. Satye Singh & ors. Vs St. of Uttarakhand, 2022 SCC Online SC 183

7. Nagendra Sah Vs St. of Bihar, (2021) 10 SCC 725

8. Rajasthan Vs Kashi Ram, (2006) 12 SCC 254

9. Thimma & Thimma Raju VS St. of Mysore, (1970) 2 SCC 105

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri Vikram Singh Srivastava as an Amicus Curiae, appointed under order dated 18.05.2022, for the appellant, who is in jail; Sri J.K. Upadhyay, learned AGA, for the State; and have perused the record.

2. This appeal is against the judgment and order dated 29.03.2007/30.03.2007 passed by the 16th Additional Sessions Judge, Kanpur Nagar in S.T. No.216 of 2005 thereby, convicting and sentencing the appellant under Section 302 IPC to imprisonment for life.

INTRODUCTORY FACTS

3. The prosecution case, in brief, is that the appellant was a tenant of a one room accommodation owned by PW-1 (Ashok Kumar Tiwari). On 02.06.2004, when foul odour was sensed, the lock of the room was broke open to notice dead body of a girl dressed in a bridal attire lying on a cot. From that room a *Sindurdan*, *Bindi*, *Lipstick*, Broken bangles and few metal articles were recovered of which a seizure memo (Ex. Ka-2) was prepared. A piece of blanket over which the dead body was lying was also seized of which seizure memo (Ex. Ka-3) was prepared. Blood stained floor and plain floor of the spot from where the body was recovered was also lifted of which seizure memo (Ex. Ka-4) was prepared. Inquest was conducted on 02.06.2004, at about 11.45 am. An inquest report (Ex. Ka-5) was prepared. The body was thereafter sealed and sent for autopsy. The autopsy was conducted on 03.06.2004 at about 12.15 pm by PW-5. The autopsy report (Ex. Ka-8), inter alia, recites as follows:-

Body description

Aged 15 years. Average built body. Rigor mortis passed off both the extremities. Both eyes bulging out, mouth open, tongue protruding out, abdomen distended, skin peeled off at places. Skull hairs loose, nails loose. Maggots present, 1 cm long all over the body.

Ante-mortem injuries:-

Incised wound 9 cm x 6 cm front of neck, 3 cm below chin, skin, muscles, trachea absent. Both carotid arteries cut.

Internal Examination:-

Stomach contained 20 ml water fluids. Small intestine half full with gases.

Large intestine contains faecal matter with gases.

Opinion:- Death due to haemorrhage and shock as a result of ante-mortem injuries

Estimated time of death:- Two days before.

4. Prior to the inquest, a written report (Ex. Ka-1) dated 2.6.2004 in respect of discovery of the body from that room was made at Police Station Kalyanpur, District Kanpur Nagar by Guru Prasad Sharma (PW-2), which was registered as Case Crime No.338 of 2004, at 9.45 am of which a chik FIR (Ex. Ka-6) was prepared by PW-4. In this written report, it was alleged that the room from where the body was recovered was in the tenancy of the accused-appellant (Sonu) whose owner was Ashok Tiwari (PW-1). It was alleged that the accused-appellant used to work as a carpenter and used to stay alone in that room though he was a permanent resident of village Naruwa Kohawa, P.S. Kakwan, District Kanpur Nagar. It was also alleged that the appellant and Km. Seema (the deceased) were related to each other. Despite being related to each other, they had developed an intimate relationship which was not acceptable to Chhotey Lal (not examined), the father of the deceased, and when this relationship was discovered, people had objected to it and made Seema and Sonu understand that they should stay away from each other. The report also alleges that in the night of 30.05.2004, Sonu (the appellant) had invited Km. Seema (the deceased) to his room and in the morning of 31.05.2004, like usual, locked the room and went away, whereafter, on 02.06.2004, when foul odour emitting from the room was sensed, tenants including the landlord got the lock broken to discover the body.

5. After investigation, PW-6 submitted a charge sheet (Ex. Ka-9) against the appellant. After cognizance on the charge sheet, the matter was committed to the court of session where the appellant was charged for the offence of murder punishable under Section 302 IPC, vide order dated 16.07.2005. The appellant pleaded not guilty and claimed for trial.

PROSECUTION EVIDENCE

6. During the course of trial, the prosecution examined as many as 7 witnesses.

7. **PW-1 - Ashok Kumar Tiwari** - landlord. He proved that the room from where the body of the deceased was recovered was given on rent by him to the appellant. In paragraph 2 of his deposition he stated that on 30.5.2004, like usual, Sonu left at 7.00 am for duty but whether he returned that day or not he did not notice. He also stated that he does not know whether on that day, the deceased had come to that room. In paragraph 5 he stated that on 30.5.2004 he did not notice the deceased entering the room of the appellant-accused. In paragraph 10 he stated that when foul door started coming from that room, upon enquiry, he came to know that the accused-appellant never returned after leaving the room in the morning of 31.5.2004. In paragraph 11 he stated that he never saw the accused in the room after 30.5.2004

8. **PW-2 - Guru Prasad Sharma (the informant)**. He spoke about the illicit relations between the appellant (Sonu) and the deceased (Seema) and also stated that they were cousins. Interestingly, he is not an eye witness of any of the incriminating circumstances such as the deceased being

last seen alive with the appellant or of the appellant leaving the room from where the body of the deceased was recovered. In fact, he is not a next door neighbour. Notably, his house is 2-3 furlongs away from the complex bearing the room from where the body of the deceased was found. There is another interesting feature in his testimony, as would be apparent from paragraph 25 of his deposition, which is, that Seema's father was addicted to intoxication and was not gainfully employed and that there was no one to look after Seema and, therefore, she used to roam here and there. The exact words used by PW-2 in that regard are reproduced below:-

"सही बात यह है कि सीमा के बाप नसैड़ी थे कुछ करते धरते नही थे, घटना के दिन में वह घर पर नही थे। इसलिए सीमा मारी मारी फिरती थी। सीमा को कोई परवरिश करने वाला कोई नही था।''

9. **PW-3 - Radhey Shyam**. He is a neighbour and a tenant in the same complex in which the appellant had a room on rent. He proved that the appellant was one amongst many tenants of that complex of which Ashok Tiwari (PW-1) was the landlord. In paragraph 1 of his deposition, PW-3 stated that a girl used to visit Sonu (the appellant) whose name he does not remember. Sometimes that girl used to go back between 10 and 11 pm in the night and sometimes she used to stay over night. He stated that that girl was a relative of the appellant but he is not aware of their relationship. This witness is one of the inquest witnesses. He proved the inquest report. But, interestingly, this witness does not specifically state that he saw the appellant in the company of the deceased whose body was recovered from the room let out to the appellant. He also does not specify a date when he had seen that girl coming and leaving the tenanted accommodation of the appellant. Most importantly, in his deposition, it has come that he had not seen the body because the body was sealed in a cloth when he became a witness to the inquest report.

10. **PW-4- HCP Har Charan Singh.** He is the head Moharrir of the police station concerned where the written report was submitted and was registered as Case Crime No.338 of 2004. He proves the submission of written report, the registration of the case and the GD entry as well as Chik report thereof, which were all exhibited.

11. **PW-5 - Dr. A.K. Gupta, Autopsy Surgeon**. He stated that he was posted at the hospital when on 03.06.2004, at 12.15 hours, body of Seema, daughter of Chhotey Lal, was placed for autopsy. He proved conducting autopsy of the cadaver. He proved the injuries noticed in the autopsy report, which was exhibited as Ex. Ka-8. In paragraph 6 of his deposition, he ruled out the possibility of death having occurred by morning of 31.5.2004 by stating as follows:-

"मैगट्स ;डंहहवजेद्ध प्रायः मृतक की मृत्यु के डेढ़ दिन बाद बनने प्रारम्भ हो जाते है। मृतका के शव विच्छेदन से समय पूरे शरीर मे डंहहवजे विद्यमान थे मृतका की मृत्यु दिनांक 30.5.04 से 31.5.04 की प्रातः के मध्य होना सम्भव नही था।''

In his cross examination, PW-5 admitted that death of Seema could have occurred around noon of 01.06.2004.

12. **PW-6 - Sanjay Kumar,** the second investigating officer, who took over the investigation from Mohan Verma (PW-

7), the first investigating officer, proved various steps of investigation, particularly, in respect of effecting the arrest of the appellant. He stated that as he could not effect the arrest of the appellant, despite steps, he submitted charge sheet in abscondence. The charge sheet was exhibited as Ex. Ka-9.

13. **PW-7- S.I. Mohan Verma,** the first investigating officer. He stated that on 02.06.2004, after registration of the first information report, he recorded the statement of the scribe of the FIR, the informant and proceeded to the spot and, after inspecting the spot, prepared site plan. The site plan was exhibited as Ex. Ka.-10. He stated that on the spot he found Sindoor, Bindi, etc of which he prepared seizure memos, which were marked Ex. Ka-2. Ex. Ka-3 and Ex. Ka-4. He also conducted inquest proceeding and prepared report (Ex. Ka-5) and papers for autopsy. He proved dispatch of the cadaver for autopsy and of recording statement of inquest witnesses.

14. The incriminating circumstances emanating from the prosecution evidence were put to the appellant for recording his statement under Section 313 CrPC. In the statement recorded under Section 313 CrPC the appellant though denied the allegations but admitted that the room from where the body of the deceased was recovered was in his tenancy and it was owned by PW-1. Interestingly, by question no.9, the statement of PW-5, Dr. A.K. Gupta (the Autopsy Surgeon), was put to the appellant in a manner which was at variance with what PW-5 had actually stated as a witness. The question put, read, as if, PW-5 stated that the deceased had died between 30.05.2004 and morning of 31.05.2004 when, in fact, from paragraph 6 of PW-5's statement it appeared that he had ruled out the possibility of her death between 30.05.2004 and morning of 31.05.2004. Further, no question was put to the appellant in respect of his alleged abscondence as disclosed by PW-6.

15. The defence, however, examined no witness.

TRIAL COURT FINDINGS

16. The trial court while recording conviction took notice of the following circumstances as proved: (i) that in the evening of 30.05.2004 the deceased was seen entering the room of Rajendra Prasad alias Sonu and thereafter she was never seen alive; (ii) that on 02.06.2004 her body was discovered from that room, after breaking open the lock put on that room; (iii) that autopsy disclosed a homicidal death; (iv) that room was let out to the accused-appellant therefore, he was under an obligation to explain the presence of her body in that room; and (v) that the appellant did not return to his room and remained absconding. The trial court held that these circumstances constitute a chain so complete that it pointed to the guilt of the appellant and ruled out involvement of a third person. As there was no good explanation coming from the appellant, the trial court drew an inference in respect of appellant's guilt.

SUBMISSIONS ON BEHALF OF THE APPELLANT

17. Assailing the judgment and order of the trial court, learned counsel for the appellant has submitted that PW-1 (the landlord), in paragraph 2 of his deposition, had specifically stated that on 30.05.2004, at about 7 am in the morning, the appellant

had left the room to attend to his duty, as usual, and whether he returned thereafter or not, he was not aware. Learned counsel for the appellant further pointed out that in paragraph 5 of his deposition, PW-1 specifically stated that on 30.05.2004, he had not seen Seema (the deceased) going to the room of the accused-appellant. It has been submitted that neither PW-1 nor PW-3 (the neighbour) stated that they saw the deceased entering the room in the tenancy of the appellant on either 30.05.2004 or 31.05.2004 and none of the witnesses had stated that in that room when the deceased entered, the appellant was present. It has been urged that the prosecution evidence is completely silent as regards the deceased being last seen alive with the accused-appellant in that room. It has also been urged that since there is a positive stand in the prosecution evidence, namely, the testimony of PW-1, that the accused left the room in the morning of 30.05.2004 and there is a categorical statement of the doctor (PW-5), vide paragraph 6, that the deceased could not have died in the intervening night of 30.05.2004/31.05.2004 and there being no evidence whatsoever that after leaving the room in the morning of 30.05.2004, as stated by PW-1, the appellant returned back to his tenement, there exists no reliable evidence that soon or before the probable time of death of the deceased was seen alive in the company of the appellant. It has also been urged that the incriminating circumstance, that is, on 30.05.2004 the deceased was seen entering the room of the appellant, on which the trial court has placed reliance, is, firstly, not proved and, secondly, the trial court has misread the evidence that there is statement of the witness that on 30.05.2004 the deceased was seen entering the room in the tenancy of the appellant. It has been submitted that this is a case where there is no motive for the crime and in so far the lock allegedly put on the door of the room is concerned, there is no evidence that the lock was of the appellant or that its key was recovered from the appellant. Further, there is no seizure memo of that lock. In so far as the alleged conduct of the appellant relating to abscondence is concerned, it has not been put to the appellant while recording his statement under section 313 CrPC. It has thus been prayed that the appeal of the appellant be allowed and the judgment and order of the trial court be set aside.

SUBMISSIONS ON BEHALF OF STATE

18. Sri J.K. Upadhyay, learned AGA, who has appeared for the State, has submitted that as it is admitted by the appellant that he was a tenant of the accommodation, continuity of his possession over the accommodation would be deemed and therefore, as the body of the deceased was recovered from that accommodation of which he was in possession, the burden was on the appellant to specifically disclose that he was away at the relevant time and could not have been there when Seema was killed. He submits that as there is no explanation of the appellant as to when he left the room and as to why he could not, or did not, return back to his room, which was admittedly in his tenancy, an inference with regard to his guilt was a logical inference from the proven circumstances. He further submitted that the deceased was in a relationship with the appellant therefore, in the facts of the case, there could be multiple reasons for the murder including the pressure being built by the deceased upon the appellant to marry her. Hence, absence of evidence of a motive, in the facts of the case, is not relevant. He thus submitted that the proven

circumstances taken together, constitute a chain so complete that points towards the guilt of the appellant and rule out all other hypotheses consistent with the innocence of the appellant therefore even if the trial court misread a portion of the testimony that, by itself, would not be sufficient to set aside the judgment and order passed by the trial court. He thus prays that the appeal be dismissed and conviction recorded by the trial court be upheld.

ANALYSIS

19. Having noticed the prosecution case, the entire prosecution evidence and the rival submissions, before we proceed to evaluate the prosecution evidence, we must remind ourselves that this a case where there is no direct evidence of the offence. It is a case based on circumstantial evidence. In a case based on circumstantial evidence as to when conviction can be recorded, law is well settled by the Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116** where, in paragraph 153, it was observed:-

"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 following observations were made:

"19. .....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."

20. A three-judge Bench of the Apex Court in case of **Shatrughna Baban Meshram Vs. State of Maharashtra (2021) 1 SCC 596** reiterating the legal principles set out in the case of **Sharad Birdhichand Sarda (supra),** in para 42, observed:-

".....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."

21. In addition to above, we must bear in mind the most fundamental principle of criminal jurisprudence, which is, 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 **(vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793)**. These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in ***Devi Lal v. State of Rajasthan, (2019) 19 SCC 447*** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

22. At this stage, it would be useful also to examine as to when a conviction could be sustained with the aid of section 106 of the Evidence Act. In respect of conviction with the aid of section 106 of the Evidence Act of a person on death of his or her spouse due to injuries, the Supreme Court in the case of **Shivaji Chintappa Patil Vs. State of Maharashtra**, reported in **2021 (5) SCC 626,** in paragraph 23, observed:-

"23. 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."

23. Further, in the case of **Satye Singh and others Vs. State of Uttarakhand 2022 SCC Online SC 183,** after analysing earlier decisions, in respect of applicability of Section 106 of Evidence Act, the Supreme Court, in paragraph 16, observed:-

"16. Applying the said principles to the facts of the present case, the Court is of the opinion that the prosecution had miserably failed to prove the entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Reliance placed by learned advocate Mr. Mishra for the State on Section 106 of the Evidence Act is also misplaced, inasmuch as Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused. In Shambu Nath Mehra vs. State of Ajmer, AIR (1956) SC 404, this court had aptly explained the scope of Section 106 of the Evidence Act in criminal trial. It was held in para 9:

"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 preeminently 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]."

24. The Apex Court in **Nagendra Sah Vs. State of Bihar (2021) 10 SCC 725** observed in paragraphs 22 and 23 as:-

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in

establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. ***In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."***

25. Further, in the case of **Shivaji Chintappa Patil (supra)** in paragraph no. 25 it was observed:-

"25. Another circumstance relied upon by the prosecution is, that the appellant failed to give any explanation in his statement under Section 313 Cr.P.C. ***By now it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain.*** *Reference in this respect could be made to the judgment of this Court in Sharad Birdhichand Sarda (supra)."*

26. In ***Rajasthan Vs. Kashi Ram, (2006) 12 SCC 254,*** the Supreme Court in paragraph 26 of the judgment, clarified the law with regard to the provisions of Section 106 of the Evidence Act in the following words:-

"It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatiable with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

The principle has been succinctly stated in Naina Mohd."

27. In our considered view, the legal principle deducible from the decisions noticed above is that in a case based on circumstantial evidence the prosecution must fully establish the circumstances from which the conclusion of guilt is to be drawn; the circumstances so established should be conclusive in nature and tendency; they must form a chain of circumstances 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. If the chain of circumstances by itself is not complete, lack of explanation, or false explanation tendered, by the accused is not sufficient to complete the chain. Thus, the ordinary rule that applies to criminal trials is that the burden lies on the prosecution to prove the guilt of the accused, this burden is not in any way modified by the rule of evidence contained in Section 106 of the Evidence Act. It is only in cases where facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted and that such inference can be negatived by proof of some fact which can only be within the special knowledge of the accused, the court can take the aid of Section 106 of the Evidence Act to take the failure of the accused to adduce an explanation as an additional link to the chain of circumstances. But if the proven circumstances by themselves do not indicate that in all human probability it is the accused who has committed the crime in question and those proven circumstances do not exclude a reasonable ground for a conclusion consistent with the innocence of the accused, it would not be legally justified to absolve the prosecution of its burden to prove the guilt by taking recourse to the provisions of Section 106 of the Evidence Act. Ultimately, it is a matter of appreciation of evidence and, therefore, each case must turn on its own facts.

28. In the instant case, the circumstances proved by the prosecution beyond reasonable doubt are: (i) the deceased was a relative (cousin) of the appellant and used to visit the appellant; (ii) the dead body of the deceased was recovered on 02.06.2004 from a room which was let out to the appellant; and (iii) the autopsy report, dated 3.6.2004, indicated that the deceased died a homicidal death two days before the autopsy. At this stage it be noted that the autopsy surgeon (PW-5) ruled out possibility of death occurring between 30.5.2004 and the morning of 31.05.2004. According to the autopsy surgeon death probably occurred around noon on 01.06.2004. Another important feature to note is that the prosecution has failed to prove that the deceased was last seen alive with the accused, either on 30.05.2004 or any time thereafter, till recovery of her body on 02.06.2004.

29. In this case the prosecution has led no evidence to substantiate that the appellant and the deceased lived either as husband and wife or as a live-in couple. The evidence is that the deceased used to come and go. When we carefully scrutinise the prosecution evidence, we would find that the prosecution does not allege continuous presence of the deceased in that room from where her body was recovered. As to when she came, there is no

admissible evidence; yet, the trial court recorded a finding that she came on 30.5.2004. What is important to note is that it is not the case of the prosecution that the deceased had no other abode than the place from where her body was recovered. The evidence of the prosecution witness is that she used to come and go. Thus, at best she could be considered a visitor of the place from where her body was recovered but not a resident of that place. The other aspect which assumes importance is that the prosecution has failed to disclose any motive for the crime. In a case based on circumstantial evidence, motive assumes importance. If the accused had been in a relationship with the deceased, there was no reason for the accused to commit her murder. But, interestingly, from the statement of PW-2, this relationship was not palatable to other relatives of the deceased as the deceased and the accused were cousins. In these circumstances, there existed a motive for others, who were not happy with that relationship, to commit the crime.

30. In so far as presence of the body of the deceased in the room of the appellant is concerned, that would have been a gravely incriminating circumstance, if it had been proved, firstly, that the room was under the lock and key of the accused-appellant, secondly, that the deceased entered the room, when the accused was present, and, thirdly, that the appellant had not left the accommodation before the probable time of her death.

31. In the instant case, though, it is alleged that the lock had to be broke open to retrieve the body but neither the lock has been seized nor its key has been recovered from the appellant to show that the room was in exclusive possession and control of the accused appellant. Importantly, the lock of the room was broke open even before lodging the FIR therefore, it was not proved beyond doubt that the room was locked and in exclusive control or possession of the appellant. In respect of deceased entering the room on any particular day in the presence of the accused appellant, there is no evidence. The evidence is of general nature, that is, the deceased used to come and go. In respect of the presence of the accused appellant on or about the relevant time, as per PW-1, to his knowledge, the accused left the room in the morning of 30.05.2004. But, as per information received by him (PW-1), accused left in the morning of 31.05.2004 and did not return. As the statement with regard to leaving on 31.5.2004 would be hearsay, we would have to accept the first statement, that is, the accused left in the morning of 30.05.2004. No doubt, PW-1 stated that the accused left the room, as usual, after locking the room, but, interestingly, the lock alleged to have been put on the door, which was broke open to retrieve the body, has neither been seized nor produced. No key of that lock is stated to have been recovered from the appellant. In these circumstances, one cannot rule out the hand of some one else who had access to that room from where the body was retrieved. Once that is the position and testimony of PW-1 is clear that the appellant had left the accommodation on 30.05.2004 and there is no evidence of his return or as to when the deceased entered the room, the possibility of somebody else committing the crime is not ruled out by the prosecution evidence. In such circumstances, by relying on the legal principles governing a case based on circumstantial evidence, we have no hesitation in extending the benefit of doubt to the appellant. More so, when the autopsy

surgeon's (PW-5's) report (Ex. Ka-8), dated 3.6.2004, and his testimony rules out death between the night of 30.05.2004 and the morning of 31.05.2004.

32. At this stage, we may observe that the investigating officer led evidence in respect of various steps taken by him to effect the arrest of the appellant to demonstrate that the accused was absconding but, unfortunately, those incriminating circumstances were not specifically put to the appellant to elicit his explanation while recording his statement under Section 313 CrPC. Without going into the legal aspect as to whether those incriminating circumstance would have to be eschewed from consideration, we may observe that though the conduct of an accused in absconding immediately after the occurrence is relevant, as an indication of his guilty mind, but, it is not conclusive of that fact because, sometimes even innocent persons, when suspected, may abscond to avoid arrest. In **Thimma and Thimma Raju V. State of Mysore, (1970) 2 SCC 105**, while giving not much importance to the allegation that the accused absconded after the crime, a three-judge Bench of the Supreme Court, in paragraph 11 of its judgment, observed: "*Even innocent persons may, when suspected of grave crimes, be tempted to evade arrest: such is the instinct of self-preservation in an average human being. We are therefore, not inclined to attach much significance to this conduct on the peculiar facts and circumstances of this case.*"

33. In the instant case, abscondence would have been a gravely incriminating circumstance had it been proved that the deceased was wife of the accused-appellant and the accused-appellant had motive to finish off the deceased. Because, in those set of facts, a presumption in respect of joint living could be drawn. But here marriage or live-in relationship of the deceased with the appellant is not proved by the prosecution. Prosecution evidence only proves that she was a regular visitor. It is not proved that she resided with the appellant as a couple and had no other abode. Notably, except for vermillion (Sindoor), bangles, etc nothing much was recovered to demonstrate that goods or clothes of her or of the appellant were there to suggest their joint living. Interestingly, though the dead body was in a bridal attire but there is no evidence that she recently got married to the appellant. May be she wanted to marry the appellant, and that may be the reason for her murder, but conjectures and speculations cannot take the place of proof in a criminal trial. The prosecution had to dispel all these doubts by leading cogent and coherent evidence. In this case, the prosecution was required to establish beyond reasonable doubt as to when the deceased entered the room and that when she entered the room, the appellant was present. If that was proved, the prosecution might have succeeded in absence of evidence or explanation from the accused regarding him parting company of the deceased before the probable time of her death. Rather, here, the prosecution evidence itself is that accused left in the morning of 30.05.2004 or 31.05.2004 (if the hearsay part of the evidence is accepted), whereas, the autopsy evidence suggests that deceased could have died on 01.06.2004. In these circumstances, it would be unsafe to convict the appellant only on his abscondence. The other reason why we do not propose to give that much weightage to his abscondence is lack of motive for the accused to commit the crime as also the possibility of others'

involvement to protect their honour inasmuch as prosecution story accepts that people were objecting to the relationship between the appellant and the accused as they were cousins. For all the reasons above, we are of the view that the prosecution evidence though raises strong suspicion against the accused-appellant but fails to carry the suspicion to the level of proof. Hence, the benefit of doubt must go to the appellant.

34. Consequently, and for all the reasons recorded above, the appeal is allowed. The judgment and order of the trial court convicting and sentencing the appellant is set aside. The appellant is acquitted of the charge for which he has been tried and convicted. The appellant is reported to be in jail. He shall be shall be released forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

35. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022)06ILR A837
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.05.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No.7441 of 2008

Shaki ...Appellant (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Amit Daga A/c, Sri Ashok Kumar Panday A/C, Sri Abhishek Kumar Jaiswal

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

Criminal Law- Indian Evidence Act, 1872- Section 8- Subsequent Conduct- The accused-appellant has not absconded and his conduct was not suspicious but was bonafide as he was also searching the deceased along with other boys. Absconding may lead to suspicion against the person who is suspected and has absconded after occurrence but in this case it is not so- ''Absconding' is a telltale circumstance of a guilty mind, unless the accused can offer a reasonable explanation for his absence for several days at his normal place of residence or work or at places where he would normally be expected to be found. It is only one link in the chain of evidence and not the determining link. Hiding in his own house may be absconding. It is hiding to evade process of law.

Where the accused does not abscond after the commission of the offence, then the said fact would be one of the considerations pointing to his innocence as subsequent conduct forms one of the links in a case of circumstantial evidence.

Indian Evidence Act, 1872-Section 45- That the child had been murdered on the previous evening at around 4 to 5 pm and, therefore, when the appellant was seen last at around 4 to 5 pm i.e. around the time when the child was killed it could be safely concluded that the appellant alone had killed the child-No doctor can determine the exact time of death as there can be a variation of six hours on both sides.

Settled law that on the basis of the Post Mortem Report the time of death can only be opined by the medical examiner and no specific time of death can be given with exactitude.

Indian Evidence Act, 1872- Conviction on the basis of the fact that the appellant was last seen with the deceased has no ground to stand as there are many missing links between the time the first informant (P.W.-1), the P.W. - 2 and

Surendra had seen the appellant last with the child and the time when the body of the deceased was found-In scrutinising circumstantial evidence, a court is required to evaluate it to ensure that the chain of events is established clearly and completely, to rule out any reasonable likelihood of the innocence of the accused. Whether the chain is complete or not would depend on facts of each case emanating from the evidence and no universal yardstick should ever be attempted.

Settled law that in a case resting on circumstantial evidence the prosecution has to connect the links of the circumstances that unerringly point to the guilt of the accused and to no other hypothesis. (18, 29, 33, 38, 39, 40)

Criminal Appeal allowed. (E-3)

Judgements/ Case law relied upon:-

1. Hanumant Govind Nargundkar & anr. Vs St. of M.P A.I.R. 1952 SC 343
2. Sharad Birdhichand Sarda Vs St. of Maha. 1984 (4) SCC 116

3. Bablu alias Mubarik Hussain Vs St. of Raj. 2006 (13) SCC 116

4. Vijay Shankar Vs St. of Har. 2015 (12) SCC 644

5. Anjan Kumar Sharma & ors. Vs St. of Assam 2017 (100) ACC 913

6. St. of Kar. Vs Chand Basha 2016 (1) SCC 501

7. St. of U.P Vs Satveer & ors. 2015 (9) SCC 44

8. Baliya @ Bal Krishan Vs State of M.P. 2012 (79) ACC 713

9. CrLa. No. 5824 of 2010 (Satish Sharma & anr Vs St. of U.P.).

10. Thimma Vs St. of Mysore, AIR 1971 SC 1871

11. St. of U.P. Vs Mohd. Iqram (2011) 3 SCC (Cri) 354

12. Kunju Mohd. Vs St. of Ker. 2004 SCC (Cri) 1425

13. Pattipati Venkaiah Vs St. of A.P. 1985 4 SCC 80

14. Nathiya Vs St. Rep. By Inspr. of Police, Bagayam P.S, Vellore, (Crim. Appeal No. 1015 of 2010, date of judgement 08.11.2016)

15. Ganpat Singh Vs St. of M.P (2018) 2 SCC (Cri) 159

16. Raju Vs State, by Inspr. of Police, AIR 2009 SC 2171

17. Vithal E Adlinge Vs St. of Maha., AIR 2009 SC 2067)

18. Krishna Ghose Vs St. of W.B., AIR 2009 SC 2279

19. Dev Kanya Tiwari Vs St. of U.P., (2018) 5 SCC 734

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

1. Heard Sri Amit Daga (Amicus Curiae) assisted by the Sri Abhishek Kumar Jaiswal learned counsel for the appellant and Sri Vikas Goswami learned Government Advocate.

2. This jail appeal has been filed against the judgement and order dated 20.3.2008 passed by the Additional Sessions Judge, Court No. 6, Muzaffarnagar, in Session Trial No. 854 of 2007 arising out of Case Crime No. 7 of 2007, under Section 302 and 201 IPC, Thana - Bhaunrakala, District - Muzaffarnagar, wherein the appellant - Shaki- was tried and punished for the offences under Sections 302 and 201 IPC. Under Section 302 IPC, the appellant was awarded life sentence and a fine of Rs. 10,000/-. In the event of non-deposit of

fine, the appellant was to undergo further two years' of rigorous imprisonment and under Section 201 IPC, the appellant was to undergo three years of rigorous imprisonment and a fine of Rs. 2,000/- was also imposed. In the event of non-deposit of fine, the appellant was to undergo a further rigorous imprisonment of three months. All the punishments were directed to run concurrently.

3. The father of the deceased Shiva had lodged a first information report on 24.1.2007 alleging that his son Shiva, aged about five years, on the previous day i.e. 23.1.2007, at around 4-5pm, was seen with the appellant - Shaki s/o Somdatt Harijan. It has been alleged in the first information report that when the son of the first informant had not returned, then the first informant tried to search for his son and when the son of the first informant and the accused were not found till the morning of the next day, a first information report was lodged. It has been stated in the F.I.R. that the first informant along with other villagers had commenced a search in the adjoining jungle and then in the sugar cane field of one Satendra s/o Kitepal, the dead body of his son was found buried in a pit which was covered with mud. However, his legs were protruding out. In the first information report itself, the first informant had alleged that the accused had a motive to kill the son of the appellant as earlier the appellant had done some dirty work with Deepak, another son of the first informant who was elder to the one who had died. Since the first informant had, two or three days prior, threatened the appellant with dire consequences, the appellant had taken a revenge. He had also stated in the F.I.R. that when the appellant had taken away his son Shiva, his brother Satyaveer and certain other villagers had also seen the appellant taking the boy with him. He stated that the body of his child Shiva had been exhumed from where the accused-appellant had buried him and the dead body was lying over there. He, therefore, had prayed that the State might proceed against the accused-appellant and take action for the commission of the crime. Thereafter, when the first information report was lodged on 24.1.2007, the police started the investigation. Amongst other investigations, postmortem was also done on the body of the deceased. Thereafter, the Police submitted a charge sheet and upon the submission of the charge sheet, the Court of District and Sessions Judge, Court No. 6, Muzaffarnagar, framed charges against the accused-appellant under Sections 302 read with Section 201 of the IPC. The accused pleaded not guilty and demanded a trial.

4. From the side of the prosecution, P.W. - 1, i.e. the first informant, was examined, Satyaveer, the brother of the first informant was examined as P.W. - 2, the Doctor who had conducted the postmortem was examined as P.W.- 3, the P.W. - 4 Vijendra Singh was the signatory on the Punchnama, the P.W. - 5 & 6 were the investigating officers who had conducted the investigation and the P.W. 7 was the chik writer who was produced to prove the chik.

5. From the defence side, no one was produced. However, the appellant was confronted with certain questions and situations under Section 313 Cr.P.C., which questions were, however, denied by the accused-appellant on 12.11.2007. Thereafter, the Trial Court, after assessing all the evidence and after hearing all the parties passed the judgement and order dated 20.3.2008 convicting the accused-

appellant under Section 302 IPC for life imprisonment. A fine of Rs. 10,000/- was also imposed (in the event of non-deposit of fine, the accused-appellant was to undergo a further rigorous imprisonment of two years). He was also convicted under Section 201 IPC for three years of rigorous imprisonment and a fine of Rs. 2,000/- was also imposed (in the event of non-deposit of fine, the accused-appellant was to undergo a further three months of rigorous imprisonment).

6. It has been contended by the learned counsel for the accused-appellant that appellant was innocent and had been wrongly convicted as the assessment of evidence was not done properly by the Trial Court. The following were the arguments advanced by the learned counsel for the accused-appellant:-

I. The appellant was seen with the victim by the first informant at around 4 - 5pm on 23.1.2007 and, thereafter, the dead-body was found on the next day i.e. on 24.1.2007 at around 12:30pm. There is absolutely no connecting evidence to suggest that the appellant alone was guilty of murdering the child Shiva.

7. Learned counsel for the accused-appellant, therefore, submitted that the evidence on the basis of which the punishment had taken place was circumstantial in nature and the circumstances from which the conclusion of guilt was drawn were not such by which, at the first instance, it could be fully established that the accused-appellant was guilty of the crime. He further submitted that the circumstances should have been of such a nature and tendency that they should have excluded every other hypothesis but the one proposed to be proved by the prosecution.

8. He submits that even otherwise, there ought to have been 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 within human probability that the act must have been done by the accused-appellant alone and no one else. He further submits that conviction could have been possible only if the prosecution, after it had led its evidence, would have connected the chain of circumstances in such a manner that the circumstances would have led to no other conclusion other than the conclusion that the accused-appellant was guilty.

9. Learned counsel for the accused-appellant, therefore, submits that after the first informant had seen the accused with the deceased at around 4 - 5 pm in the evening of 23.1.2007, there was absolutely no other evidence which could lead to the conclusion that the accused and the accused alone had killed the deceased and had buried him in the sugar cane field of Satendra s/o Kitepal.

10. Learned counsel for the accused-appellant submitted that there is no clear and specific evidence that the place where the body of the deceased was recovered was accessible only to the accused and no one else. He, therefore, submits that there was absolute lack of evidence with regard to the fact that the accused was last seen with the deceased and furthermore there was no connection with the evidence of the fact that even if the accused was last seen with the victim he had in fact perpetrated the crime. Learned counsel, therefore, submits that it would be very unsafe to conclude that the appellant was guilty of the murder.

11. Learned counsel for the accused-appellant to bolster his argument relied

upon **A.I.R. 1952 SC 343 : Hanumant Govind Nargundkar and another vs. State of Madhya Pradesh, 1984 (4) SCC 116 : Sharad Birdhichand Sarda vs. State of Maharashtra, 2006 (13) SCC 116 : Bablu alias Mubarik Hussain vs. State of Rajasthan, 2015 (12) SCC 644 : Vijay Shankar vs. State of Haryana, 2017 (100) ACC 913 : Anjan Kumar Sharma and others vs. State of Assam, 2016 (1) SCC 501 : State of Karnataka vs. Chand Basha, 2015 (9) SCC 44 : State of Uttar Pradesh vs. Satveer and others, 2012 (79) ACC 713 : Baliya @ Bal Krishan vs. State of M.P.** and the Criminal Appeal No. 5824 of 2010 (Satish Sharma and another vs. State of U.P.).

12. Learned counsel for the accused-appellant, therefore, submitted that the chain of evidence from the time the appellant was last seen with the deceased and till the body of the deceased was found was definitely not complete and, therefore, it could definitely not be said that the evidence was such which could make the prosecution to reach the only conclusion that the appellant was the perpetrator of the crime.

II. Learned counsel for the accused-appellant has submitted that in the first information report the father of the deceased, Sri Karan Singh had stated that the appellant had a motive to kill his son on account of the fact that the first informant had threatened the appellant with dire consequences because of the fact that he had a few days earlier done some dirty work with another son of his, namely, Deepak.

13. Learned counsel for the appellant submits that the attribution of this motive to the appellant was absolutely misplaced as the learned counsel for the accused-appellant submitted that if the appellant had done any dirty work on the person of the son of the first informant then upon seeing the deceased/victim with the appellant, the father/first informant would definitely have reprimanded both his child and also appellant for being together.

14. Learned counsel for the appellant submitted that no father in his proper senses would allow any child of his to be with a person who had on an earlier occasion tried to do something dirty on the person of any one of his children and, therefore, learned counsel for the appellant submits that the first informant had for no reason whatsoever tried to implicate the appellant.

III. Learned counsel for the accused-appellant submitted that there were many contradiction in the statements made by the prosecution witnesses. He submits that P.W.-1 i.e. the first informant had stated in the F.I.R. that the witnesses of fact were he himself and Satyaveer. However, in his cross-examination, he has stated that along with him Satyaveer, his brother and one Surendra had also seen the appellant taking away the child. Here, by Surendra he had meant Surendra s/o Rahtu Harijan which name finds place in the list of witnesses in the charge sheet.

15. Learned counsel for the accused-appellant submits that while at one place in his testimony, he has stated that he himself, his brother Satyaveer and Surendra s/o Rahtu had seen the child being taking away at around 4-5pm, in his cross-examination he had stated that he, Surendra s/o Shree pal and Kripal s/o Kadam had also seen the child being taking away by the appellant on 23.1.2007. Learned counsel states that the

father in his cross-examination has further stated that on that date both Surendra and Kripal had come back from work after 6:30 pm in the evening after it was dark. Learned counsel, therefore, states that there is a contradiction in what the first informant says in the F.I.R. from what he says in the examination in chief and further he has taken a different stand in the cross-examination.

16. Learned counsel for the accused-appellant further submitted that even though the first informant had stated in the first information report that after 4 to 5 pm when the appellant was last seen with the child the accused was not seen thereafter till his arrest but P.W. -2 i.e. that the brother of the first informant Satyaveer in his statement had stated that Shiva's body was found at around 12:30pm and the first person to find the body of the deceased was Shaki, that is the accused along with four other boys, namely, Vipin, Sonu, Pradeep and Ankit. Learned counsel for the accused-appellant, therefore, submits that, in fact, Shaki as per the statement of P.W. -2 was throughout searching for the child Shiva. Since learned counsel for the appellant had heavily relied upon this part of the statement of P.W. 2, the same is being reproduced here as under:- ''शिवा की लाश करीब साढे बारह बजे दिन में मिली थी। सबसे पहले लाश के पास शाकी अभि0 चार लडको को लेकर जिनमें अंकित,
विपिन, सोनू व प्रदीप थे तलाश कराने ले गया था। उन लडकों को ही शाकी ने बताया था शिवा कीलाश गन्ने के खेत में है। उसके बाद ये पांचोंगांव मे गये थे। और फिर गांव वाले इनके साथ गये थे।साकी यह बात बताकर गांव से फरार हो गया था।''

17. Learned counsel for the accused-appellant further submitted that to disprove the fact that Shaki had seen the dead body along with his four friends, namely, Ankit, Vipin, Sonu and Pradeep the four friend were never produced in the witness box.

18. In this case, the accused-appellant has not absconded and his conduct was not suspicious but was bonafide as he was also searching the deceased along with other boys. Absconding may lead to suspicion against the person who is suspected and has absconded after occurrence but in this case it is not so.

19. "Absconding' is a telltale circumstance of a guilty mind, unless the accused can offer a reasonable explanation for his absence for several days at his normal place of residence or work or at places where he would normally be expected to be found. It is only one link in the chain of evidence and not the determining link. Hiding in his own house may be absconding. It is hiding to evade process of law. In ***Thimma vs. State of Mysore, AIR 1971 SC 1871*** the Supreme Court held that even innocent persons may, when suspected of grave crimes, be tempted to evade arrest. Unnatural conduct of accused can strengthen prosecution version.

20. Learned counsel for the appellant further submitted that if the P.W. 1 i.e. the first informant was of the view that Shaki, the accused and the deceased were together after they were last seen on 23.1.2007 in between 4-5pm till the incident had occured then the first informant should have got at least some report registered with the Police with regard to the fact that his son was not being found.

IV. Learned counsel for the accused-appellant still further has argued that if the post mortem report was seen then

there was no sign of any dirty work (as mentioned in Section 377 IPC) having been done on the body of the deceased. He specifically pointed out to column 4 of the postmortem report which is to the effect that there was no abrasion and laceration wound around the anus and, therefore, learned counsel for the appellant submitted that for no reason the appellant was implicated and, thereafter, punished.

21. Learned counsel for the appellant while assailing the judgement of the Trial Court submits that the trial court had only presumed on the basis of suspicion that the deceased was taken away by the appellant after he was last seen on 23.1.2007 at around 4 to 5 pm and he submitted that suspicion cannot take the place of proof. He submits that just because there was an enmity it could not be said that it had to be concluded that the appellant had killed the son of the first informant.

22. Learned counsel for the accused-appellant, thereafter, has also pointed out to the delay in the filing of the first information report. He has drawn the attention of the Court to the statements made by other witnesses wherein it was evident that they had seen the child till very late in the evening much after 4 to 5 pm. It is noteworthy that the presence of the finger prints on the neck of the deceased with the fingers of the accused was not matched. Similarly, the footprints of the actual accused may have been present on the spot, but those footprints were not matched with the footprints of the accused.

23. Learned Additional Government Advocate Sri Vikas Goswami, however, in his reply has submitted that when the appellant was last seen with the deceased at around 4 to 5 pm and, thereafter, when the body was found around 12:30 pm on the next date i.e. 24.1.2007, the prosecution could come to only one conclusion and that was that the appellant had taken away the child and had killed him and buried him in the sugar cane fields. Thus, it was established that the deceased was seen with the accused before the death and, therefore, he was responsible for the death.

24. Learned AGA further submitted that minor discrepancies in the statements of various witnesses with regard to seeing the child playing with the appellant were of no consequence and they should be ignored.

25. Learned AGA submits that the P.W. -1 & 2 were rustic witnesses and if there were certain contradictions in their statements then they were of no value and should be ignored. He vehemently submitted that the hyoid bone of the child was fractured and, therefore, the only conclusion was that the child was murdered by strangulation by the appellant, with whom he was last seen.

26. Learned AGA also tried to fix the time of occurrence by drawing the attention of the Court to the rigour mortis which had set in and he submitted that the stage of rigour mortis was such that it definitely suggested that the child had been murdered on the previous evening at around 4 to 5 pm and, therefore, when the appellant was seen last at around 4 to 5 pm i.e. around the time when the child was killed it could be safely concluded that the appellant alone had killed the child. The Hon'ble Supreme Court has opined in various cases that no doctor can determine the exact time of death as there can be a variation of six hours on both sides.

27. In the case of **State of U.P. vs. Mohd. Iqram reported in (2011) 3 SCC (Cri) 354,** the Hon'ble Supreme Court has

held that *"the post mortem report is not a substantive piece of evidence. Substantive piece of evidence is that statement which is given by witness in Court. If the post mortem is proved but that does not meant that its each and every content thereof also proved or can be held admissible."*

28. The decision passed in the case of **Kunju Mohammad v. State of Kerala reported in 2004 SCC (Cri) 1425** is relevant in respect of rigor morits and its evidence for ascertaining the time of death. It has been observed that " *according to the prosecution the incident took place at 8.15 on 03.11.1991. Post Mortem of the deceased was conducted at 13.30 on the same day. Doctor opined in P.M.R. that rigor mortis was present all over the body. Doctor in his evidence stated that rigor mortis sets in 4 to 7 hours after death. The Supreme Court on the basis of rigor mortis observed that the death in question must have occurred before 6.30 am on 03.11.1991 not at 8.15 a.m. as per prosecution."*

29. The time of occurrence can be determined by some other means also such as food found while conducting post mortem.

30. In the instant case, 400ml liquid food was found in the stomach. The autopsy was conducted on 25.1.2007 at 2:30pm. According to the prosecution case, the deceased was killed in the night of 23/24.1.2007. Thus, the post mortem had been conducted after about two days from the time of probable death.

31. According to P.W.-3, Dr. Ashwani Kumar Sharma, who did the post mortem has opined that there is possibility that the deceased was killed in between the evening of 23.1.2007 at 4:00pm to 12:00am. The deceased was killed between 4:00pm to 12:00am of night of 23.1.2007 and 24.1.2007.

32. In the cross-examination, the P.W. - 3, has opined that food remains in the stomach of alive person can be there for six to eight hours. He deposed that the deceased died after 6 to 8 hours after taking the food. He has agreed that there is a possibility of variation of around 6 to 8 hours about the time of death. The hon'ble Supreme Court in the case of **Pattipati Venkaiah vs. State of A.P.** reported in **1985 4 SCC 80** has observed that *"the medical science is not yet so perfect as to determine the exact time of death, nor can the same be determined in a computerized or mathematical fashion so as to the last record. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence, because that would be matter of speculation. The time required for digestion may depend upon the nature of the food, digestive capacity of a person, and quality and quantity of food and atmospheres and condition etc.*

So argument raised on behalf of appellant rejected."

33. Having heard Sri Amit Daga (Amicus Curiae) assisted by the Sri Abhishek Kumar Jaiswal learned counsel for the appellant and Sri Vikas Goswami learned Government Advocate, we are of the view that the order of conviction which was passed by the Additional Sessions Judge, Court No. 6, Muzaffarnagar, was erroneously passed. The judgement and order dated 20.3.2008 was passed on the testimony of various prosecution witnesses. After the examination-in-chief and the cross-examination of the

P.W. - 1 i.e. the first informant is perused, the Court finds that it could be said that the first informant had seen the appellant along with the first informant's son Shiva at around 4 to 5 pm. As per the P.W. -1, the brother of the P.W. -1 who was produced as P.W. -2 and one Surendra son of Rahtu Harijan had also seen the appellant playing with the deceased at around 4 to 5 pm on 23.1.2007. Thereafter, they were not to be found. As per the P.W. - 1 both the appellant and the deceased had absolutely disappeared after they were last seen and the child after being killed was found buried at 12:30pm on the next date on 24.1.2007. In the cross-examination, we find that the P.W. -1 has also stated that it was Surendra son of Shree Pal who had actually seen the child playing with the appellant. This prosecution witness (P.W.-1) has not been able to, with any certainty, come up with any evidence which would lead one to reach a conclusion that the appellant and the appellant alone had murdered the child. His statement of fact that the appellant was not to be found after he was seen last at 4 to 5 pm was in direct contradiction to the statement made by P.W. - 2 that the appellant himself was searching for the missing child Shiva and the appellant along with 4 other boys, namley, Ankit, Vipin, Sonu and Pradeep had found the dead body. This not only makes the statement of the P.W. - 1 unreliable but in fact a suspicion is raised in the mind of the Court that the first informant was trying to falsely implicate the appellant. The P.W. - 1 has also not tried to disprove the statement of the P.W. - 2 by producing the four boys, namely, Ankit, Sonu, Vipin and Pradeep. He has also not questioned the P.W. - 2 with regard to the fact as to whether he had actually seen the appellant Shaki searching for the missing child. The Court, therefore, finds that conviction on the basis of the fact that the appellant was last seen with the deceased has no ground to stand as there are many missing links between the time the first informant (P.W.-1), the P.W. - 2 and Surendra had seen the appellant last with the child and the time when the body of the deceased was found.

34. Further, we find substance in the argument of the learned counsel for the accused-appellant that if only a few days back the appellant had done some dirty work with the elder son of the first informant who was named Deepak then it was a natural behaviour of any father not to trust the younger son of his with that person.

35. We have earlier already found that this case is totally based on circumstantial evidence and not on direct evidence. In the case of State of U.P. vs. Satish reported in 2005 (3) SCC 114, the Supreme Court has held that "there is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back in 1952."

36. Further, in the case of **Sharad Birdichand Sarda vs. State of Maharashtra** reported in **AIR 1984 SC 1622,** the Supreme Court has held that "before conviction could be based on circumstantial evidence the following conditions must be fully established and they are:

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

2. The fact so established should be consistent only with the hypothesis of the guilt of the accused.

3. The circumstances should be of conclusive nature and tendency.

4. They should exclude every possible hypothesis except one to be proved.

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.

37. These conditions have been called as the "Five golden principles' or to say' constitute the panchsheel of the proof of a case based on circumstantial evidence.'

38. Recently, in **Nathiya vs. State Rep. By Inspector of Police, Bagayam Police Station, Vellore, (Crim. Appeal No. 1015 of 2010, date of judgement 08.11.2016)**, the Hon'ble Court has approvingly referred to **Sujit Biswas vs. State of Assam, (2013) 12 SCC 406 and Raja @ Rajednra vs. State of Haryana (2015) 11 SCC 43**. The proposition laid down is to the effect that in scrutinising circumstantial evidence, a court is required to evaluate it to ensure that the chain of events is established clearly and completely, to rule out any reasonable likelihood of the innocence of the accused. Whether the chain is complete or not would depend on facts of each case emanating from the evidence and no universal yardstick should ever be attempted.

39. More recently in **Ganpat Singh vs. State of Madhya Pradesh (2018) 2 SCC (Cri) 159**, it has been reiterated that circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. 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 accused and they should be incapable of explanation on any hypothesis other than that of guilt of accused and inconsistent with his innocence."

40. Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. **(Raju vs. State, by Inspector of Police, AIR 2009 SC 2171).** Onus is on the prosecution to prove that the chain is complete and false defence or plea cannot cure the infirmity or lacuna in the prosecution case. If the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted.**(Vithal E Adlinge vs. State of Maharashtra, AIR 2009 SC 2067)**. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances **(Krishna Ghose vs. State of W.B., AIR 2009 SC 2279).**

41. In **Dev Kanya Tiwari vs. State of U.P., (2018) 5 SCC 734,** it has been held that when there is no eye witness to an incident and the case is entirely based upon circumstantial evidence, then court is expected to be more careful and cautious while analyzing the evidence and while convicting the accused. In other words, in all probabilities chain of circumstances should lead to an irresistible conclusion that the accused participated in the commission of the crime and committed the offence.

42. In the instant case, if the first informant had in his mind the dirty work

which was done by the appellant with Deepak his elder son then he would definitely not have allowed the appellant to play with the child of the first informant who was later on murdered. On these grounds we, therefore, conclude that the appeal deserves to be allowed and the appellant deserves to be acquitted.

43. The appeal is, therefore, allowed and the judgement and order dated 20.3.2008 passed by the Additional Sessions Judge, Court No. 6, Muzaffarnagar, in Session Trial No. 854 of 2007 arising out of Case Crime No. 7 of 2007, under Section 302 and 201 IPC, Thana - Bhaunrakala, District - Muzaffarnagar, is quashed and is set aside.

44. Since the appellant is reported to be in jail, he be set free forthwith, if he is not required in any other case.

45. We appreciate the hard work which has been put in by the Amicus Curiae and quantify the fee to be Rs. 35,000/- which may be paid to him.

(2022)06ILR A847
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.05.2022

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

First Appeal No. 30 of 2022

Smt. Anamika Srivastava ...Appellant
Versus
Anoop Srivastava ...Respondent

Counsel for the Appellant:
Sri Ramesh Kumar Dwivedi

Counsel for the Respondent:
Sri Akhilesh Kumar Pandey, Sri Akhilesh Kumar Pandey

A. Civil Law - Hindu Marriage Act, 1955 – Section 13-B – Divorce by mutual consent – Waiving of cooling period of six months – Compliance of Section 13-B(2), mandatory or directory in nature – Held, the period mentioned under Section 13-B(2) of the Act is not mandatory but directory. It is open to the Court concerned to exercise its discretion in the facts and circumstances of each case – However, the discretion to waive statutory period of six months is a guided discretion for consideration of interest of justice where there is no chance of reconciliation and the parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13-B(2) of the Act – Amardeep Singh's case and Amit Kumar's case relied upon. (Para 21 and 22)

B. Matrimonial Law – Divorce – Irretrievable Break down – The parties lived together only for three months – They lived apart for more than eleven years – The parties have appeared before the Mediation and Conciliation Centre and have settled their dispute amicably. The parties are unwilling to live together as husband and wife – Effect – Held, considering that the parties had already engaged in mediation before the Mediation Centre, and had failed to reconcile, no purpose would be served by subjecting the parties to the same process again, especially when they have been living apart for several years, and the marriage has irretrievably broken down. (Para 29 and 30)

Appeal allowed. (E-1)

List of Cases cited :-

1. Amardeep Singh Vs Harveen Kaur; (2017) 8 SCC 746

2. Neeti Malviya Vs Rakesh Malviya; (2010) 6 SCC 413

3. Amit Kumar Vs Suman Beniwal; 2021 SCC OnLine SC 1270

4. Naveen Kohli Vs Neelu Kohli; (2006) 4 SCC 558

(Delivered by Hon'ble Rakesh Srivastava, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

1. This first appeal under Section 19 of the Family Courts Act, 1984 has been filed challenging the orders dated 02.02.2022 and 07.03.2022 passed by the Family Court (Principal Judge, Family Court, Barabanki) rejecting the prayer made by the Appellant and the Respondent to waive the minimum period of six months stipulated under Section 13-B(2) of the Hindu Marriage Act, 1955 (for short 'the Act') for a motion for passing a decree of divorce on the basis of mutual consent.

2. Anamika Srivastava, the Appellant, was married to Anoop Srivastava, the Respondent, according to Hindu rites and rituals at Barabanki on 17.06.2010. Soon after the marriage, differences arose between them to such an extent that the Appellant left her matrimonial home on 24.09.2010 and since then she has been living with her parents. On 01.05.2013, the Appellant moved an application under Section 125 CrPC against the Respondent before the Family Court. The said case was registered as Criminal Misc. Case No. 258 of 2013 (Anamika Srivastava vs. Anoop Srivastava). On 03.10.2018, the Family Court allowed the application moved by the Appellant and directed the Respondent to pay a sum of Rs. 5000/- (Rupees five thousand only) per month to the Appellant towards maintenance with effect from the date of judgment. The judgment and order dated 03.10.2018 was assailed by the Respondent before this Court in Criminal Revision No.10 of 2019.

3. This Court vide its order dated 08.09.2021, passed in the said criminal revision, referred the matter to the Mediation and Conciliation Centre of this Court to explore the possibility of an amicable settlement between the parties. The mediation was successful. The Appellant and the Respondent agreed to dissolve their marriage. It was agreed that the Respondent shall pay a sum of Rs. 4,25,000/- (Rupees four lacs twenty five thousand only) to the Appellant towards full and final settlement of all disputes and the litigation between them whether civil or criminal will terminate. In terms of the settlement arrived at between the parties, the Respondent paid a sum of Rs. 3,00,000 (Rupees three lacs only) to the Appellant and on 13.01.2022 the parties jointly filed an application under section 13-B of the Act before the Family Court for dissolution of their marriage. The said case was registered as Regular Suit No.56 of 2022, Smt. Anamika Srivastava v. Anoop Srivastava. A copy of the settlement agreement dated 30.03.2022 signed by the Appellant, the Respondent, their counsel and the mediator has been brought on record as annexure no. SA-2 to the supplementary affidavit dated 12.04.2022.

4. On 13.01.2022 the Family Court passed an order, whereby the petition for divorce moved by the Appellant was ordered to be registered. 02.07.2022 was the date fixed for second motion and in the meantime the parties were directed to appear before the mediation centre on 14.02.2022. The relevant portion of the order dated 13.01.2022 is quoted below:

"पक्षकारों द्वारा एक साथ रहना संभव न होने का कथन किया गया तथा आपसी सहमति से तलाक की याचना की गई। पक्षकारों को पुर्नविचार

हेतु छः माह का समय देना विधि अनुसार आवश्यक है।

आदेश

दर्ज रजिस्टर हो। पत्रावली वास्ते पुर्नविचार एवं द्वितीय मोचन हेतु दिनांक 02.07.2022 को पेश हो। इससे पूर्व दिनांक 14.02.2022 को उभय पक्ष मेडिएशन में उपस्थित हो।"

5. On 02.02.2022 the Appellant and the Respondent jointly moved an application before the Family Court under Section 13-B(2) of the Act, seeking waiver of six months waiting period to make a motion for the court to pass decree of divorce on the ground that the mediation between the parties had already taken place before the mediation centre of this Court wherein the parties had agreed to dissolve their marriage by mutual consent and, as such, there was no occasion for the second mediation. The said application was rejected by the Family Court. The relevant portion of the order dated 02.02.2022 reads as under:-

"वाद पेश हुआ। ग–9 प्रार्थना पत्र प्रार्थीगण की ओर से इस आशय का प्रस्तुत किया गया है कि प्रस्तुत मामले में माननीय उच्च न्यायालय लखनऊ खण्ड पीठ लखनऊ में समझौता होने के उपरान्त प्रस्तुत वाद योजित किया गया है। इसलिए प्रस्तुत मामले में मीडिएशन सेन्टर हेतु नियत तिथि दि0 14.02.2022 व सुनवाई हेतु 02.07.2022 निरस्त करते हुए शीघ्र सुनवाई हेतु अन्य तिथि नियत की जाए।

सुना तथा पत्रावली का अवलोकन किया।

प्रस्तुत मामले में विधि द्वारा विहित उपबंध के अनुसार ही कार्यवाही सुनिश्चित करने हेतु उभय पक्ष को मीडिएशन सेन्टर हेतु नियत तिथि दि0 14.02.2022 की तिथि व द्वितीय मोशन हेतु तिथि 02.07.2022 प्रस्तुत मामले में नियत की गयी है। प्रस्तुत मामले में कोई अन्यथा आपवादिक तथ्य दर्शित नहीं की गयी है। जिससे विधि द्वारा विहित प्रक्रिया से इतर कार्यवाही करते हुए पूर्व नियत तिथि को निरस्त कर अन्य कोई तिथि नियत की जाए। अतः मामले के तथ्य एवं परिस्थितियों को देखते हुए प्रार्थना पत्र में याचित शीघ्र सुनवाई की याचना स्वीकार किए जाने का औचित्य पूर्ण आधार नहीं है। प्रार्थना पत्र निरस्त किए जाने योग्य है।

तदनुसार प्रार्थना पत्र ग–9 निरस्त किया जाता है।"

(emphasis supplied)

6. On 07.03.2022 the parties again moved an application for waiving the statutory period of six months for second motion. It was inter alia said in the said application that parties had been living separately for more than ten years; that before the Mediation Centre of this Court the parties freely on their own accord, without any coercion or pressure, have arrived at a joint settlement. In the circumstances, six month waiting period be waived and a decree of divorce be passed forthwith. By an order dated 07.03.2022 the said application has been rejected by the Family Court on the ground that in terms of the order passed in the said case, the parties had not appeared before the mediation centre and, as such, there was no good ground to waive the statutory period of six months. The Order dated 07.03.2022 is extracted below:-

"वाद पेश हुआ। प्रार्थीगण उभय पक्ष की ओर से प्रार्थना पत्र ग–12 इस आशय का प्रस्तुत किया गया है कि उभय पक्ष के मध्य दि0 17.06.2010 को हिन्दू रीति–रिवाज के अनुसार विवाह हुआ था। दोनों के मध्य कोई संतान नहीं है। विवाह के 3 माह बाद ही दोनों पक्ष अलग हो गये और तब से दोनों पक्ष अलग–अलग रह रहे हैं। भरण–पोषण के वाद में उभय पक्ष के मध्य विवाद विच्छेद पर सहमति हुई जिसके अनुक्रम में प्रस्तुत वाद विवाह विच्छेद हेतु अन्तर्गत धारा 13(बी) हिन्दू विवाह अधिनियम प्रस्तुत किया गया है और उभय पक्ष के मध्य आपसी सुलह समझौते से भरण–पोषण के संबंध में भी धनराशि मु0 4,25000/– तय हो गयी है जिसमें से मु0 300000/– प्रार्थिनी/वादिनी संख्या–1 को प्राप्त हो चुकी है और सुलह समझौते के अनुक्रम में मु0 1,25,000/– वादी संख्या–2 द्वारा वादिनी संख्या–1 को

दिया जायेगा। न्यायालय द्वारा निर्धारित प्रथम मोशन की तिथि दि0 14.02.2022 को उभय पक्ष में समझौता नहीं हो सका। उभय पक्ष के मध्य विवाह बनाये रखने की अब कोई संभावना नहीं है। छः माह की अवधि आज्ञापक नहीं बल्कि निर्देशात्मक है इसलिए छः माह की अवधि को समाप्त कर वादीगण के वाद को उभय पक्ष की सहमति के आधार पर तत्काल आज्ञाप्त किया जाए और उभय पक्ष के मध्य गठित विवाह को विच्छेदित किया जाए।

सुना तथा पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से स्पष्ट होता है कि पूर्व में उभय पक्ष की ओर से इसी आशय का प्रार्थना पत्र दि0 02.02.2022 को प्रस्तुत किया गया था जिसे गुण–दोष के आधार पर प्रार्थना पत्र पोषणीय न होने के कारण निरस्त किया गया था।

प्रस्तुत प्रकरण में अन्तर्गत धारा 13(बी) हिन्दू विवाह अधिनियम उभय पक्ष के मध्य हुए विवाह को विघटित करने हेतु संस्थित वाद में प्रथम मोशन हेतु मध्यस्थता केन्द्र पर पक्षकारों को उपस्थित होने हेतु दि0 14.02.2022 की तिथि निर्धारित की गयी और द्वितीय मोशन हेतु सुनवाई की तिथि दि0 02.07.2022 नियत की गयी। किन्तु प्रार्थीगण/वादीगण प्रार्थना पत्र ग–12 समर्थित शपथ पत्र के अनुसार उभय पक्ष दि0 14.02.2022 को सुलह समझौता हेतु मध्यस्थता केन्द्र पर उपस्थित नहीं आये। यद्यपि कोविड–19 महामारी के प्रभाव व प्रसार के कारण न्यायिक कार्य व मध्यस्थता कार्य उक्त अवधि में सम्यक रूप से सम्पादित नहीं हो सका, किन्तु वर्तमान में माननीय उच्च न्यायालय के दिशानिर्देश के अनुक्रम में न्यायिक कार्य व मध्यस्थता कार्य पूर्ण रूप से संचालित किया जा रहा है *किन्तु उसके बाद भी उभय पक्ष अन्तर्गत धारा 13(बी) हिन्दू विवाह अधिनियम व परिवार न्यायालय अधिनियम की सुसंगत उपबंधों के अधीन सुलह समझौता हेतु मध्यस्थता केन्द्र पहुँच नहीं सके न ही सुलह–समझौता हेतु प्रयासरत हैं न ही बाद में जब मध्यस्थता कार्य सुचारू रूप से संचालित होने लगा तब सुलह–समझौता केन्द्र पहुँचने का कोई कारण दर्शित नहीं किया जा सका। स्वयं प्रार्थीगण/वादीगण के प्रार्थना पत्र के अनुसार लम्बे अन्तराल से उभय पक्ष अलग रह रहे हैं जिसके उपरान्त ही प्रस्तुत वाद योजित किया गया है। न्यायिक कार्य व मध्यस्थता कार्य सामान्य रूप से संचालित होने के उपरान्त भी उभय पक्ष प्रार्थीगण मध्यस्थता केन्द्र पर सुलह समझौता हेतु उपस्थित नहीं हो सके। जैसा की न्याय की मंशा है।*

उपरोक्त तथ्य एवं परिस्थितियों में अन्तर्गत धारा 13(बी) हिन्दू विवाह अधिनियम व परिवार न्यायालय अधिनियम के सुसंगत उपबंधों के अनुपालन में प्रार्थीगण/पक्षकारों के मध्यस्थता केन्द्र उपस्थित होने के निर्देश के अनुपालन के बिना पूर्व निर्धारित तिथि दि0 02.07.2022 के पूर्व प्रार्थीगण/वादीगण का प्रार्थना पत्र ग–12 में याचित अनुतोष को स्वीकार करते हुए प्रस्तुत वाद को तत्काल आज्ञप्त किए जाने का औचित्य पूर्ण आधार नहीं है। अतः प्रार्थना पत्र ग–12 उपरोक्त विश्लेषण के आलोक में निरस्त किया जाता है। प्रार्थीगण/उभय पक्ष दि0 15.03.2022 को सुलह समझौता हेतु मध्यस्थता केन्द्र उपस्थित हों। तत्पश्चात पत्रावली नियत तिथि दि0 02.07.2022 को पुनर्विचार व द्वितीय मोशन हेतु पेश हो।'*

7. The orders dated 02.02.2022 and 07.03.2022 are under challenge in this appeal.

8. Shri Ramesh Kumar Dwivedi, learned counsel for the Appellant has contended that the marriage between the parties has irretrievably broken down and the parties have settled their differences. Relying upon a decision of the Apex Court in the case of *Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746*, the counsel contends that in the absence of any chance of reconciliation, the Family Court ought to have exercised its discretion to waive of the cooling period of six months in favour of the Appellant.

9. Shri Akhilesh Kumar Pandey, learned counsel for the Respondent has supported the counsel for the Appellant and has prayed that this appeal be allowed.

10. Heard the counsel for the parties and perused the record.

11. Section 13-B of the Act reads as under:-

"13-B. Divorce by mutual consent.-(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be

presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriag

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

(emphasis supplied)

12. The three ingredients for initiating proceedings under Section 13-B of the Act for divorce by mutual consent are: firstly, that the parties to the marriage have been living separately for a minimum period of one year. *Secondly*, they have not been able to live together, and *thirdly,* they have mutually agreed that marriage should be dissolved.

13. Sub-section (1) of Section 13-B of the Act is an enabling section. It enables the parties to file a petition for divorce by mutual consent. Sub-section (2) of Section 13-B lays down the procedure for the parties to adhere to after expiry of six months from the date of filing of the petition for divorce by mutual consent. The second motion, which as per Sub-section (2) of Section 13-B is to be made not earlier than six months after the date of presentation of the petition, enables the court to proceed with the case. If the court is satisfied that the consent of the parties was not obtained by force, fraud or undue influence and they mutually agree that the marriage should be dissolved, the court is left with no other option but to pass a decree of divorce.

14. Sub-section (2) of Section 13-B of the Act, in unequivocal terms, provides that the second motion has to be made not earlier than six months from the date of presentation of the petition before the Court.

15. Section 14 of the Act provides that notwithstanding anything contained elsewhere in the Act, it shall not be competent to the Court to entertain any petition for dissolution of a marriage by a decree of divorce, unless on the date of presentation of the petition, one year had elapsed since the date of marriage. However, the proviso to Section 14 provides that the Court may, on application made to it, in accordance with such rules as may be made by the High Court, allow a petition to be presented before one year has elapsed since the date of marriage, on the ground that the case is one of exceptional hardship to the Appellant or of exceptional depravity on the part of the respondent.

16. The provisions of the Hindu Marriage Act evince an inherent respect for the institution of marriage, which contemplates the sacramental union of a man and a woman for life. However, there may be circumstances in which it may not reasonably be possible for the parties to the marriage to live together as husband and

wife. The Act, therefore has provisions for annulment of marriage in specified circumstances, which apply to marriages which are not valid in the eye of law and provisions of judicial separation and dissolution of marriage by decree of divorce on grounds provided in Section 13(1) of the said Act, which apply to cases where it is not reasonably possible for the parties to a marriage to live together as husband and wife.

17. Section 13-B incorporated in the Act with effect from 27.5.1976, which provides for divorce by mutual consent, is not intended to weaken the institution of marriage. Section 13-B puts an end to collusive divorce proceedings between spouses, often undefended, but time consuming by reason of a rigmarole of procedures. Section 13-B also enables the parties to a marriage to avoid and/or shorten unnecessary acrimonious litigation, where the marriage may have irretrievably broken down and both the spouses may have mutually decided to part. But for Section 13-B, the defendant spouse would often be constrained to defend the litigation, not to save the marriage, but only to refute prejudicial allegations, which if accepted by Court, might adversely affect the defendant spouse.

18. Legislature has, in its wisdom, enacted Section 13-B(2) of the Act to provide for a cooling period of six months from the date of filing of the divorce petition under Section 13-B(1), in case the parties should change their mind and resolve their differences. After six months if the parties still wish to go ahead with the divorce, and make a motion, the Court has to grant a decree of divorce declaring the marriage dissolved with effect from the date of the decree, after making such enquiries as it considers fit.

19. Prior to the judgment in Amardeep Singh (Supra), sub-section (2) was treated to be mandatory in nature. In *Neeti Malviya v. Rakesh Malviya, (2010) 6 SCC 413*, a Bench of two Judges of the Apex Court, while dealing with the question as to whether the period prescribed in Sub-section (2) of Section 13-B of the Act could be waived off or reduced by the Apex Court in exercise of its jurisdiction under Article 142 of the Constitution, observed as under:

"7. As already stated, the language of the said provision is clear and *prima facie* admits of no departure from the time-frame laid down therein i.e. the second motion under the said sub-section cannot be made earlier than six months after the date of presentation of the petition under sub-section (1) of Section 13-B of the Act."

20. However, in *Amardeep Singh (supra)*, the Apex Court considered the question as to whether the minimum period of six months stipulated under Section 13-B(2) of the Act for a motion for passing decree of divorce on the basis of mutual consent was mandatory or it could be relaxed in any exceptional situations and after taking into account the statutory provisions and the judgment on the issue for the first time opined that the statutory period of six months specified under sub-section (2) of Section 13-B of the Act was not mandatory and the court, in exceptional circumstances, can waive the same, subject to certain conditions specified therein. Paragraph 19 of the said report is extracted below:

"19. Applying the above to the present situation, we are of the view that where *the court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following:*

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) all efforts for *mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;*

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court concerned."

(emphasis supplied)

21. Thus, as held by the Apex Court in the case of Amardeep Singh, the period mentioned under Section 13-B(2) of the Act is not mandatory but directory. It is open to the Court concerned to exercise its discretion in the facts and circumstances of each case. However, the discretion to waive statutory period of six months is a guided discretion for consideration of interest of justice where there is no chance of reconciliation and the parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13-B(2) of the Act.

22. In *Amit Kumar v. Suman Beniwal, 2021 SCC OnLine SC 1270,* the Apex Court enumerated some of the factors which are to be taken into consideration while exercising the discretion of waiving the statutory period of six months for moving a motion for divorce and observed as under:-

"27. For exercise of the discretion to waive the statutory waiting period of six months for moving the motion for divorce under Section 13B(2) of the Hindu Marriage Act, the Court would consider the following amongst other factors : -

i. the length of time for which the parties had been married;

ii. how long the parties had stayed together as husband and wife;

iii. the length of time the parties had been staying apart;

iv. the length of time for which the litigation had been pending;

v. whether there were any other proceedings between the parties;

vi. whether there was any possibility of reconciliation;

vii. whether there were any children born out of the wedlock;

viii. whether the parties had freely, of their own accord, without any coercion or pressure, arrived at a genuine settlement which took care of alimony, if any, maintenance and custody of children, etc."

23. Under the Act also, in respect of the family matters, Parliament has made several provisions for reconciliation. Under Section 23(2)

"before proceeding to grant any relief under this Act, it *shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".*

(emphasis supplied)

24. Sub-section (3) of Section 23 of the Act further provides for methods to facilitate the process, which reads as follows:

"23. (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if *the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days* and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, *with directions to report to the court, as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report."* (emphasis supplied)

25. The Family Courts Act was introduced with the avowed object to set up Family Courts for the settlement of family disputes, where emphasis was to be laid on conciliation and achieving socially desirable results without adherence to rigid rules of procedure and evidence.

26. Section 9 of the Family Courts Act makes it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings are informal and the rigid rules of procedure do not apply. The said provision reads as follows:

"9. Duty of Family Court to make efforts for settlement.-- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the f*irst instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement* in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings."

(emphasis supplied)

27. No doubt Section 9 of the Family Courts Act casts an obligation upon the Family Court to make efforts for settlement. However, the Court is not supposed to act in a mechanical manner, and force the parties to engage in mediation where the marriage has irretrievably broken down. Section 9 itself states that the Court is required to make an endeavor to assist and persuade the parties to arrive at a settlement. It also says that this has to be done in consistence with the nature and circumstances of the case. Therefore, it is clear that reference of the parties to mediation is not compulsorily required where the facts and circumstances of the case showcase that no purpose would be served out of such reference. The endeavor to get the matter settled is compulsory, but the reference to mediation by the Family Court itself is not.

28. At this juncture, it is relevant to support the above conclusion by making reference to certain extracts of a judgment of the Apex Court in Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, wherein a three Judge Bench of the Apex Court observed as under:

"72. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

* * *

74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

* * *

85. Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the

parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond."

(emphasis supplied)

29. In the case of Amit Kumar (Supra) the Apex Court has observed where marriage between the parities has irretrievably broken down and the parties have mutually opted to part ways, it is better to dissolve the marriage. Paragraphs 18 and 19 of the report are extracted below:-

"18. The object of Section 13B(2) read with Section 14 is to save the institution of marriage, by preventing hasty dissolution of marriage. It is often said that "time is the best healer". With passage of time, tempers cool down and anger dissipates. The waiting period gives the spouses time to forgive and forget. If the spouses have children, they may, after some time, think of the consequences of divorce on their children, and reconsider their decision to separate. Even otherwise, the cooling period gives the couple time to ponder and reflect and take a considered decision as to whether they should really put an end to the marriage for all time to come.

19. Where there is a chance of reconciliation, however slight, the cooling period of six months from the date of filing of the divorce petition should be enforced. However, if there is no possibility of reconciliation, it would be meaningless to prolong the agony of the parties to the marriage. Thus, if the marriage has broken down irretrievably, the spouses have been living apart for a long time, but not been able to reconcile their differences and have mutually decided to part, it is better to end the marriage, to enable both the spouses to move on with the life."

(emphasis supplied)

30. In the case at hand both the parties are well educated. Admittedly, the parties lived together only for three months and after which they have separated on account of irreparable differences. The parties have lived apart for more than eleven years. The parties have appeared before the Mediation and Conciliation Centre of this Court and have settled their dispute amicably. The parties are unwilling to live together as husband and wife. Even after eleven years of separation the parties still want to go for divorce. Considering that the parties had already engaged in mediation before the Mediation Centre of this Court, and had failed to reconcile, no purpose would be served by subjecting the parties to the same process again, especially when they have been living apart for several years, and the marriage has irretrievably broken down. No useful purpose would be served in keeping the petition pending except to prolong their agony.

31. In view of the discussions made above, the appeal is allowed.

32. The impugned orders dated 02.02.2022 and 07.03.2022 passed by the Family Court are set aside. The statutory waiting period of six months under Section 13-B(2) of the Act is waived.

33. Parties are directed to appear before the Family Court on 30.05.2022.

The Family Court will forthwith pass a decree of divorce in accordance with law.

(2022)06ILR A857
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.05.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

First Appeal No. 104 of 2017
And
First Appeal No. 108 of 2017

Deepa Bajpai ...Appellant
Versus
Dr. Ashish Mishra ...Respondent

Counsel for the Appellant:
Sri Nilish Anand

Counsel for the Respondent:
Sri Anand Mani Tripathi, Sri Bhup Chandra Singh, Saima Khan, Sri Vinay Kumar Dubey

A. Civil Law - Hindu Marriage Act, 1955 – Section 13-B – Divorce by mutual consent – Coercion or fraud – Allegation of using force and compulsion for signing the petition, how far reliable – No FIR or complaint filed – Application containing photograph was signed by wife and duly identified by her counsel – Effect – Held, while passing the impugned judgment, the court had inquired with the parties to ascertain their free consent/collusion and at that time also appellant failed to narrate any fact of force or coercion before the presiding officer – Appellant has failed to prove that the impugned judgment and decree was obtained by playing any fraud or coercion with appellant as well as with the trial court. (Para 17 and 18)

B. Civil Law - Family Courts Act, 1984 – Sections 19(1), 19 (2) & 20 – Civil Procedure Code,1908 – Section 96(3) - O. 43 R. 1A – Divorce by mutual consent – Maintainability of Appeal against it – Applicability of provision of CPC – Held, Family Court Act is a special Act and according to Section 20, the provisions of the Act have overriding effect – Hence, the appeal against judgment and decree u/s 13(B) is not maintainable. (Para 20)

C. Civil Law - Civil Procedure Code,1908 – O. 23 R. 3A – Divorce by mutual consent – Compromise decree – Maintainability of Suit against it – Held, on the grounds of any fraud, misrepresentation or coercion an application to set aside the consented decree is maintainable before the same court which passed such order or decree – No separate suit is maintainable – K. Rajam Raju case relied upon. (Para 22)

D. Custody of minor child – Paramount consideration – In the matter of custody of minor, the paramount consideration for the court to view is as to what is conducive to the welfare of minor child – Held, for welfare of her minor daughter, the appellant always has a liberty to move application for the custody of her minor daughter before appropriate court. (Para 27)

Appeal dismissed (E-1)

List of Cases cited :-

1. Nathu Lal Vs Raghuvir Singh & ors. AIR 1926 Alld. 50

2. Smt. Sureshta Devi Vs Om Prakash (1991) 2 SCC 25

3. K.Rajam Raju & ors. Vs Smt. P.Rangamma & ors. 2006 (4) ALD 61

4. Jamna Devi & ors. Vs Sarswati Devi & ors. MANU/HP/1692/2018

5. Pushpa Devi Bhagat (D) through L.R. Smt. Sadhna Rai Vs Rajinder Singh & ors. MANU/SC/3016/2006

6. Rosy Jacob Vs Jacob A. Chakramakkal; MANU/SC/0260/1973

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. First Appeal No. 104 of 2017 (Deepa Bajpai Vs. Dr. Ashish Mishra) under Section 19 (1) of the Family Courts Act, 1984 has been filed against judgment and decree dated 15.05.2017, passed by Principal Judge, Family Court, Lucknow in Regular Suit No.2799 of 2016 (Dr. Ashish Mishra Vs. Deepa Bajpai).

First Appeal No. 108 of 2017 (Deepa Bajpai Vs. Dr. Ashish Mishra) has been filed against the order dated 10.07.2017, passed by Principal Judge, Family Court, Lucknow in Misc. Case No.Nil/2017, by which the application filed by the appellant for recall of the judgment/decree dated 15.05.2017 was rejected.

2. Since the facts and issue in both the appeals are similar, parties are same, therefore, both the appeals are being decided by the common judgment.

3. The brief facts of the case as argued before us are that the appellant Deepa Bajpai got married with respondent Dr. Ashish Mishra on 29.01.2015 at Lucknow observing Hindu rites and rituals. In the marriage, sufficient dowry including motor car and jewelry were given by the parents of the appellant but respondent and his family members were not satisfied by the dowry given and were continuously rebuking and demanding additional dowry. The mother of appellant was suffering from cancer and her father was working on the post of Assistant Accounts Officer in Defence Accounts department who performed her marriage by taking loan, that is why the parents of the appellant were not in a position to fulfill the demand of additional dowry, consequently, the in-laws of the appellant started torturing her.

4. The appellant was performing her duties as wife of respondent and never left his company. On 11.02.2016, appellant gave birth to a female child but the in-laws were not happy, as the appellant gave birth to a girl. The daughter of the appellant was not a normal child, as she was having only one Kidney in her body and her treatment was continuing from the hospital SGPGIMS, Lucknow. Since the demand of additional dowry could not be fulfilled, hence the in-laws of appellant were continuously torturing and behaving badly with her. They were intending to remarry the respondent in greed of money and were forcing the appellant to take divorce but the appellant was not ready. Without the consent of appellant, the respondent prepared the papers for divorce on the basis of mutual consent. On 20.10.2016, the sister-in-law of appellant snatched her daughter from the lap of appellant and by giving threat of her life they forced the appellant to sign the papers of divorce petition in Court. Appellant appeared before the Court but due to threat to the life of her minor daughter, she could not speak a single word before the Court concerned. She had never signed any affidavit before oath commissioner. The divorce petition was instituted on 20.10.2016 and the next date, after six months, was fixed as 13.05.2017. On 13.05.2017, the next date given by the Court was 15.05.2017. On 15.05.2017 appellant along with respondent appeared before the Family Court and she was again forced to sign on some papers already prepared.

5. The appellant was living in her matrimonial home from 30.1.2015 till 10.06.2017. On 10.06.2017, the family members of the in-laws expelled and turned her out from her matrimonial home on the pretext that the decree for her divorce had been passed. Infact her in-laws had threatened appellant for the life of her minor daughter and she was compelled to

sign the pleading and affidavit with false contention. The in-laws of the appellant have also committed offence by rebuking and torturing her in connection with demand of additional dowry. The divorce petition under Section 13-B of the Hindu Marriage Act,1955 has been filed in the Court with false contentions. It has wrongly been mentioned in the divorce petition that the parties have been living separately since 10.09.2015. Hence, a fraud has been committed with the appellant as well as with the court concerned. Accordingly, the consent which was given by the appellant before the Principal Judge, Family Court, was not free and had been obtained by force, fraud and undue influence.

6. Learned counsel for the appellant has further submitted that even the in-laws of the appellant expelled her from her matrimonial home. Immediately she approached to the court concerned to obtain the certified copy of the judgment and decree but her application was rejected on the ground of summer vacation. Immediately after summer vacation, appellant moved an application under Section 151 and under Order 47 Rule 1 of Code of Civil Procedure for recall and cancellation of the aforesaid judgment and decree but the application was rejected by the Principal Judge, Family Court on 10.07.2017. Thereafter, the instant appeal has been filed with the prayer to set aside the judgment and decree dated 15.05.2017. The minor daughter of the appellant is a medically challenged girl, who requires the custody and care of appellant urgently, hence the impugned judgment and decree be set-aside and appeal deserves to be allowed.

7. Learned counsel for the respondent vehemently opposed the arguments and replied that the instant appeal, which has been filed with false contention, according to law, is not maintainable. The application under Section 151 Code of Civil Procedure for cancellation/review of the judgment dated 15.05.2017 has already been rejected by the trial court vide order dated 10.07.2017. The instant appeal is not permissible, according to the provisions of Section 19 (2) of the Family Court Act. Learned counsel for respondent by referring the decision of this Court in the case of ***Nathu Lal vs. Raghuvir Singh and other; AIR 1926 Alld. 50*** further submitted that for the relief as prayed by appellant a suit for declaration is maintainable.

8. We have heard the rival contentions of the parties and perused the record.

9. Taking into consideration the arguments of rival parties, the following points of determination are being framed :

(i) Whether the impugned judgment and decree dated 15.05.2017, is liable to be set-aside as the appellant was under coercion and a fraud has been played with appellant as well as with Court?

(ii) Whether the order dated 10.07.2017, passed by Principal Judge, Family Court, Lucknow was bad in law and is liable to be set aside, as prayed in Appeal No.108 of 2017?

(iii) Whether the impugned judgment and decree which is based upon mutual consent under Section 13B of Hindu Marriage Act, 1955 can be challenged by way of appeal/suit?

(iv) Whether for the reasons to grant custody of minor daughter, the appeal deserves to be allowed?

10. So far as point (i & ii)) - Whether the impugned judgment and decree is liable

to be set-aside as the appellant was under coercion and a fraud has been played with appellant as well as with Court and Whether the order dated 10.07.2017, passed by Principal Judge, Family Court, Lucknow was bad in law and is liable to be set aside, as prayed in Appeal No.108 of 2017, are concerned, the provisions of Section 13B of Hindu Marriage Act, 1955, is reproduced as under :-

"13B. Divorce by mutual consent. *- (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

11. According to the above definition, following ingredients are essential for granting decree of divorce : -

(i) parties have been living separately for a period of one year,

(ii) they have not been able to live together.

(iii) they have mutually agreed that the marriage should be dissolved.

12. The legislature in its wisdom has consciously provided the waiting period during which a decree for divorce by mutual consent can be passed. The object behind providing this period appears to allow time to the spouses to reconsider their decision and finally make up their mind in the above period. It also appears that in the interregnum period between minimum and maximum, the spouse can take legal recourse, if any force or fraud has been played while instituting the suit/proceedings under Section 13B of Hindu Marriage Act, 1955. The enactment also enables the court to satisfy itself that the consent of spouse is free from any extraneous influence or collusion. The legislation has also cast a duty on court under Section 23 of Hindu Marriage Act, 1955. Section 23 of Hindu Marriage Act, 1955, reads as under :-

"23. Decree in proceedings.- (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -

(a) x x x x

(b) x x x x

(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and

(c) x x x x

(d) x x x x

(e) x x x x"

13. It is depicted by the record of the trial court that the application under Section 13B of Hindu Marriage Act, 1955 was signed by the appellant who was identified by her counsel Mr. Nischal Pal Advocate. The application contains the photograph of appellant with signature over there also. The petition has been signed by the appellant along with respondent on 20.10.2016. Apart from that, on 15.05.2017, appellant had signed the affidavit which has been filed in the court in support of the application under Section 13B of the Hindu Marriage Act, 1955. Record also indicates that a memo of appellant's address was also filed on 20.10.2016 before the Court while institution of petition. Learned counsel for the appellant has submitted that both the papers, i.e. divorce petition as well as affidavits in evidence has been signed by the appellant due to the reason that a threat was given to her for the life of her minor daughter.

14. Appellant is properly educated and is a post graduate lady, as it has been mentioned in paragraph 1 of the rejoinder affidavit dated 30.05.2018. The petition as well as the affidavit was drafted in Hindi. Certainly the appellant would have gone through the petition as well as the affidavit before signing the aforesaid papers but she did not raise any objection or complaint to Presiding Officer of the Court while the court was examining the parties in accordance with Section 13B (2) of the Hindu Marriage Act, 1955. Contrary to the same no argument has been put before us. Even no affidavit of her counsel has been submitted by appellant.

15. It has also been argued that petition for divorce was filed by the respondent with false facts. It has wrongly been mentioned in divorce petition that parties are living separately from 10.09.2015. The appellant, as wife was residing with respondent in her matrimonial home till 10.06.2017, the date on which the appellant was expelled from her

16. On the above point, appellant has not filed any documentary evidence in support of her argument regarding her dwelling in her matrimonial home till 20.10.2016. Even, she failed to file any paper of hospital where she gave birth of her daughter, to show the address of patient. The appellant has submitted her memo of address before the proceeding of trial court, showing a different address. She has not explained the same in memo of appeal. In paragraph 9 of Judgment ***Smt. Sureshta Devi vs. Om Prakash (1991) 2 SCC 25,*** the Hon'ble Apex Court has held that,

"9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital

obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved."

17. Nothing has been placed on record to show that after 10th September, 2015, any conjugal relation was subsisting between appellant and respondent. For the argued fact that the in-laws of appellant illegally forced her and under coercion the appellant had signed the petition as well as the affidavit in court campus and to compel her, her medically challenged daughter had been snatched from her lap, the appellant even after 10.06.2017, has not lodged any F.I.R./complaint before any authorities/court. Paragraph 2 of the impugned judgment is reproduced as under :-

"पक्षकारों को सुनने तथा उनके शपथ–पत्र के अवलोकन से यह पाया जाता है कि उनके मध्य विवाह सम्पन्न हुआ था और याचिका में कहे गये तथ्य सत्य प्रतीत होते है। पक्षकारों के मध्य आपस में कोई दुरभि–संधि प्रतीत नहीं होती है। पक्षकार लगभग एक साल से अधिक समय से अलग–अलग रह रहे हैं। अतएवं उभय पक्षों की पारस्परिक सहमति के आधार पर उनके मध्य सम्पन्न हुए विवाह के सम्बन्ध में विवाह विच्छेद की डिक्री पारित किया जाना उचित होगा।"

Hence, it is apparent that while passing the impugned judgment, the court had inquired with the parties to ascertain their free consent/collusion and at that time also appellant failed to narrate any fact of force or coercion before the presiding officer or her counsel. Even during the pendency of appeal appellant could have not submitted any cogent evidence which may establish that she was subjected to any undue influence or coercion during the proceedings of trial court, although she had filed the affidavits of Yagya Prasad Bajpai (father of appellant), Ankit Bajpai (brother of appellant) and Lalit Mohan Pandey (brother-in-law of Deepa's father) under Order 41 Rule 27 of Code of Civil Procedure but the deponent of the affidavits are none other than the family members and close relatives of the appellant. According to Section 1 of Evidence Act affidavits are not recognized as evidence.

18. On the basis of above facts and circumstances, it can be said that appellant has failed to prove that the impugned judgment and decree was obtained by playing any fraud or coercion with appellant as well as with the trial court. No evidence has been produced by the appellant before the Family Court in the proceedings under Section 151 and Order 47 Rule 1 Code of Civil Procedure. Accordingly, the first and second points of determination are decided in negative.

19. Point of determination No. (iii) - Whether the impugned judgment and decree, which is based upon mutual consent under Section 13(B) of Hindu Marriage Act, can be challenged by way of appeal/suit: appeal, filed u/s 19(1) of Family Courts Act, whereas, Section 19 (2) of the Act prohibits the maintainability of such appeal. The provision of Section 19 (2) reads as under :-

"19. Appeal.- *(1) x x x x x*

(2) No appeal shall lie from a decree or order passed by the Family Court

with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) x x x

(4) x x x

(5) x x x

(6) x x x

20. Learned counsel for the appellant has argued that according to the provisions of Order 43 Rule 1A of the Code of Civil Procedure, the impugned decree can be challenged. The provisions of order 43 Rule 1A of the Code of Civil Procedure, is reproduced as under :-

"1A. Right to challenge non-appealable orders in appeal against decrees.- *(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.*

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

So far as the appeal from original decree is concerned, Section 96 (3) C.P.C. bars appeal against consent decree. Section 96 (3) C.P.C. reads as under :-

"96.Appeal from original decree.- *(1) x x x x x*

(2) x x x x

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) x x x x "

However, appellant cannot get any relief by way of filing appeal under Order XLI Rule 1A of the Code of Civil Procedure, as the Family Court Act is a special Act and according to Section 20 of the Family Court Act, the provisions of the Act have overriding effect. Section 20 of the Family Courts Act, reads as under : -

"20. Act to have overriding effect.*-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

Hence in accordance with law cited above the appeal against judgment and decree u/s 13(B) is not maintainable.

21. Appellant cannot challenge the above judgment and decree by way of suit also. The barring provision is inacted under Order 23 Rule 3A of the Code of Civil Procedure, which reads as under :-

"3A.Bar to suit.- *No suit shall lie to set aside a decree on the ground that the*

compromise on which the decree is based was not lawful."

22. In the case of ***K.Rajam Raju and others Vs. Smt. P.Rangamma and others, 2006 (4) ALD 61***, it has been held by Andhra Pradesh High Court that on the grounds of any fraud, misrepresentation or coercion an application to set aside the consented decree is maintainable before the same court which passed such order or decree. No separate suit is maintainable.

23. The Himachal Pradesh High Court in the case of ***Jamna Devi and others Vs. Sarswati Devi and others : MANU/HP/1692/2018,*** referring the law laid down in the case of ***Pushpa Devi Bhagat (D) through L.R. Smt. Sadhna Rai Vs. Rajinder Singh and others, MANU/SC/3016/2006***, has held in paragraph 13 as under :-

"13. Bearing in mind the aforesaid exposition of law, more particularly, the observations made in para - 10 of the aforesaid judgment, it is evidently clear that all questions with regard to lawfulness validity of the agreement or compromise as being void or voidable or where the compromise, in question, having been obtained by a fraud, duress, coercion etc., the same has to be raised before that Court which passed the decree on the basis of any such agreement or compromise. The Court cannot direct the parties to file a separate suit on the subject or no such suit will lie in view of the provisions of Order 23 Rule 3-A CPC"

24. Learned counsel for the appellant has argued that after getting the knowledge of divorce decree, appellant approached the trial court under the provisions of Order 47 Rule 1 and Section 151 of C.P.C. for recall of judgment and decree dated 15.05.2017 but the application of the appellant was rejected by the Principal Judge, Family Court vide order dated 10.07.2017. The rejection order for the reasons recorded by the Family Court, and in absence of any ground made out within the scope of Order 47 Rule 1 read with Section 151 of C.P.C. was rightly rejected. Therefore, in the light of the above discussion, the above third point of determination is decided in negative. The appellant cannot challenge the impugned judgment and decree by way of present appeal/civil suit.

25. Point of determination No. (iv) - Whether for the reasons to grant custody of her minor daughter, the appeal deserves to be allowed.

26. Learned counsel for the appellant has submitted that the judgment and decree for divorce has been obtained by the respondent by use of force and by committing fraud and under coercion to sign the petition for divorce as well as affidavit in trial court. The daughter of appellant is medically challenged. She has only one kidney in her body and requires special care and protection. On the other hand, respondent is a bank employee and is intending to remarry, therefore, considering the welfare of minor child, it is utmost needed that the daughter of appellant named, Gauri, be given under the custody of her mother and on the above ground the appeal deserves to be allowed.

27. In paragraph 11 of the petition under Section 13B of the Act, the appellant had given her consent to keep her daughter in the custody of respondent. So far as the custody of minor is concerned, undoubtedly, her welfare is supreme and the court has ample power to safeguard the

interest of minor. In catena of judgments, it has been held by Hon'ble Supreme Court that in the matter of custody of minor, the paramount consideration for the court to view is as to what is conducive to the welfare of minor child. In the case of ***Rosy Jacob Vs. Jacob A. Chakramakkal MANU/SC/0260/1973,*** it has been held by Hon'ble Supreme Court in paragraph 20 that,

"20.The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us.

All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation."

In view of above, in changed scenario and for welfare of her minor daughter, the appellant always has a liberty to move application for the custody of her minor daughter before appropriate court. The third point of determination is decided accordingly.

28. Under the facts and circumstances of the case, material available on record, we are of the considered view that the present appeal as well as the connected First Appeal No.108 of 2017 being bereft of merit are liable to be dismissed.

29. Accordingly, the first appeals are **dismissed.**

30. Cost is made easy.

31. Let a copy of the judgment/order be kept in the record of First Appeal No.108 of 2017.

(2022)06ILR A865
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

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

First Appeal From Order No. 990 of 2010

Moti Lal & Ors. ...Appellants
Versus
The New India Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Ranjay Kumar, Sri Ashutosh Srivastava, Sri Satyendra Narayan Singh

Counsel for the Respondents:
Sri Aijaz Ahmad Khan

A. Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 168 - Motor Accident claim - Quantum of compensation - Income - Income tax return - Claimants filed copy of income tax return of the deceased pertaining to the financial year 2005-06 - Tribunal refused to rely on the annual income of the deceased on the basis of income tax return on the ground that registration certificate of business and details of account showing the income of

the deceased not filed & there was no proof of deceased income - Tribunal - *Held* - income tax returns are statutory document on which reliance may be placed to determine annual income of the deceased, which cannot be ignored by any Court/Tribunal or Authority - details of account & proof of income is not necessary once income tax returns is filed - deceased died on 17.01.2007, hence income of financial year 2005-06 is relevant (Para 8)

B. Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 168 - Motor Accident claim - Determination of compensation - Monthly income Rs. 15000 - Future loss; Deceased aged 26 years i.e. below 40 years of age, 40% would be added for future loss of income = Rs. 6,000 - Total income : Rs.15000 + 6000=21,000 - deduction for personal and living expenses - deceased was unmarried and nobody was dependent upon him, hence, 1/2 should be deducted for personal expenses of the deceased; After 1/2 deduction for personal expenses = Rs 21000 - 10500=10500 - Annual income Rs. 10500 X 12=126000 - multiplier should be applied according to the age of the deceased - Tribunal fell in error applying multiplier on the basis of age of the parents - Multiplier applicable : 17 - Loss of dependency Rs. 126000 X 17=2142000 - Amount under non pecuniary heads Rs. 20000+50000= 70000 - Total compensation Rs. 2142000+70000=2212000 - claimants entitled for interest at the rate of 7% on the enhanced amount from the date of filing claim petition. (Para 13)

Allowed. (E-5)

List of Cases cited :

1. Vimal Kanwar & ors. Vs Kishore Dan & ors., AIR 2013 SC 3830

2. Sarla Verma & ors. Vs Delhi Transport Corp. & anr., 2009 ACJ 1298

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

4. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & ors. reported in (2015) 6 SCC 347

5. Malarvizhi & ors. Vs United India Insurance Co. Ltd. & anr., reported in 2020 0 AIR (SC) 90

6. Smt. Meena Pawaia & ors. Vs Ashraf Ali & Ors. reported in 2021 0 Supreme (SC) 694

7. National Insurance Co. Ltd. Vs Indira Srivastava & ors. (2008) 2 Supreme Court Cases 763

8. Panchratni & ors. Vs Smt. Manju Singh & ors. First Appeal From Order No. 2386 of 2013 decided on 25.03.2022

9. General Manager, Kerala State Road Transport Corporation, Trivandrum Vs Susamma Thomas 1993 (0) AIJEL-SC 9412

10. Gobald Motor Service Ltd. & anr. Vs R.M.K Veluswami & ors., 1962 SCR(1) 929

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

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

13. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors.

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

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

1. This appeal, at the behest of the claimants, challenges the judgment and order dated 15.01.2010 passed by Motor Accident Claims Tribunal/ Special/

Additional District Judge, Ballia (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No. 31 of 2007 awarding a sum of Rs.1,24,500/- with interest at the rate of 6% p.a. as compensation.

2. Heard Sri Satyendra Narayan Singh, learned counsel for the appellants; Sri Aijaz Ahmad Khan, learned counsel for the respondent no. 1-New India Insurance Company Ltd. None appears for the the remaining respondents.

3. The brief facts as culled out from the record are that on 17.01.2007 when deceased was driving his Indica Car No. U.P.-60-H-4901 owned by him and was travelling on Varanasi Ghazipur road, D.C.M. Truck No. U.P.-65-H-8205 coming from opposite side, which was driven rashly and negligently, dashed against the said car at about 10.00 p.m. In this accident, Anand Kumar and Jatin Kumar died on spot and Kumari Drishya Verma and Abhishek Verma sustained grievous injures. Deceased was a healthy person who was partner in J.J. Honda agency Ballia and was dealing in the business of purchase and sale of silver-golden ornaments, in retain which is his ancestral occupation. He was earning Rs. 1,77,578 annually and was paying income tax. He was unmarried. Claimant/appellant no. 1-Moti Lal Sarraf is the father, Claimant/appellant no. 2-Smt. Tara Devi is the mother and Claimant/appellant no. 3- is the sister of the deceased.

4. The accident is not in dispute, the liability of owner/insurance company to pay the compensation is also not disputed. The finding regarding negligence has attained finality. So now it is the dispute of quantum of compensation which is left to be decided in this appeal.

5. Learned counsel for the appellants submitted that the deceased was a business man he was engaged in jewelry business. It is also submitted that the deceased was income tax payee and his income tax return has been filed on record, but the learned Tribunal did not consider the income mentioned in income tax return on the ground that source of income is not proved by the appellants which was not required. Hence, learned Tribunal has awarded a very meagre amount of compensation. Learned counsel also submitted that it is also opined by the learned Tribunal that income tax return of only one year is filed. Learned Tribunal did not consider the fact that the income at the time of death of the deceased was relevant. It is further submitted that learned Tribunal not given any amount for loss of future income and multiplier of 5 is applied on the basis of age of the parents of the deceased wife, multiplier should have applied according to the age of the deceased. It is next submitted by learned counsel for the appellants that only Rs. 2,000/- were granted for funeral expenses and of Rs. 2,500/- were granted for loss of estate. No amount is granted for the loss of love and affection.

6. Learned counsel for the Insurance Company vehemently objected the submissions made by the appellants and further submitted that income of deceased mentioned in income tax return is not proved. Moreover, income tax return is in the name of firm and the shop of deceased is not disclosed. Hence, learned Tribunal rightly consider notional income of the deceased but learned counsel very fairly submitted that the multiplier should be

applied according to the age of the deceased.

7. We have perused the record and impugned judgment.

8. The deceased died on 17.01.2007, hence income of financial year 2005-06 may be relevant. Appellants have filed the copy of income tax return of the deceased pertaining to the financial year 2005-06 which is paper no. 14-C on the record. This goes to show that it is not in the name of firm but it is "individual". This document shows the annual income of the deceased at Rs. 1,77,578/- Learned Tribunal has ignored the income tax return on the ground that registration certificate of business and details of account showing the income of the deceased have not been filed and there is no proof of his income from business of sale and purchase of ornaments. On the basis of above observation, learned Tribunal has refused to rely on the annual income of the deceased on the basis of income tax return. This is not only absurd but not germane to the compensatory jurisprudence with regard to the Motor Accident Claim Petition under Section 166 of the Motor Vehicles Act, 1988. The income tax return is the face of income of assessee. This is authentic document of income which cannot be ignored by any Court/Tribunal or Authority. Hence, learned Tribunal has fallen error by not placing the reliance of income tax return which is not controverted by the Insurance Company and is against the judgment of ***Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830.*** Hence, learned Tribunal has not awarded just compensation. Annual income of the deceased for financial year 2005-06 is shown Rs. 1,77,578/- in the copy of income tax return, filed by the appellants on record which is not shown taxable. Hence we hold the monthly income of the deceased at Rs. 15,000/- per month rounded off.

9. Learned Tribunal has not awarded any sum for future loss of income file but judgment of Apex Court in ***Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 ACJ 1298*** was in vogue when the impugned judgment was delivered. After the aforesaid judgment, Hon'ble Apex Court has held in ***National Insurance Co. Ltd. Vs. Pranay Sethi and Others, 2017 LawSuit (SC) 1093*** that case of self employed persons, if he is below 40 years of age, 40% would be added for future loss of income.

10. Learned counsel for Insurance Company submitted that the deceased was unmarried and nobody was dependent upon him, hence, 1/2 should be deducted for personal expenses of the deceased. Per contra learned counsel for the appellants submitted that the learned Tribunal has rightly deducted 1/3 of income for personal expenses but we unable to concur the submissions made by the appellants. As per the judgment of Apex Court ***Munna Lal Jain And Another Vs. Vipin Kumar Sharma and Others reported in (2015) 6 SCC 347*** 1/2 would be deducted for personal expenses because the deceased was unmarried.

11. Learned Tribunal has fallen an error again for applying multiplier on the basis of age of the parents of the deceased Hon'ble Apex Court has held in ***Munna Lal Jain (Supra)*** that the multiplier would be applied according to the age of the deceased. As per the judgment of Sarla Verma (Supra), keeping in view 26 years age of the deceased multiplier of 17 would be applicable. Appellants would be entitled

to get Rs. 20,000/- for funeral expenses and mother of the deceased being Class-I heir would also get Rs. 50,000/- as filial consortium.

12. Despite the fact that the decisions even in the date when the judgment was pronounced namely ***Sarla Verma (Supra)*** were very clear that the income tax returns have to be look into a holistic approach. We are fortified in our view by the judgment of Apex Court in ***Malarvizhi & Ors. Vs. United India Insurance Company Limited & Anr., reported in 2020 0 AIR (SC) 90*** relied by the learned counsel for the appellants will enure for the benefit of the claimants, hence income tax returns are statutory document on which reliance may be placed to determine annual income of the deceased. The Insurance Company has not laid any rebuttal evidence and the Tribunal has failed to consider the potential of a man to earn relying on the decision of the Apex Court in brushing a side the income tax returns goes to show that the Tribunal has made the judgement venerable, just returning of filing that his share or income in the said commercial organization can also not be estimated, the proof is very clear that the income tax returns which were produced by the appellants were in the name of not the firm but it was individual in the name of the deceased. This is an error which is apparent on the face of the record proof of income is not necessary once income tax returns are filed details of account has not to be filed. This is not taking holistic view of the matter the decision relied by the Tribunal in deducting 1/3 and fixing the income at Rs. 3,000/- per month is again bad. The multiplier of parents would not have been applied after the judgment of ***Sarla Verma (Supra),*** the judgment is after the judgment of ***Sarla Verma (Supra)*** shows that the Tribunal has misdirected itself in awarding multiplier of 5 and added what can be said to be meagre amount under the head of funeral expenses and loss of estate, this itself makes the judgment venerable. We are again fortified in our view the judgment of Apex Court in Smt. ***Meena Pawaia & Ors. Vs. Ashraf Ali & Ors. reported in 2021 0 Supreme (SC) 694*** and the judgement in ***National Insurance Company Ltd. Vs. Indira Srivastava and Others reported in (2008) 2 Supreme Court Cases 763*** and a recent decision of this Bench in ***Panchratni and 5 Others Vs. Smt. Manju Singh and 2 Others in First Appeal From Order No. 2386 of 2013 decided on 25.03.2022*** will also enure for the benefit of the appellants. The judgement of Apex Court in ***General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas reported in 1993 (0) AIJEL-SC 9412*** and the judgment of ***Gobald Motor Service Ltd. and another Vs. R.M.K Veluswami and other, 1962 SCR(1) 929*** should have been made applicable for granting future loss of income which has not been done. We, therefore, recalculate the income as fallows and as reasoned above.

13. On the basis of above discussions the amount of compensation payable to the appellants is computed herein below:

(i). Monthly income Rs.15,000/-.

(ii) Added 40% for future loss of income=Rs. 6,000/-.

(iii). Total income : Rs.15,000+6,000=21,000/-.

(iv). After 1/2 deduction for personal expenses=Rs.21,000-10,500=10,500/-.

(v). Annual income Rs. 10,500X12=1,26,000/-.

(vi). Multiplier applicable : 17.

(vii). Loss of dependency Rs. 1,26,000X17=21,42,000/-.

(viii). Amount under non pecuniary heads Rs. 20,000+50,000= 70,000/-.

(ix). Total compensation Rs. 21,42,000+70,000=22,12000/-.

14. 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."

15. 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.

16. In view of the above, the appeal stands **partly allowed.** Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent- Insurance Company shall deposit the amount within a period of 08 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. Statutory amount be remitted to the Tribunal.

17. 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.

18. 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.

19. We request the Registrar General to circulate a copy of this judgement as we have relied on the recent guidelines issued by the Apex Court in ***Bajaj Allianz (Supra)*** and the recent judgment of Gujarat High Court ***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.***

20. We also request the Registrar General to send the copy of this judgment to the concerned Judge, if he still in service, so that he may not commit such mistakes in future, which are so apparent that it burdens the High Court.

(2022)06ILR A871
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2022

BEFORE

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

First Appeal From Order No. 1080 of 2021

Smt. Sheela Devi & Ors. ...Appellants
Versus
Shri Sumit Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Shreesh Srivastava

Counsel for the Respondents:
Sri Arvind Kumar

A. Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168 & 173 - Motor Accident claim - Negligence - one Magic loader suddenly dashed deceased who was driving his own car on correct side - Held - vehicle driven by the deceased also crossed the white mark, however driver of the bigger vehicle was suppose to take more caution is cardinal principle of law of negligence - driver of the offending vehicle has not stepped into the witness box so as to testify as in what manner, the accident took place - negligence of the deceased can be attributed 30% as the speed of the bigger vehicle was much more than the speed of car when it dashed with the vehicle driven by deceased and it pushed the vehicle behind. (Para 12, 13)

B. Civil Law - Motor Vehicles Act, 1988 - Sections 166, 168 & 173 - Motor Accident claim - Income - Deceased income Rs. 405994 per year as per the income tax return of year preceding the accident or of the year when accident occurred- Tribunal misdirected itself in not considering the income tax return and decided that the deceased was earning Rs.358676 which was the mean of three years - Held - court considered deceased income to be Rs. 400000 per annum as per the income tax returns. (Para 16)

Allowed. (E-5)

List of Cases cited :

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

2. New India Assurance Co. Ltd. Vs Somwati & ors., 2020 LawSuit (SC) 559

3. Oriental Insurance Co. Ltd. Vs Sangita & ors., 2020 LawSuit(SC) 559

4. Bajaj Allianz General Insurance Co. Ltd. Vs Venu Singh & ors., 2016 [3] LawSuit (All) 4465

5. Kumari Kiran & ors. Vs Sajjan Singh & ors., 2014 LawSuit (SC) 827

6. Sangita Arya & ors. Vs Oriental Insurance Co. Ltd. & ors., (2020) 5 SCC 327

7. New India Assurance Co. Ltd. Vs Somwati & ors., 2020 LawSuit (SC) 559

8. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

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

10. Renu Rani Shrivastava Vs New India Assurance Co. Ltd., AIR (2019) 5719

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

12. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

14. Bajaj Allianz General Insurance Co. Ltd. Vs U.O.I. & ors. dated 27.1.2022

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

1. Heard Sri Shreesh Srivastava, learned counsel for the appellant, Sri Arvind Kumar, learned counsel for the respondent, none appears for the owner and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment/award dated 30.3.2021 and the decree dated 3.4.2021 passed by Motor Accident Claims Tribunal/ Presiding Officer , Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.No.1014 of 2016 awarding a sum of Rs.19,77,831/- with interest at the rate of 7% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is in dispute. The respondent has not challenged the liability imposed on them. The issues to be decided by this Court are, the quantum of compensation awarded and negligence.

4. Brief facts of the present case are that on 7.5.2016 at about 2:30 p.m, near village Gopalpur, one Magic loader vehicle bearing number U.P.-71 B-9992 was coming from Kanpur side suddenly dashed Gyan Prakash @ Gyan Prakash Uttam who driving his own car on correct side and was plying the vehicle forwards Kanpur from Jahanabad in district Fatehpur. He received several injuries from the aforesaid accident and thereafter he was taken to C.H.C. Bhitargoan there he was declared dead. He died on 7.5.2016 due to the injuries received in the aforesaid motor traffic accident.

5. It is submitted by learned counsel for the appellant that the deceased was 48 years of age at the time of accident and was in the business of dealing in Jwellery and was having his shop. His income was considered by the Tribunal to be Rs.3,58,676/- per year which according to the counsel for the appellant is on the lower side and should be considered at least Rs.4,05,994/- per year as per the income tax return of year preceding the accident or of the year when accident occurred. It is further submitted that the Tribunal has granted amount towards future loss of income of the deceased which is on lower side and should be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and Rule 220(i) of U.P. Motor Vehicles Rules, 1998. It is further submitted that the amount granted under non-pecuniary damages are on the lower side requires enhancement in view of the decision of New India Assurance Company Limited Vs. Somwati and others, 2020 LawSuit (SC) 559.

Learned counsel for the appellant further submits that the ocular version of PW-2 is categorical that the road was 12'5 feet wide and, therefore, the decision of the Tribunal that the deceased had contributed 50% to the accident is bad and the facts prove otherwise.

6. Learned counsel for the appellant has heavily relied on the decisions of (a) **Oriental Insurance Company Limited Vs. Sangita and others, 2020 LawSuit(SC) 559, (b) Bajaj Allianz General Insurance Company Limited Vs. Venu Singh and others, 2016 LawSuit (All) 4465, (c) Kumari Kiran and others Vs. Sajjan Singh and others, 2014 LawSuit (SC) 827 (d) Sangita Arya and Others Vs. Oriental Insurance Company Limted and others, (2020) 5 SCC 327 and (e) New India Assurance Company Limited Vs. Somwati and others, 2020 LawSuit (SC) 559** so as to contend that the Tribunal has misdirected itself in not considering the income tax return and decided that the deceased was earning Rs.3,58,676/- which was the mean of three years. Learned counsel has contended that the vehicle driven by the deceased was a smaller vehicle and driver of the truck has not stepped into witness box and therefore the finding of deceased being co-author of accident requires reassessment by this Court.

7. As against this, learned counsel for the Insurance Company has submitted that the award does not require any interference. The accident occurred on 7.5.2016 and the decision of the Tribunal is in consonance with twin decisions namely, **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** for multiplier and compensation is calculated as per decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** and therefore the Tribunal has not committed any error in granting the non pecuniary damages. It is further submitted that the Tribunal has granted compensation considering the income tax return and has rightly taken mean of last three years for deciding the income of deceased. The learned counsel submitted that the evidence of claimants would demonstrate that the decision qua negligence does not require any interference by this Court under Section 173 of Motor Vehicles Act, 1988.

Finding On Negligence

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

10. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

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

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

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

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

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal

Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

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

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

emphasis added

11. As far as negligence is concerned, we are satisfied that the deceased has also contributed to the accident having taken place. The only question is what was the percentage of this contribution.

12. While going through the evidence of PW-2, we find that the vehicle driven by the deceased has also crossed the white mark. However, the driver of the bigger vehicle is suppose to take more caution is cardinal principle of law of negligence. Our findings get support from decision of Apex Court in **Kumari Kiran and others (supra).**

13. In our case, the charge sheet and FIR was laid against the driver of the other offending vehicle. The driver of the offending vehicle has not stepped into the witness box so as to testify as in what manner, the accident took place. The negligence of the deceased can be attributed 30% as the speed of the bigger vehicle was much more than the speed of car when it dashed with the vehicle driven by deceased and it pushed the vehicle behind. We are fortified in our view by the decision of this Court in **Bajaj Allianz General Insurance Co.Ltd. (supra).**

14. The Apex Court in the decision of **Renu Rani Shrivastava Vs. New India Assurance Company Limited, AIR (2019) 5719** while considering several decision on the issue of negligence has reconsidered the issue of negligence. In the said case the deceased was coming from K side to A side by car and lorry was coming from A to K and there was a collision between two vehicles - car was coming on its correct side. Lorry recklessly and negligently was driven by driver came on the right side of the road and dragged the car to extreme side of road. The Apex Court considered the breadth of road and decided the question of negligence.

15. In case on hand from the evidence it is clear that the car was on its correct side but was slightly on the right hand side of the road. This fact would reveal that the driver of the lorry was more negligent and collided with the car of the deceased at point "A" . Thus, we hold the driver of both the vehicles to have contributed to the accident not in equal proportionate. The driver of the car was driving the smaller vehicle . The driver of lorry was suppose to take more caution and, therefore, we modified the order of Tribunal.

Finding For Compensation :-

16. We consider the income of the deceased to be Rs.4,00,000/- per annum as per the income tax returns. It has been submitted by counsel that tax has already been deduced while calculating the income. As far as the heads of addition of future loss is concerned, the finding of Tribunal does not require any modification as addition of 25% is granted which is just and proper.

17. Heard the learned counsels for the parties and considered the factual data. This Court finds that the accident occurred on 7.5.2016 causing death of Gyan Prasad Uttam who was 48 years of age at the time of accident. The Tribunal has assessed his income to be Rs.3,58,676/- per year which according to this Court, in the year of accident, would be at least Rs.4,00,000/- per year looking to his vocation and the income tax return as per decision of Apex Court in **Sangita Arya and Others (supra)** and hold that taking mean of income of three years is bad as reflected in tax returns. The income as per income tax return by increasing and hence income of last year return latter most income tax return every year has to be considered taking of average has been deprecated by Apex Court in case titled **Sangita Arya and Others (supra)** which we follow. To which as the deceased was in the age bracket of 46-50, 25% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. The amount under non-pecuniary heads should be at least Rs.1,00,000/- in view of the decision in Pranay Sethi (Supra) as every three years 10% be added to Rs.70,000/-. In view the facts and circumstances of the case, this Court feels no interference is called for as far as deduction of personal expenses is concerned.

18. The total compensation payable is recalculated and is computed herein below:

i. Annual Income Rs.4,00,000/-

ii. Percentage towards future prospects : 25% namely Rs.1,00,000/-

iii. Total income : Rs.4,00,000/- + Rs.1,00,000/- = Rs.5,00,000/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.3,33,333/-

v. Multiplier applicable : 13

vi. Loss of dependency: Rs.3,33,333/- x 13 = Rs.43,33,329/-

vii. Amount under non pecuniary heads : Rs.1,00,000/-

viii. Total compensation :Rs.44,33,329/-.

ix. Compensation payable to claimants after deductions of 30% negligence on the part of the deceased :

Rs.44,33,329/- - Rs.13,29,999/- = Rs.31,03,330/-

19. As far as issue of rate of interest is concerned, the interest 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."

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

21. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till award and 6% thereafter till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

22. 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.

23. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri 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.

24. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment

of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

25. T he 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 19 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

(2022)06ILR A878
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

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

First Appeal From Order No. 1663 of 2016

Smt. Pooja Tiwari & Ors. ...Appellants
Versus
Union Of India & Anr. ...Respondents

Counsel for the Appellants:
Sri Vidya Kant Shukla

Counsel for the Respondents:
Smt. Raj Kumari Devi

(A) Civil Law – Motor Vehicles Act, 1988, Section -166— Appeal - compensation - Contributory negligence – offending Truck came and dashed with scooter of deceased causing grievous injuries and death – truck being bigger vehicle, the driver of truck has to be more cautious – Principle of *Res ipsa loquitur* - contributory negligence to the extent of 25% attributed to the deceased.(Para 15)

(B) Civil Law – Motor Vehicles Act, 1988, Section 166, - U.P. Motor Vehicles Rules, 1998, Rules 220 - Compensation - Quantum - Multiplier of 16 should be applied instead of 17 as deceased was in age bracket of 31 - 35 as well as per law lay down in *Sarla Verma'a* & Pranay Sethi' case 50% of income ought to be added towards future loss of income - Compensation computed and awarded accordingly. (Para 16, 17, 20)

Appeal is partly allowed.(E-11)

List of Cases cited: -

1. Dinesh J Vs National Insurance Comp. Ltd. & ors., 2018 vol. 1 TAC 337 (SC)

2. National Insurance Comp. Ltd. Vs Pranay Sethi & ors., 2017 vol. 0 Supreme (SC) 105

3. Pawan Kumar & anr. Vs M/S Harkishan Dass Mohan Lal & ors. (Decided on 29.01.2014)

4. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. (FAFO No. 1818/2012 Decided on Dt. 19.07.2016)

5. Archit Saini & anr. Vs Oriental Insurance Comp. Ltd., AIR 2018 SC 1143

6. Khenyei Vs New India Assurance Comp. Ltd. & ors., 2015 LawSuit (SC) 469

7. Vimal Kanwar & ors. v. Kishore Dan & ors., 2013 (3) T.A.C. 6 (SC)

8. Sarla Verma & ors. v. Delhi Transport Corporation & anr., 2009 LawSuit (SC)

9. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (Supreme court)

10. A. V. Padma Vs Venugopal (2012 vol. 1 GLH SC 442)

11. Smt. Hansa Gauri P. Ladhani Vs The Oriental Insurance Company Ltd. (2007 vol. 2 GLH 291)

12. 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

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

1. Heard Sri Vidya Kant Shukla for the appellants and Ms. Raj Kumari Devi for the respondents.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 31.03.2016 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.17, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 624 of 2007 awarding a sum of Rs. 9,48,023/- with interest at the rate of 7% as compensation.

3. Brief facts are that on the fateful date i.e. 8.8.2006 at about 9:40 a.m. the deceased was going to join his duties by Scooter, bearing no.UP78Z-4094, and when he reached near Golghar traffic point, Bahad, district Abardin, Andaman (Port Blair), a Army Truck, bearing no.03-D-152105-M came and dashed with the scooter of the deceased which caused grievous injuries causing death. He succumbed to injuries on the very same day in the hospital.

4. The accident is not in dispute. The claimants have challenged the award on two counts namely negligence and quantum of compensation.

5. Leaned Counsel for the appellant has relied on the decisions in **Dinesh Kumar J. @ Dinesh J Vs. National Insurance Company Limited and others, 2018 (1) TAC 337 (SC) and decision of this Court in Smt. Pooja Tiwari and others Vs. Union of India and another, First Appeal From Order No.1663 of 2016, decided on 28.4.2022**, so as to contend that the deceased was not negligent and the quantum requires upward modification. It is submitted that the driver of the truck was solely negligent.

6. Learned counsel for the appellant has submitted that the Tribunal has not granted any amount towards future loss of income. It is further submitted that 50% should be added as future loss of income of the deceased in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105** as the deceased was below 40 years and was in permanent job. It is further submitted that the amount granted under non-pecuniary head is on the lower side and is required to be enhanced. It is lastly submitted that interest should be as per the repo rate prevailing.

7. As against this, learned counsel for the respondent submits that the quantum of compensation awarded by the Tribunal is just and proper and does not call for any interference of the Court.

8. The twin issues posed for our consideration are holding deceased to be co-author of the accident to the extent of 35% and compensation awarded more particularly non-grant of future loss of income.

9. The concept of contributory negligence has been time and again evolved, decided and discussed by the courts.

10. 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.

11. The term contributory negligence has been discussed time and again a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place. The Apex Court in **Pawan Kumar & Anr vs M/S Harkishan Dass Mohan Lal & Ors decided** on 29 January, 2014 has held as follows:

"7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha & Ors. (supra). Paras 6 and 7 of T.O. Anthony (supra) which are relevant may be extracted hereinbelow:

"6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant

and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

12. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co. Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 which has held as under:

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

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

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

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without*

negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

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

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

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

13. The respondent has failed to prove that accident occurred due to carrying of more persons as pillion rider. In absence of such a finding, the respondents having not proved factum of negligent on the part of the scooterist, cannot be benefitted. The negligent act must contribute to the accident having taken place. The Apex Court recently has considered the principles of negligence in case of ***Archit Saini and another Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143.***

14. The Apex Court in ***Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469*** has held as under:

4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of

composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions*

by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

15. The deceased sustained injuri0es on his head as helmet was not used by him. He came from behind and tried to overtake the truck. PW1 and PW2's version is contradicted by driver of the truck, who was also an Army man. The evidence goes to show that it was a case of contributory negligence but, truck being bigger vehicle, the driver of the truck has to be more cautious and, therefore, we hold the deceased negligent to the tune of 25%.

16. It is not in dispute that the deceased was an employee in the Indian

Air Force and was earning Rs.10,748/- per month. This fact has been held by the Tribunal. The Tribunal has considered the judgment in ***Vimal Kanwar and others v. Kishore Dan and others, 2013 (3) T.A.C. 6 (SC)*** holding that certain amounts cannot be deducted. We also confirm the same. However, non applicability of the judgment in ***Sarla Verma and others v. Delhi Transport Corporation and another, 2009 LawSuit (SC)*** for addition of 50% towards future loss of income is an error apparent on the face of record. Non application of Rules 220 of Uttar Pradesh Motor Vehicle Rules, 1998 (hereinafter referred to as "Rules') by the Tribunal is also bad. The finding of the Tribunal that Rules came into force after 2010 and the accident occurred on 8.8.2006 is a misreading of the said Rules by the Tribunal. This finding of the Tribunal will have to be upturned and, therefore, we grant addition of 50% towards future loss of income as both Rules as well as the decision in ***Sarla Verma (Supra)*** will apply. The deduction of 1/3rd as granted by the Tribunal is not disturbed. However, we are in agreement with the learned Counsel for the respondents that the multiplier of 16 should be applied instead of 17 as the deceased was in the age bracket of 31 - 35. The Tribunal has granted only Rs.6,000/- under non pecuniary heads which is also bad and against the settled legal principle. Therefore, as far as amount under non-pecuniary head are concerned, the claimants would be entitled to Rs. 70,000 + 10% rise in every three years in view of the decision in ***Pranay Sethi (supra).*** We also award Rs.50,000/- each to the minor children, who have lost their father at very prime age. Hence, the compensation payable to the appellants in view of the decision of the Apex Court in ***Pranay Sethi (Supra)*** is computed herein below:

i. Income Rs.10,748/- per month

ii. Percentage towards future prospects : 50% namely Rs.5,374/-

iii. Total income : Rs. 10,748 + 5,374 = Rs. 16,122/-

iv. Income after deduction of 1/3rd : Rs. 10,748/-

v. Annual income : Rs.10,748 x 12 = Rs.1,28,976/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.1,28,976 x 16 = Rs. 20,63,616/-

viii. Amount under non pecuniary heads : Rs.1,00,000/- (rounded up) + Rs.50,000/- + Rs.50,000/- (total Rs.2,00,000/-)

ix. Compensation : Rs. 22,63,616/-

x. Amount payable to claimants after deduction of 25% negligence is Rs. **16,97,712/-.**

17. As far as issue of rate of interest is concerned, the interest 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."

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

19. 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.

20. 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 of 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.

21. 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 shall deposit the amount with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited within a period of 12 weeks from today. The amount already deposited be deducted from the amount to be deposited.

22. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

23. This Court is thankful to both the counsels to see that this very old matter is disposed of.

(2022)06ILR A886
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2022

BEFORE

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

First Appeal From Order No. 1751 of 2017

Smt. Shabnam Begum & Ors. ...Appellants
Versus
Surendra Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Pramod Kumar, Sri Ram Ashish Pandey

Counsel for the Respondents:
Ms. Archana Singh, Sri Mukesh Kumar, Sri Shresth Pratap Singh

Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 173 - Motor Accident claim - Income - deceased 34 years of age & was a L.I.C. Agent - Tribunal considered income of deceased to be Rs. 3000 per month disbelieving the documentary evidence and considered income of labourer - *Held* - not believing Form 16-A of Income Tax Return is absolutely perverse finding - documentary evidence on record shows that the deceased was getting commission of about Rs.85,000/- per annum from L.I.C. - claimants produced documents to show that the deceased was having his own business - decision of Tribunal perverse for discarding all evidence - documentary evidence even if not proved, the Tribunal's should take a holistic view - Tribunal u/s 169 of Act could have taken upon itself to see that the documents are proved (Para 5, 6)

Allowed. (E-5)

List of Cases cited:

1. Laxmi Devi Vs Mohd. Tavar 2008 (2) TAC SC

2. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

3. General Manager Kerela State Road Transport Corp. Trivandrum Vs Susamma Thomas & ors. 1994 (2) SCC 176

4. U.P.S.R.T.C. Vs Trilok Chand, 1996 T.A.C. (2) 176

5. Gobald Motor Service Ltd. & Vs R. M. K. Veluswami & ors. AIR 1962 SC 1

6. R.K. Malik Vs Kiran Pal, 2009 14 SCC 1

7. Smt. Meena Pawaia & ors.Vs Ashraf Ali & ors. 2001 0 Supreme (SC) 694

8. Akhilesh Kumar Anand Vs Rahul Mishra & anr. F.A.F.O. No. 2019 of 2021 decided on 18.4.2022

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

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

11. Bajaj Allianz General Insurance Company Pvt. Ltd. Vs U.O.I. & ors. vide order dated 27.1.2022

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

1. Heard Sri Ram Ashish Pandey, learned counsel for the appellants, Sri Shresth Pratap Singh, learend counsel appearing along with Ms. Archana Singh, learned counsel for the respondent-Insurance Company and perused the judgment and order impugned.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 27.02.2017 and decree dated 03.03.2017 passed by the learned Additional District Judge, Court No. 8/Motor Accident Claim Tribunal, Etawah (hereinafter referred to as 'Tribunal') in M.A.C.P. No.765 of 2015 (Smt. Shabnam Begum And 5 Others Vs. Surendra Kumar And 2 Others), under Section 140/166 of the Motor Vehicle Act, 1988 (referred as Act), awarding a sum of Rs.4,15,000/- with 7% interest per annum to the claimants.

3. It is not in dispute that the deceased was 34 years of age. He was a L.I.C. Agent. The Tribunal has considered income of deceased to be Rs.3,000/- per month by disbelieving the documentary evidence produced by the claimants and considered

income of labourer. It is submitted by Sri Ram Ashish Pandey, learned counsel for the appellants that the income of the deceased should have been considered to be Rs.30,000/- per month; as the deceased was below 40 years, 40% of the income should be added as future loss of income. It is further submitted that the deceased was survived by his widow and three minor children, 1/4th amouny towards personal expenses of the deceased should be deducted. It is also submitted that the interest should be granted at the rate of 7.5% and Rs.70,000/- should be granted under the head of non-pecuniary damages.

4. It is submitted that reliance by Tribunal on the judgment of **Laxmi Devi Vs. Mohd. Tavar 2008 (2) TAC SC** has been applied by the Tribunal for considering the income is bad. It is submitted that the judgment in the case of Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121 has been in vogue when the Tribunal decided this matter on 27.02.2017. The Uttar Pradesh Motor Vehicle Rules 1998 (Amended in 2011) was also in vogue despite that the Tribunal has not considered and has not granted any amount under the head of future loss of income. It is submitted that the Tribunal has not followed the judgment in the case of **General Manager Kerla State Road Transport Corporation Trivandrum** Vs. **Susamma Thomas and others 1994 (2) SCC 176** followed by **U.P.S.R.T.C. Vs. Trilok Chand, 1996 T.A.C. (2) 176** which has followed the judgment in the case of **Gobald Motor Service Ltd. & Vs. R. M. K. Veluswami & Others AIR 1962 SC 1,** hence, all the three judgments enjoined duty on the Tribunal to decide what is known as just compensation.

5. The learned Tribunal very unfortunately has not even considered that even in the year of accident the minimum wages admissible for a house wife in the year 2012 were Rs.5,000/- per month. For a child of 12 years in 2012 also the Apex Court has granted a sum of Rs.5/- lacs. In the case of **R.K. Malik Vs. Kiran Pal, 2009 14 SCC 1.** The learned Tribunal in its over zeal to grant less amount has rendered the award absolutely venerable as the documentary evidence even if was not proved, the Tribunal's in the state should take a holistic view instead of relying upon the judgment of **Laxmi Devi (supra)** which is of the year 2008. The Tribunal very strangely relies on the xerox copies of school certificate for fixing age but refuses to rely on the Income Tax Return. We do not find any overwriting as mentioned by the Tribunal in its award, it was nobody's case that the documents produced were not genuine. Such a reasoning of the Tribunal shows that either the Tribunal was stayed away with other factor which are not germane to such a litigation. The Tribunal even lost site of the fact that the deceased survived for some hours and was hospitalized. The deceased was a holder of Pan Card. The L.I.C. Agency Code was also there. He was a Income Tax payer and not believing Form 16-A of Income Tax Return is absolutely perverse finding. We do not find any overwriting in the document 16-A filed by the claimants along with the document of Divisional Office Agra, L.I.C. can this all said to be not showing that the deceased was a person who was earning and was a respectable tax payer of the country. The bills given by Manoj Kumar Gupta and the receipts by agricultural Mandi Samiti also belies the finding of the Tribunal. The identity card for Commission Agent also and registration certificate given by K.B.C.L. India Ltd. will not permit us to concur with the learned Tribunal, rather, we deprecate this

practice and as there was also further document of Sai Prasad's property in the name of the deceased way back in the year which comprises of bunch of documents which goes to show that he was running a flour mill, it is also orally opined by his wife (widow). We do not find any overwriting in the Income Tax Return produced as document 26(G) and though, the document is not admitted by the Insurance Company. The document shows that he was not a labourer but one of tax payer of this country. The Income Tax Department has also given the acknowledgement of tax deduction at source. The Tribunal under Section 169 of Act could have taken upon itself to see that the documents are proved. The Insurance Company could have also examine as an expert just to brush aside the the same cannot be accepted. The claimants have tried to summon the witnesses but the Tribunal in its over zeal has not considered the same. The written arguments of Insurance Company also did not stayed that the said documents produced are fake. The only contention is that they have not been proved. The finding of fact that the deceased was getting Rs.5,000/- as rent is also held against the claimants.

6. The documentary evidence is there on record which shows that the deceased was getting commission of about Rs.85,000/- per annum from L.I.C. which is also on record which could not be disputed by Ms. Archna Singh, learned counsel for the Insurance Company. The claimants have produced documents to show that the deceased was having his own business, bill are there which are no doubt, xerox copies not proved to be taken though they are secondary evidence. The Tribunal should consider the same. The decision of Tribunal is perverse for discarding all evidence. The judgment of Laxmi Devi (supra) has applicable to cases of labaur when the men or women does not have any vocation or income. The recent judgment in the case of **Smt. Meena Pawaia & others Vs Ashraf Ali and others 2001 0 Supreme (SC) 694** would also enure for the benefit of the appellants. We, therefore, cannot concur with the view taken by the Tribunal that minimum of the income i.e. Rs.3,000/- should be considered.

7. The Income Tax Returns are the mirror of the income of the person discarding the same is against the principle of law enunciated by the Apex Court. In F.A.F.O. No. 2019 of 2021 **(Akhilesh Kumar Anand Vs. Rahul Mishra and Another)** decided on 18.4.2022, the Division Bench of this Court has held as follows:-

*"11. The Apex court decision in **Anita Sharma Vs. New India Assurance Company Ltd, 2021 (1) SCC 171** and **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186,** has held that strict proof of all facts is not necessary to decide the motor accident claim petition. The Tribunal should take the holistic view of the matter and the claimant has to establish his/her case on the touchstone of preponderance of probability.*

*12. The Division Bench of Madhya Pradesh High Court in **Reliance General Insurance Co. Ltd. Vs. Subbulakhmi and others** passed in CMA No. 1482 of 2017 has also expressed the same view with regard to the standard of proof.*

*13. In **Bimla Devi and others Vs. Himanchal Road Transport Corporation***

and others 2009 (2013) SCC 530, *also the Apex Court held that 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.*

14. Learned Tribunal has discarded the documentary evidence, filed by the appellant with regard to the salary of the deceased. Learned Tribunal could have invoked the powers under Section 169 of the Motor Vehicle Act, 1988, which gives claims Tribunal all the powers of Civil Courts for the purpose of taking evidence, and enforcing the attendance of the witnesses and compel the discovery and proof of documents and material objects. If the learned Tribunal wanted to get the salary certificate and payment register to be proved, it could have suo moto summoned the concerned employee of the school with original record because it is the duty of the Tribunal to award 'just compensation'."

8. Section 169 in The Motor Vehicles Act, 1988-

"169. Procedure and powers of Claims Tribunals.?

(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

9. The age of the deceased as decided by the Tribunal is maintained. The multiplier for the age 34 years would be 16 and not 17. For non-pecuniary damages, we grant Rs.70,000/- and Rs.50,000/- each to the three minor child. The deduction of 1/4th made by the Tribunal is confirmed.

10. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession namely that of L.I.C. Agent can be considered to be Rs.30,000/- per month to which as he was below 40 years, 40% as future loss of income requires to be added in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

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

i. Income Rs.20,000/- per month

ii. Percentage towards future prospects : 40% namely Rs.8,000/-

iii. Total income : Rs. 20,000 + 8,000 = Rs. 28,000/-

iv. Income after deduction of 1/4th : Rs. 21,000/-

v. Annual income : Rs.21,000 x 12 = Rs. 2,52,000/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.2,52,000 x 16 = Rs.40,32,000/-

viii. Amount under filial consortium and other non pecuniary heads : Rs.70,000/- + Rs.50,000/- to the each 3 minor children

x. Total compensation : 42,52,000/-

12. 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."

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

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

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 10 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

16. Record be sent back to the tribunal.

17. This Court is thankful to both the counsels for getting this matter decided.

(2022)06ILR A891

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 From Order No. 2030 of 2011

Smt. Sunita Bansal Gupta & Anr. ...Appellants

Versus

Smt. Ranjana Gupta & Anr. ...Respondents

Counsel for the Appellants:

Sri Sanjay Agarwal, Sri Abhijit Banerjee, Sri Sundeep Agarwal

Counsel for the Respondents:
Sri Arun Kumar Srivastava

Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 173 - Motor Accident claim - Quantum of compensation - deceased going on a Scooter as a pillion rider collided with the truck, sustained several injuries and died – deceased aged about 20 years was Student of Engineering & was also doing part time job and was earning Rs.10,000/- per month - Tribunal refused to consider the Income Tax Returns of the deceased as it held that the income of the deceased was not proved, therefore daily wage of labourer should be considered as an income - reason for not accepting IT returns, is that a young student cannot travel to serve - Tribunal not granted any amount towards future loss of income & applied multiplier of 14 as per age of mother - *Held* - income looking to the private employment and the student of engineering, his income must be Rs.10,000/- p.m. - deceased was below the age of 40 years and self employed, hence 40% of the income will have to be added - it is now settled legal position that age of the deceased has to be considered, therefore Multiplier applicable is 18, as the deceased was in the age bracket of 15- 20 years applicable (Para 14, 15)

Allowed. (E-5)

List of Cases cited:

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

2. National Insurance Co. Ltd. Vs Shyam Singh & ors., 2011 ACJ 1990 SC

3. Smt. Sarla Verma Vs Delhi Transport Corp. & ors., 2009 (3) RAJ 373

4. Meena Pawaia & ors. Vs Ashraf Ali & ors, 2021 LawSuit (SC) 743

5. General Manager, Kerala State Road Transport Corp., Trivandrum Vs. Susamma Thomas 1993 (0) AIJEL- SC 9412

6. Gobald Motor Service Ltd. & anr. Vs R.M.K Veluswami & ors. 1962 SCR(1) 929,

7. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

8. Kurvan Ansari @ Kurvan Ali Vs Shyam Kishore Murmu, 2021 (0) AIJEL-SC 67995

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

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

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

12. National 7 Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

13. Oriental Insurance Co. Ltd. Vs Chief Commissioner of Income Tax (TDS), R/Special Civil Application No.4800 of 2021 decided on 05.04.2022

14. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. vide order dated 27.1.2022

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

1. Heard learned counsel for the appellants and learned counsel for the respondents. Perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 30.11.2010 passed by Motor Accident Claim Tribunal Agra/Additional District Judge, Court No.4, Agra (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.458 of 2009 awarding a sum of Rs.2,59,000/- with interest at the rate of 6% as compensation.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent concerned has not challenged the liability imposed on them and, therefore, issues decided by the tribunal other then grant of compensation have attained finality. The only issue to be decided is, the quantum of compensation awarded.

4. The brief facts as culled out from the record are that on 25.05.2009 at about 12.00 p.m., deceased Rahul Bansal aged about 20 years along with one Prashant Goyal was going by the Honda Activa Scooter as a pillion rider to his college in a moderate speed on his left side, a truck no.RJ-29/GA-0223 which was being driven ahead of deceased, in a very high speed suddenly applied brake and due to which scooter collided with the truck, the deceased plying along with Prashant Goyal sustained several injuries and died on the same day.

5. It is submitted by Shri Sundeep Agarwal, learned counsel for appellants that the Tribunal refused to consider the Income Tax Returns of the deceased and it is further submitted by Shri Agarwal that young boy who was Student of Engineering may have taken loan that cannot be adversely held against the earning capacity of the deceased. It is not proved by any cogent evidence by the respondents that the evidence of PW-3 is unreliable. It is further submitted that Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050**. It is further submitted that amount under non-pecuniary heads which is granted and the interest awarded by the Tribunal are on the lower side and requires enhancement. Learned counsel for appellants submitted that deceased was Student of Engineering and he was also doing part time job and was earning Rs.10,000/- per month. It is also submitted that as the deceased was looking after his father and mother, the deduction towards personal expenses of the deceased who was bachelor and 20 years of age should be 1/2. The multiplier has to be as per age of deceased, i.e., 20 years and it should have been 18 instead of 14 as awarded by the tribunal. No cogent reasons except that reasonable compensation would be if multiplier of 14 is granted as per age of mother. The tribunal has considered the judgment of Sarla Verma (supra) wherein also it is held that age of deceased be considered. The judgement of Sarla Verma (Supra) has been totally misinterpreted by the learned Judge. The tribunal could have very well even relied on the judgment titled ***National Insurance Company Ltd v. Shyam Singh and others, 2011 ACJ 1990 SC*** referred by reiterating Sarla Verma (Supra) which also should have been looked into by the tribunal while deciding the multiplier. The tribunal should not have taken the multiplier of the mother. However, it is now settled legal position that age of the deceased has to be considered. The tribunal has not assessed the future loss of income and it should be 40% of income as per U.P. Motor Vehicles Rules, 2011 and Pranay Sethi (Supra).

6. Learned counsel for the respondent-Insurance company, has vehemently submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement. It is also contended that there is no documentary evidence to show that the income of the deceased was Rs.10,000/- p.m. in the year 2011, i.e., year of accident.

7. The moot question which arises before us, whether this Court should concur with funniest reasons given by the learned tribunal sought to be concurred with and reiterated and supported by Shri Arun Kumar Srivastava, learned counsel for respondent-insurance company that a student of Engineering who had taken loan could not serve as he had taken educational loan and could not serve in a private firm. It is submitted by Shri Srivastava that reasoning of the Tribunal are germane and the income of the deceased was rightly considered to be Rs.3,000/- per month as per he was a student and income is not proved.

8. The reasoning given by the tribunal is not only perverse but it has misled itself and misread the judgement of the Apex Court case titled ***Smt. Sarla Verma Vs. Delhi Transport Corporation and others, 2009 (3) RAJ 373*** and has brushed aside the judgments cited by claimants. ***As far as reasonings and income of deceased are concerned*** admitted position of facts are as follows:-

(a) Deceased was Student of Engineering and was 20 years of age;

(b) IT returns of the deceased were filed;

(c) he was part time employed; and

(d) the salary certificate is proved by cogent evidence.

9. The tribunal held that as the income of the deceased was not proved, therefore daily wage of labourer should be considered as an income and no amount for future loss could be given. This again if fallacious reading of the facts and non grant of future loss is against the mandate of the Apex Court.

10. It is not proved to the contrary by Insurance Company, therefore, placing not reliance on the document by the tribunal cannot be accepted by this Court as the reason for not accepting IT returns, is that a young student cannot travel to serve and thus considered the minimum amount as income of student.

11. The tribunal with due respect has not taken what is known as holistic view of the matter, the young boy who was aged about 20 years was studying Engineering even if go by the decision of the Apex Court in the case of ***Meena Pawaia & ors. Vs. Ashraf Ali & ors, 2021 LawSuit (SC) 743*** and the judgment cited of this Court and Apex that the tribunal has taken a holistic view in the matter even if the tribunal did not believe that he was serving, the tribunal could not have considered his income as that of a labourer.

12. Having heard learned counsels for the parties and considered the factual data, the accident occurred on 25.05.2009 causing death of Rahul Bansal who was also 20 years of age and left behind him his father and mother. The Tribunal has assessed the income of the deceased to be Rs.3000/- per month is not just and proper, it requires to be enhanced. The income as decided by the tribunal requires interference by this Court. The tribunal has also committed error in not considering future prospects and personal expenses of the deceased and granting multiplier of 14 instead of 18 on basis of wife as awarded by the tribunal requires to be enhanced as per age of the deceased.

13. As far as beneficial piece of legislation is concerned, the strict rules of

Civil Procedure Code and Evidence Act are not required to adhered to.

14. The tribunal has erred itself in not considering the income and future prospects as per age of the deceased. The income looking to the private employment and the student of engineering, his income must be Rs.10,000/- p.m. and same should be considered. The deceased was below the age of 40 years and self employed, hence 40% of the income will have to be added in view of the decision of the Apex Court in General **Manager, Kerala State Road Transport Corporation, Trivandrum Versus Susamma Thomas** reported in **1993 (0) AIJEL- SC 9412** reiterated in **Pranay Sethi (Supra).** Looking to the general trend even in **Gobald Motor Service Ltd. and another Vs. R.M.K Veluswami and other, 1962 SCR(1) 929**, the addition of 40% can be granted. The tribunal even at the earliest judgment it would not be committed this fallacy.

15. 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 recalculation of compensation would be as follows:

i. Income Rs.10,000/- p.m.

ii. Percentage towards future prospects : 40% namely Rs.4000/-

iii. Total income : Rs. 10,000 + Rs. 4,000= Rs.14,000/-

iv. Income after deduction of 1/2 : Rs.7000/-

v. Multiplier applicable : 18 (as the deceased was in the age bracket of 15-20 years)

vi. Loss of dependency: Rs.7000 x 18 = Rs.1,26,000/-

vii. Annual income = Rs.1,26,000 x 12 =Rs.15,12,000/-

viii. Under the head of non pecuniary damages = Rs.50,000 + Rs.50,000 (as children are 6 and 13 years of age)= Rs.1,00,000/-

ix. Total compensation : **Rs.16,12,000/-.**

16. The recent judgment of the Apex Court in ***Kurvan Ansari Alias Kurvan Ali Vs. Shyam Kishore Murmu, 2021 (0) AIJEL-SC 67995*** will also have to be looked into.

17. 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.***

18. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma (supra), the order of investment is not passed because applicants /claimants are neither illiterate nor rustic villagers.

19. 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.

20. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

21. 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."

22. 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 along with 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. The amount already deposited be deducted from the amount to be deposited.

23. 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

24. 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 13 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 without investment.

25. We are thankful to learned counsel for the parties for ably assisting this court in getting this old appeal disposed of.

(2022)06ILR A897
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2022

BEFORE

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

First Appeal From Order No. 2526 of 2014

Smt. Pista Devi & Ors. ...Appellants
Versus
The New India Insurance Co. Ltd. & Ors. ....Respondents

Counsel for the Appellants:
Sri B.P. Verma

Counsel for the Respondents:
Sri Arvind Kumar

Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 173 - Motor Accident claim - Quantum of compensation - accident took place in the year 2013 - deceased was about 52 years of age and was working on the post of Charge-man (F) in Indian Oil Corporation, Mathura Refinery & Rs 79876 per month was his salary - Tribunal did not grant any amount towards future loss of income, granted multiplier of 9 & granted only a sum of Rs. 5000 towards filial consortium - Held - Multiplier is 11 for age group of 51 to 55 years - future loss to the dependents is awarded at the rate of 20% of the income of the deceased and compensation for non pecuniary damages awarded Rs. 70,000 and towards the compensation for loss of love and affection is awarded Rs. 30000 (Para 10)

Allowed. (E-5)

List of Cases cited:

1. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 Law Suit (SC)

2. Syed Basheer Ahamed & ors. Vs Mohd. Jameel & anr, 2009 ACJ 690 (SC)

3. Gobald Motor Service Ltd. & anr. Vs R.M.K. Veluswami & ors. [1962 SCR (1) 929]

4. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 SC 1050

5. New India Assurance Co. Ltd. Vs Urmila Shukla & ors. 2021 ACJ page 2081

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

7. Oriental Insurance Co. Ltd.Vs Chief Commissioner of Income Tax

8. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. order dated 27.1.2022

9. Smt. Hansagauri P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

10. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

1. Heard Sri B.P. Verma, learned counsel for the claimant-appellants and Sri Arvind Kumar, learned counsel appearing for the New India Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and

award dated 07.08.2014 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.02, Mathura (hereinafter referred to as 'Tribunal') in M.A.C.P No. 172 of 2013 (Smt. Pista Devi and others Vs. The New India Insurance Company Ltd. and others.) awarding a sum of Rs.52,51,911/- as compensation with interest at the rate of 7%.

3. The accident having taken place at the time of noon at about 1:45 P.M. on 04.03.2013 is not in dispute. The vehicle of the opposite party No. 2 Bansal Transport Company, Nayee Mandi, Bharatpur being involved in the accident is not in dispute. The issue of negligence decided by the Tribunal has attained finality as the opposite party No. 2, the owner of the offending vehicle, has chosen not to challenge the award of the Tribunal. Hence, the only issue to be decided is the quantum of compensation awarded.

4. The accident took place in the year 2013. The deceased was about 52 years of age and was working on the post of Charge-man (F) in the Marketing Division of Indian Oil Corporation, Mathura Refinery, Mathura and Rs. 79,876/- per month was his salary. The learned Tribunal has considered the income of the deceased to be Rs.61500/- per month, deducted 1/4th towards personal expenses of the deceased as he was married person and in view of the prevailing judgements, granted multiplier of 9 taking into consideration the relevant factor of age of the deceased and his dependents. The Tribunal has granted Rs.5,000/- towards funeral expenses, however Rs. 15,000/- was claimed in the claim petition.

5. It is submitted by Shri Verma, learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income; the multiplier granted by the Tribunal is not in consonance with the decisions of the Apex Court. According to him, the multiplier of 11 ought to have been granted by the learned Tribunal as per the decision of the Apex Court in ***Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 Law Suit (SC),*** but unfortunately in a very strange and casual manner, the learned tribunal has lost sight of this important aspect of the matter while passing the award impugned in this appeal for enhancement of the compensation amount awarded to the dependents of the deceased under different heads. He further submits that the multiplier cannot be as per the whims and fancies of the learned Tribunal just because the deceased was a married person and the loss of non pecuniary damages to the family has to be considered and awarded as per the settled legal position more particularly the law enunciated by the Apex Court in the case of ***Syed Basheer Ahamed & Ors vs Mohd. Jameel & Anr, 2009 ACJ 690 (SC),*** which lays down the law in respect to determination and assessment of the dependency of the claimants on the deceased persons. The question as to what factors should be kept in view for calculating pecuniary loss to a dependent came up for consideration before a three-Judge Bench of this Court in **Gobald Motor Service Ltd. & Anr. Vs. R.M.K. Veluswami and other [1962 SCR (1) 929],** with reference to a case under the Fatal Accidents Act, 1855, wherein, K. Subba Rao, J. (as His Lordship then was) speaking for the Bench observed thus:

"In calculating the pecuniary loss to the dependants many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the dependants may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly, stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained."

6. Shri Verma submits that the concept of multiplier of '9' adopted by the learned Tribunal to determine the compensation amount payable to the claimants is not as per the ratio decendi of the said judgment and it has to be 11 as per the law laid down by the Apex Court. It is further submitted that the Tribunal has granted only a sum of Rs. 5,000/- towards filial consortium which should be Rs. 40,000/-.

7. Thereafter, the learned counsel Shri D.P. Verma for the appellants further submits that the loss of future prospects calculated by the learned tribunal is also towards lower side. It cannot be decided as per the thumb law of ***Sarla Verma*** (supra), it should be decided as per the facts and circumstances of the case particularly the job, profession as well as position in a office or the status of the deceased should be taken into account. Here, in this case as the deceased was a charge-man (F) in the Indian Oil Corporation, it is submitted that the Tribunal has again committed an error in granting only Rs. 15,000/- under the head of non pecuniary damages on the wrong interpretation of the U.P. Motor Vehicle Rules. It is also submitted by Shri Verma that even if this Court holds that the judgment of ***Sarla Verma*** (supra) would apply and squarely cover the instant case, the learned Tribunal ought not to have applied it in piecemeal. In the alternative he submits that if this Court takes a view that the decision pronounced in the case of **National Insurance Co. Limited Vs. Pranay Sethi and others, 2017 0 SC 1050** would apply, it has been clarified by the Hon'ble Supreme Court in the case of **New India Assurance Company Ltd. Vs. Urmila Shukla and others reported in 2021 ACJ page 2081** and therefore at least 20% should be granted as future loss and it should be enhanced looking to the evidence on record.

8. In response to the submission made by the learned counsel for the appellants, the learned counsel Shri Arvind Verma appearing for the Insurance Company submits that in view of the judgment of this Hon'ble High Court he has a right to raise oral cross objections and as far as the future prospects is concerned, it should be in consonance with the judgment of the ***Sarla Verma*** (supra) and ***Pranay Sethi (***supra) and therefore the 20 per cent could not have been granted as future loss. It is further submitted that the deceased is surviving by his wife and four children, two of them are major and therefore the deduction of 1/4th amount assessed to be deducted from the monthly income of the deceased considering it as his personal expenses should also be either one half or one third. Further argument is that the reasoning given by the learned tribunal for adopting the lower multiplier of '9' is just and proper.

9. This Court finds that according to the learned counsel for Insurance Company the rate

of interest should not be 10 per cent as demanded by the learned counsel for the appellants in the grounds of appeal. Having heard the learned counsel for the parties and have gone through the facts and circumstances of this case and the impugned award passed by the learned Tribunal, the only area which we would like to interfere with is multiplier and non pecuniary damages and interest.

10. The learned counsel Shri Verma appearing for the appellants submits that he would be satisfied if the multiplier is applied of 11 in place of 9, future loss to the dependents is awarded at the rate of 20% of the income of the deceased and compensation for non pecuniary damages awarded Rs. 70,000/- and towards the compensation for loss of love and affection is awarded Rs. 30,000/-.

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

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

i. Monthly Income: Rs.61,500/-

ii. Percentage towards future prospects : 20% i.e. Rs.12,300/-

iii. Less personal expenses of the deceased :Rs.1,93,959 (1/4th)

iv. Monthly loss of dependency : Rs.48,489/-

v. Annual loss of dependency:Rs.5,81,879/- (after tax deduction of Rs. 1,10,482/-)

vi. Multiplier applicable : 11

vii. Total Loss of dependency: Rs.52,36,911/-

viii. Compensation for loss of non pecuniary damages: Rs.1,00,000/-

ix. Total compensation Rs.52,36,911/- + Rs.1,00,000/- (under head of non pecuniary damages) = Rs 53,36,911.

13. 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."

14. 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 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. The amount already deposited be deducted from the amount to be deposited.

15. Recently, the Gujrat High Court in case titled the **Oriental Insurance**

Company Limited Vs. Chief Commissioner of Income Tax (TDS) , R/Special Civil Application No. 4800 of 2021 decided on 5.4.2022 held that interest awarded by the Tribunal under Section 171 of Motor Vehicles Act is not taxable under the Income Tax Act, 1961.

16. 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 20 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

17. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri 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.

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

19. 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.

20. With the aforesaid observations the appeal is allowed partly.

21. This Court is thankful to the counsel for both sides for getting this matter decided.

(2022)06ILR A901
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2022

BEFORE

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

First Appeal From Order No. 3509 of 2007

Smt. Sonia Gupta & Ors. ...Appellants
Versus
Ashok Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri Sumit Daga

Counsel for the Respondents:
Sri Saurabh Srivastava

A. Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 173 - Motor Accident claim - deceased was driving Maruti Wagon-R car which dashed with the truck - it was head on collision - tribunal deducted 40% towards the contributory negligence of the deceased - Held - truck driver did not appear before the tribunal - from the site plan it appears that the accident occurred almost on the middle of the road – therefore there was negligence of the driver of the Maruti Wagon-R car also - driver of the Maruti Wagon-R contributed to 25% of the accident (Para 15)

B. Civil Law - Motor Vehicles Act, 1988 - Sections 166 & 173 - Motor Accident claim - Quantum of compensation - Deceased was 35 years of the age at the time of accident and was running computer centre - Deceased I.T.R of the year 2003-2004 showed his income was Rs. 83,573/- p.a out of which he paid approximately Rs. 3000/- as income tax - Held - income of the deceased in the year of accident & looking to his profession can be considered to be Rs. 80000 per annum - tribunal has not added any amount under the head of future loss of income which is fallacious - Deceased was below the age of 40 years and as per U.P. rules court added 40% as he was self employed - Deceased had a widow and two minor daughters deduction of 1/3rd is maintained, multiplier of 16 granted by the tribunal is maintained and to that sum of Rs. 70,000/- + Rs. 50,000/- each to the minor daughters who have lost their father at a tender age – Interst should be 7.5 % (Page 16)

Allowed. (E-5)

List of Cases cited:

1. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 105

2. Khenyei Vs New India Assurance Co. Ltd. & ors., 2015 LawSuit (SC) 469

3. Uttar Pradesh Rajya Sadak Parivahan Nigam Vs Smt. Anamika Deo (died) & ors., 2022 (4) ADJ 570 (DB)

4. Gobald Motor Service Ltd. & anr. Vs R.M.K Veluswami & ors. [1962 SCR (1) 929]

5. General Manager, Kerala State Road Transport Corp., Trivandrum Vs Susamma Thomas & ors. (1994) 2 SCC 176

6. U.P.S.R.T.C. Vs Trilok Chand, 1996 T.A.C. (2) 286

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

8. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

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

1. Heard Sri Sumit Daga, learned counsel for the appellants and Sri Saurabh Srivastava, learned counsel for the respondent no.2-United India Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 25.08.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Muzaffarnagar (hereinafter referred to as 'Tribunal') in M.A.C. P. No. 338 of 2004.

3. Brief facts of the case are that on 5.2.2004 the deceased-Kapil Gupta was going from Khatauli to Haridwar by Wagon-R Car bearing registration no. U.B.P.-8386 which was being driven by deceased-Kapil Gupta. At about 8.00 a.m. when he reached near Wine shop of village Badhedi, under Chapaar Police Station District Muzaffarnagar, driver of a truck coming from Roorkee bearing registration no. U.H.N. 470, driving the truck rashly and negligently dashed into the Wagon-R car as a result of which Kapil Gupta died on the spot and the Wagon-R car entirely got damaged.

4. Deceased-Kamal Arora was 35 years of the age at the time of accident and was running computer centre and was earning Rs.83,573/- annually. The deceased-Kapil Gupta was survived by his widow and two minor daughters. The Tribunal has considered his income to be Rs.75,000/- per annum, deducted Rs. 25,000/- towards personal expenses of the deceased, granted multiplier of 16, granted Rs.9,500/- under non-pecuniary heads and ultimately assessed the total compensation to be Rs.8,09,500/-. The Tribunal held the deceased-Kapil Gupta who was driving the Car negligent to the tune of 40% deducted the amount of compensation to the tune of 40%. The claimants were therefore granted amount of Rs.4,89,500/- as compensation with interest at the rate of 5%.

5. It is submitted by learned counsel for the appellants that the Tribunal has fallen in error in holding the deceased negligent to the tune of 40%. It is submitted that the Tribunal has failed to consider the evidence on record which proves that the accident in question was caused due to rash and negligent driving of the driver of truck No. U.H.N 470 and that the Tribunal has failed to consider the pleadings as well as evidence which clearly establish that the deceased was driving car carefully and cautiously.

6. It is further submitted by learned counsel for the appellants that the accident occurred on 05.02.2004 claiming the life of Kapil Gupta who was 35 years and was running a computer centre and was a income tax payer. His I.T.R of the year 2003-2004 showed his income was Rs. 83,573/- p.a out of which he has paid approximately Rs. 3000/- as income tax and therefore it is submitted that his income to be considered as Rs. 80,000/- p.a. The Tribunal did not grant any amount for future loss of income of the deceased and also the amount awarded under non-pecuniary heads granted by the Tribunal is on the lower side and should be enhanced in view of the the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105**. Lastly, learned counsel for the appellant has submitted that the interest as awarded by the Tribunal is on the lower side and requires to be enhanced.

7. As against this, Sri Saurabh Srivastava, learned counsel for the respondent-Insurance Company submits that as far as the issue of negligence is concerned, the Tribunal has rightly held the deceased negligent to the tune of 40% as the car dashed with the truck and it was head on collision and therefore, it cannot be said that the driver of the truck was solely negligent.

8. It is further submitted by Sri Saurabh Srivastava, learned counsel for the respondent-Insurance Company that the quantum of compensation and the interest awarded by the Tribunal is just and proper

and does not call for any interference by this Court.

9. Having heard the learned counsel for the parties, let us consider the negligence from the perspective of the law laid down.

10. 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.

11. The principle of contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place and that amount will be deducted from the compensation payable to him if he is injured and to legal representatives if he dies in the accident.

12. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

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

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

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every

motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

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

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

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

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

emphasis added

13. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined

wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent,

then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

18. This Court in ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the

extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

emphasis added

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

15. The tribunal has considered that the deceased who was driving Maruti Wagon-R car which dashed with the truck and it was head on collision and therefore 40% was deducted to be the contributory negligence of the deceased. We redecide the issue of negligence. Sri Sumit Daga, learned counsel for the appellants has placed reliance on the judgement of this High Court in **Uttar Pradesh Rajya Sadak Parivahan Nigam Vs. Smt. Anamika Deo (died) and others, 2022 (4) ADJ 570 (DB)** and has contended that even this Court consideres that the driver namely the deceased had contributed to the accident. It won't be 40% as 40% cannot be considered to be rash and negligent driving of the deceased. The charge-sheet was laid against the driver of the truck. The truck driver did not appear before the tribunal, however, from the site plan it appears that the accident occurred almost on the middle of the road and therefore, we are in agreement with the submission of the Sri Saurabh Srivastava, learned counsel for the respondent no. 2 that it cannot be accepted that there was no negligence of the driver of the Maruti Wagon-R car. We hold the driver of the Maruti Wagon-R who contributed to 25% of the accident.

16. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession it can be considered to be Rs.80,000/- per annum. The tribunal has not added any amount under the head of future loss of income which is again fallacious as the judgment of the Apex Court in **Gobald Motor Service Ltd. and another Vs. R.M.K Veluswami and other [1962 SCR (1) 929] and General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others (1994) 2 SCC 176** which was followed by the judgement of the Apex Court in **U.P.S.R.T.C. Vs. Trilok Chand, 1996 T.A.C. (2) 286** and therefore taking the thumb rule of **Pranay Sethi (Supra)** as he was below the age of 40 years ans as per U.P. rules, we add 40% as he was self employed. As he had a widow and two minor daughters deduction of 1/3rd is maintained, multiplier of 16 granted by the tribunal is maintained and to that sum of Rs. 70,000/- + Rs. 50,000/- each to the minor daughters who have lost their father at a tender age.

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

i. Annual Income Rs.80,000/- (as decided by the Tribunal)

ii. Percentage towards future prospects : 40% namely Rs.32,000/-

iii. Total income : Rs. 80,000 + 32,000 = Rs.1,12,000/-

iv. Income after deduction of 1/3rd : Rs.74,667/- (rounded of)

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.74,667 x 16 = Rs.11,94,672/-

viii. Amount under non-pecuniary head : 70,000/- + Rs. 1,00,000/-(Rs. 50,000/- each to two minor daughters)

ix. Total compensation : 13,64,672/-

x. Compensation payable to claimants after deductions of 25% negligence on the part of the deceased : 10,23,504/-

18. 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."

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

20. 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 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. The amount already deposited be deducted from the amount to be deposited.

21. 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.

22. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,** total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the

certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

23. 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.

(2022)06ILR A910
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

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

First Appeal From Order No. 4097 of 2017

Smt. Kusuma Devi & Ors. ...Appellants
Versus
Shrawan Kumar Mishra & Ors. ...Respondents

Counsel for the Appellants:
Sri Vidya Kant Shukla, Sri Shravan Kumar Pandey, Sri Shyam Narain Pandey

Counsel for the Respondents:
Sri Pawan Kumar Singh

(A) Civil Law – Motor Vehicles Act, 1988, Section -166— Appeal - compensation - Contributory negligence – motorcycle of the deceased hit the truck from behind due to truck driver pushed his break all of sudden - In absence of discharging the burden to prove that truck driver was not negligent – the finding of tribunal towards contributory negligence to the extent of 45% attributed to the deceased and 55% to the truck driver is maintained. (Para 14)

(B) Civil Law – Motor Vehicles Act, 1988, Section 166, - U.P. Motor Vehicles Rules, 1998, Rules 220 - Compensation - Quantum of compensation – Form 16 is authentic document for the purpose of computation of the salary of deceased - Multiplier of 9 should be applied instead of 8 as per law lay down in *Sarla Verma'a* & Pranay Sethi' case – 25% of income ought to be added towards future loss of income including Rs. 1 lacks towards non-pecuniary damages - Compensation computed and awarded accordingly. (Para 117, 21, 26, 31, 32, 34)

Appeal is partly allowed. (E-11)

List of Cases cited: -

1. Nishan Singh & ors. Vs Oriental Insurance Company Limited & ors., 2018 vol. 6 SCC 765

2. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. (FAFO No. 1818/2012 Decided on Dt. 19.07.2016)

3. Archit Saini & anr. Vs Oriental Insurance Comp. Ltd., AIR 2018 SC 1143

4. Vimal Kanwar & ors. v. Kishore Dan & ors., 2013 (3) T.A.C. 6 (SC)

5. Sarla Verma & ors. v. Delhi Transport Corp. & anr., 2009 LawSuit (SC)

6. National Insurance Company Limited Vs Pranay Sethi & ors., 2017 vol. 0 Supreme (SC) 105

7. National Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (Supreme court)

8. Smt. Hansa Gauri P. Ladhani Vs The Oriental Insurance Comp. Ltd. (2007 vol. 2 GLH 291)

9. Smt. Sudesna & ors. Vs Hari Singh & anr.-(Review Application No. 1/2020 -FAFO No. 23/2001

10. Tej Kumari Sharma Vs Chola Mandlam MS General Insurance Company Ltd. FAFO No. 2871/2016 Decided on Dt. 19.03.2021.

11. Bajaj Allianz General Insurance Co. Ltd. Vs U.O.I. & ors. (Decided by Hon'ble Apex Court on 27.01.2022)

12. United India Insurance Co. Ltd. Vs Dipesh Rai & ors. (FAFO No. 998/2022 Decided on 21.04.2022)

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

1. By way of this appeal, the claimants have challenged the judgment and award dated 05.09.2017 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.12, Kanpur Nagar (hereinafter referred to as "Tribunal') in M.A.C.P. No.926 of 2014 (Smt. Kusuma Devi and Others Vs. Shrawan Kumar Mishra and Others) awarding sum of Rs.17,13,000/- as compensation to the claimants with interest at the rate of 7% per annum.

2. Heard Mr. Shyam Narain Pandey, learned counsel for the appellants and Mr. Pawan Kumar Singh, learned counsel for the respondent-Insurance Company. Perused the record.

3. The accident is not in dispute. The driver of the said vehicle was having valid and effective driving licence on the date of accident is also a decided fact. The vehicle being insured and there being no breach of policy condition is a finding, which has attained finality. The Insurance Company Ltd. (hereinafter referred to as "Insurance Company") has not challenged the liability on it. In this case, learned Tribunal has fixed 45% contributory negligence of the deceased which the appellants have objected vehemently and argued this point along with quantum fixed by learned Tribunal.

4. Brief facts of the case are that claimants-appellants filed Motor Accident Claim Petition before the learned Tribunal with the averments that on 21.06.2014 at about 9:45 PM (night) the deceased Lal Bahadur Dwivedi was coming from his field to the home by his motorcycle. When he reached at village Bhinduri within the jurisdiction of police station Chaubepur, District Kanpur Nagar, a truck bearing no.H.R. 38A 5791, going ahead of the motorcycle of the deceased, the truck driver suddenly applied thebrake without any indication, due to which the motorcycle of the deceased rammed into the truck going ahead.

5. In this accident, the deceased sustained fatal injuries and he died on way to the hospital. Manoj Kumar-nephew of the deceased was also travelling in his motorcycle behind the deceased, who saw the accident and taken the deceased to the hospital.

6. The issue regarding the insurance of the offending truck and driving licence of its driver have been decided in affirmative. As far as question of negligence is concerned, Mr. Pawan Kumar Singh, learned counsel for the Insurance Company has submitted that deceased was negligent and responsible for the accident because he hit the truck going ahead. Learned counsel for the Insurance Company has relied on the decision of Apex Court in ***Nishan Singh and Others Vs. Oriental Insurance Company Ltd. and Others, 2018 (6) Supreme Court Cases 765.***

7. It is further submitted that since the deceased was himself negligent, except grant of non pecuniary damages, no other amount would be payable to the claimants-appellants.

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. T he 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.

10. 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."

11. Learned counsel for the appellants has submitted that learned Tribunal has held the contributory negligence of the deceased to the tune of 45% and this issue of negligence has been wrongly decided by the learned Tribunal because P.W.-2 is the eye witness of the accident and he has deposed in his testimony that the truck driver all of sudden appliedbrake which caused the accident.

12. It is also submitted by learned counsel for the appellants that truck driver did not appear before the learned Tribunal though he was the best witness. The charge sheet is also filed against the driver of the truck, hence, the deceased was not at all negligent in driving the motorcycle. P.W.-

2, Manoj Kumar Dwivedi is the eye witness of the accident, who was coming behind the deceased on his own motorcycle. As per the testimony of P.W.-2, the truck driver applied the brake all of sudden, but he has also deposed that deceased could not apply the brake completely due to which the motorcycle hit the aforesaid truck going ahead of him.

13. We are even fortified in our view by the decision of the Apex Court in ***Archit Saini and Another Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143***, wherein the finding of the Tribunal was upheld by adverting to the same more particularly the Apex Court has upheld the finding in paragraph 21 to 27 in its judgment. The paragraph 5 of the said Apex Court's judgment is reproduced hereinbelow:

"5.The respondents had opposed the claim petition and denied their liability but did not lead any evidence on the relevant issue to dispel the relevant fact. The Tribunal after analysing the evidence, including the site map (Ext. P-45) produced on record along with charge-sheet filed against the driver of the Gas Tanker and the arguments of the respondents, answered Issue 1 against the respondents in the following words:

"21. Our own Hon'ble High Court in a case captioned Lakhu Singh v. Uday Singh [Lakhu Singh v. Uday Singh, 2007 SCC OnLine P&H 865 : PLR (2007) 4 P&H 507] held that while considering a claim petition, the Tribunal is required to hold an enquiry and act not as criminal court so as to find whether the claimants have established the occurrence beyond shadow of any reasonable doubt. In the enquiry, if there is prima facie evidence of the occurrence there is no reason to disbelieve such evidence. The statements coupled with the facts of registration of FIR and trial of the accused in a criminal court are sufficient to arrive at a conclusion that the accident has taken place. Likewise, in Kusum Lata v. Satbir [Kusum Lata v. Satbir, (2011) 3 SCC 646 : (2011) 2 SCC (Civ) 37 : (2011) 2 SCC (Cri) 18 : (2011) 2 RCR (Civil) 379] the Hon'ble Apex Court has held that in a case relating to motor accident claims, the claimants are not required to rove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind. 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. The standard of proof beyond reasonable doubt could not have been applied.

22. After considering the submissions made by both the parties, I find that PW 7 Sohan Lal eyewitness to the occurrence has specifically stated in his affidavit Ext. PW 7/A tendered in his evidence that on 15-12-2011 at about 20.30 p.m. he along with PHG Ajit Singh was present near Sanjha Chulha Dhaba on the National Highway leading to Jammu. All the traffic of road was diverted on the eastern side of the road on account of closure of road on western side due to construction work. In the meantime a Maruti car bearing No. HR 02 K 0448 came from Jammu side and struck against the back of Gas Tanker as the driver of the car could not spot the parked tanker due to the flashlights of the oncoming traffic from front side. Then they rushed towards the spot of accident and noticed that the said tanker was standing parked in the middle of

the road without any indicators or parking lights.

23. The statement of this witness clearly establishes that this was the sole negligence on the part of the driver of the Gas Tanker especially when the accident was caused on 15-12-2011 that too at about 10.30 p.m. which is generally time of pitch darkness. In this way, the driver of the car cannot be held in any way negligent in this accident. Moreover, as per Rule 15 of the Road Regulations, 1989 no vehicle is to be parked on busy road.

24. The arguments of the learned counsel for the respondent that PW 7 Sohan Lal has stated in his cross-examination that there was no fog at that time and there were lights on the Dhaba and the truck was visible to him due to light of Dhaba and he was standing at the distance of 70 ft from the truck being road between him and the truck and he noticed at the car when he heard voice/sound caused by the accident so Respondent 1 is not at all negligent in this accident but these submissions will not make the car driver to be in any way negligent and cannot give clean chit to the driver of the Gas Tanker because there is a difference between the visibility of a standing vehicle from a place where the person is standing and by a person who is coming driving the vehicle because due to flashlights of vehicles coming from front side the vehicle coming from opposite side cannot generally spot the standing vehicle in the road that too in night-time when there is neither any indicator or parking lights nor blinking lights nor any other indication given on the back of the stationed vehicle, therefore, the driver of the car cannot be held to be in any way negligent rather it is the sole negligence on the part of the driver of the offending Gas Tanker as held inGinni Devi case [Ginni Devi v. Union of India, 2007 SCC OnLine P&H 126 : 2008 ACJ 1572] , Mohan Lal case [New India Assurance Co. Ltd. v. Mohan Lal, 2006 SCC OnLine All 459 : (2007) 1 ACC 785 (All)] . It is not the case of the respondent that the parking lights of the standing truck were on or there were any other indication on the backside of the vehicle standing on the road to enable the coming vehicle to see the standing truck. The other arguments of the learned counsel for Respondent 3 that the road was sufficient wide road and that the car driver could have avoided the accident, so the driver of the car was himself negligent in causing the accident cannot be accepted when it has already been held that the accident has been caused due to sole negligence of the driver of the offending stationed truck in the busy road. The proposition of law laid down in Harbans Kaur case [New India Assurance Co. Ltd. v. Harbans Kaur, 2010 SCC OnLine P&H 7441 : (2010) 4 PLR 422 (P&H)] and T.M. Chayapathi case [New India Assurance Co. Ltd. v. T.M. Chayapathi, 2004 SCC OnLine AP 484 : (2005) 4 ACC 61] is not disputed at all but these authorities are not helpful to the respondents being not applicable on the facts and circumstances of the present case. Likewise, non-examination of minor children of the age of 14 and 9 years who lost their father and mother in the accident cannot be held to be in any way detrimental to the case of the claimants when eyewitness to the occurrence has proved the accident having been caused by the negligence of Respondent 1 driver of the offending vehicle.

25. Moreover, in Girdhari Lal v. Radhey Shyam [Girdhari Lal v. Radhey Shyam, 1993 SCC OnLine P&H 194 : PLR

(1993) 104 P&H 109] , Sudama Devi v. Kewal Ram [Sudama Devi v.Kewal Ram, 2007 SCC OnLine P&H 1208 : PLR (2008) 149 P&H 444] and Pazhaniammal case [New India Assurance Co. Ltd. v. Pazhaniammal, 2011 SCC OnLine Ker 1881 : 2012 ACJ 1370] our own Hon'ble High Court has held that "it is, prima facie safe to conclude in claim cases that the accident has occurred on account of rash or negligent driving of the driver, if the driver is facing the criminal trial on account of rash or negligent driving.'

26. Moreover, Respondent 1 driver of the offending vehicle has not appeared in the witness box to deny the accident having been caused by him, therefore, I am inclined to draw an adverse inference against Respondent 1. In this context, I draw support from a judgment of the Hon'ble Punjab & Haryana High Court reported asBhagwani Devi v. Krishan Kumar Saini[Bhagwani Devi v. Krishan Kumar Saini, 1986 SCC OnLine P&H 274 : 1986 ACJ 331]. Moreover, Respondent 1 has also not filed any complaint to higher authorities about his false implication in the criminal case so it cannot be accepted that Respondent 1 has been falsely implicated in this case.

27. In view of above discussion, it is held that the claimants have proved that the accident has been caused by Respondent 1 by parking the offending vehicle bearing No. HR 02 AF 8590 in the middle of the road in a negligent manner wherein Vinod Saini and Smt Mamta Saini have died and claimants Archit Saini and Gauri Saini have received injuries on their person. Shri Vinod Saini, deceased who was driving ill-fated car on that day cannot be held to be negligent in any way. Accordingly, this issue is decided in favour of claimants."

(emphasis supplied)"

14. It is admitted fact that motorcycle hit the truck from behind, hence, we are in agreement with the finding of learned Tribunal that the deceased did not keep the safe distance from the truck. If he would have kept the safe distance, the accident could have been avoided. Hence, the deceased was also negligent in driving the motorcycle. On the other hand, the truck driver applied the brake all of sudden. The truck driver has not stepped into the witness box, who was the best witness to tell why he applied brake suddenly or whether he was in compulsion to apply the brake all of sudden. Hence, the owner and Insurance Company have not discharged their burden to prove that truck driver was not negligent. Hence, we uphold the conclusion of learned Tribunal that the deceased and truck driver both were negligent and we concur with the finding of learned Tribunal fixing the contributory negligence of truck driver to the tune of 55% and the negligence of the deceased to the tune of 45%. Hence, finding of Tribunal in this regard is maintained.

15. Now, the only issue to be decided is, the quantum of compensation, awarded by the Tribunal.

16. Learned Tribunal has computed the total compensation Rs.31,15,123/- and awarded its 55% as Rs.17,13,000/- after deducting the 45% of amount towards contributory negligence of the deceased.

17. Learned counsel for the appellants has submitted that deceased was posted as a Fitter in Indian Artificial Limbs Manufacturing Corporation, Kanpur and his salary was Rs.48,438/- per month but learned Tribunal has taken salary only at

Rs.37,555/- per month, which was not in consonance with the settled law. Income tax was also deducted from the salary of the deceased and net salary of Rs.36,055/- has taken by the learned Tribunal for the purpose of computation.

18. Learned counsel for the appellants has submitted that only that part of the salary would be admissible, which was for the benefit of the family of the deceased, but learned Tribunal has committed error in computation of the salary of the deceased. Learned counsel for the appellants has relied on the judgment of Apex Court in ***Vimal Kanwar and Others VS. Kishore Dan and Others, 2013 0 Supreme (SC) 441.***

19. It is also submitted by learned counsel for the appellants that learned Tribunal has not granted any amount under the head of non pecuniary damages and no reason is assigned for non granting the same.

20. Per contra, learned counsel for the Insurance Company has submitted that only non pecuniary damages would be grantable. We are not agreeable with the submission of learned counsel for the Insurance Company that only non pecuniary damages would be granted.

21. Perusal of record shows that last salary slip of the month of April, 2014 is on record and Form-16 is also on record. Form-16 is an authentic document for the purpose of computation of the salary of the deceased. Form-16 shows gross annual income of the deceased at Rs.5,95,175/-. It is also shown that total income tax of the year was Rs.23,622/-. Hence, after the deduction of income tax from the gross salary it comes of Rs.5,71,553/-, which should be considered for computation of compensation, hence, annual income of the deceased is taken at Rs.5,70,000/- (rounded off).

22. Learned Tribunal has added 25% for future loss of income, which needs no interference. Tribunal has deducted ¼ for personal expenses of the deceased. Keeping in view of number of dependents, we uphold the same.

23. Submission is that learned Tribunal has not awarded any sum towards non pecuniary damages and has not assigned any reason for non grant of the same.

24. Other points of contention, which are argued by learned counsel for the appellants is that learned Tribunal has applied multiplier of 8 while should have been 9 as per the judgment of the Apex Court in ***Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613*** to which we agree. Learned Tribunal has rightly deducted 1/4 of the income of the deceased for personal expenses. Lastly, it was contended by the appellants that learned Tribunal has awarded interest at the rate of 7% per annum which should be enhanced.

25. No other arguments were placed regarding the fixation of quantum.

26. As per the judgment of Apex Court in ***National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC),*** appellants would be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- towards funeral expenses. Apart from it, the wife of the deceased shall also be entitled to get Rs.40,000/- for loss of consortium. In this way, the appellants

shall be entitled to get Rs.70,000/- under non-pecuniary heads with upward revision after every three years, hence, we allow total Rs.1,00,000/- under non-pecuniary heads.

27. Hence, the total compensation payable to the appellants in view of the decisions of the Apex Court in Sarla Verma and Others (Supra) and Pranay Sethi (Supra) is computed herein below:

1.	Annual income i.e. Rs.5,70,000/-	Rs.5,70,000/- p.a.
2.	Percentage towards future prospect : 25%	Rs.1,42,500/-
3.	Total income : Rs.5,70,000/- + Rs.1,42,500/-	Rs.7,12,500/-
4.	Income after deduction of 1/4 : Rs.7,12,500/- - Rs.1,78,125/-	Rs.5,34,375/-
5.	Multiplier applicable : 9 :- Rs. 5,34,375 X 9	Rs.48,09,375/-
6.	Amount under non pecuniary head : Rs.15,000 + Rs.15,000 + Rs.40,000/- with 10% upward revision	Rs.1,00,000/-
7.	Total compensation : Rs.48,09,375 + Rs.1,00,000/-	Rs. 49,09,375/-
8.	Amount after 45% deduction towards contributory negligence : Rs.49,09,375 - Rs.22,09,218/-	Rs. 27,00,000/- (rounded off)

28. 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."

29. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

30. In view of the above, the appeal stands **partly allowed**. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent- Insurance Company shall deposit the amount within a period of 08 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. Statutory amount be remitted to the Tribunal.

31. 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.

32. 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.

33. Recently, this Bench has come across the high handed action taken by the tribunal immediately post declaration of the award by issuing recovery warrant against the Insurance Company even before expiry of period of appeal. As under Section 173 of the Motor Vehicles Act, 1988 and Uttar Pradesh Motor Vehicles (Eleventh Amendment) Rules, 2011, the period of limitation should be permitted to expire and, thereafter, the said claim application/petition itself would be considered to be an execution petition/application for execution of the award, but for a period of 90 days or as described in future till the period of appeal is not over, no coercive action shall be taken ex party in pursuance of the execution proceedings, if initiated. The claimants would not be required to file execution petition, an application in the disposed of matter itself would suffice.

34. It goes without saying that the tribunal shall wait for 90 days, namely, the period of limitation for preferring appeal under Section 173 of the Motor Vehicles Act, 1988. The order of this Court in ***F.A.F.O. No.998 of 2022, United India Insurance Co. Ltd. v. Dipesh Rai and others*** decided on 21.4.2022, wherein also this Bench has requested the Hon'ble the Chief Justice to circulate amongst the trial judicial/MACT tribunal in the State. These new directions will apply in all the matters where the awards are passed and/or to be passed and no coercive action shall be taken for 90 days except issuance of summon/notice and an advance copy to the counsel for the Insurance company or the tortfessor who is judgment debtor be served.

(2022)06ILR A919
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2022

BEFORE

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

Writ-A No. 2573 of 2022

Jitendra Kumar Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Yadav

Counsel for the Respondents:
Sri Rajnish Kumar Rai

(A) Service Law - Indian Penal Code, 1860 - Section 494 - marrying again during lifetime of husband or wife - The Code of criminal procedure, 1973 - Section 155(2) - Proceedings in a criminal case and departmental proceedings can go on simultaneously except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common - double jeopardy - standard of proof in both the proceedings is quite different, and the termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings - courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse.(Para - 8,13,17,22)

Inquiry report under challenge - Quashing of – allegation – petitioner married for the second time – criminal proceedings pending against petitioner – same set of facts and evidence - department proceeded to initiate departmental proceedings against petitioner.

HELD:-No infirmity or illegality in the impugned inquiry report. Writ petition liable to dismissed being misconceived.**(Para -23)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. Nelson Motis Vs U.O.I. & anr., AIR 1992 SC 1981

2. St. of Karn. & anr. Vs T. Venkataramanappa, (1996) 6 SCC 455

3. Ajit Kumar Nag Vs G.M. (PJ) I.O.C. Ltd., (2005) 7 SCC 764

4. St. of Raj. Vs B.K. Meena & ors., AIR 1997 SC 13

5. M. Paul Anthony Vs Bharat Gold Mines Ltd., AIR 1999 SC 1416

6. St. B.O.I. & ors. Vs R.B. Sharma, AIR 2004 SC 4144

7. Depot Manager, A.P. St. R.T.C. Vs Mohd Yousuf Miya & ors., AIR 1997 SC 2232

8. Krishnakali Tea Estate Vs Akhil Bhartiya Chah Mazdoor Sangh & Anr., (2004) 8 SCC 200

9. K.V.S. & ors. Vs T. Srinivas, AIR 2004 SC 4127

10. St. of A. P. & ors. Vs S. Sree Rama Rao, AIR 1963 SC 1723

11. B.C. Chaturvedi Vs U.O.I. & ors., (1995) 6 SCC 749

12. St. of Karn. & anr. Vs N. Gangaraj , 2020 3 SCC 423

13. St. Bank of Bikaner & Jaipur Vs Nemi Chand Nalwaya, (2011) 4 SCC 584

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

1. Learned counsel for the petitioner is permitted to correct the name of respondent no.4 as Smt. Pooja Devi in place of Smt. Pushpa Devi in the array of parties during the course of the day.

2. Heard Sri Ashok Kumar Yadav, learned counsel for the petitioner and Sri Rajnish Kumar Rai, learned counsels for the respondent nos. 1 to 3.

3. This writ petition has been filed by the petitioner challenging the inquiry report dated 28.09.2021 submitted by respondent no.3 where by certain allegations has been made against the petitioner.

4. Learned counsel for the petitioner submits that the petitioner was posted as Constable in RPF post/Belgachia, Metro Railway, Kolkata and discharging his duties upto the satisfaction of his superior. The respondent no.4, Smt. Pooja Devi (wife of the petitioner), filed N.C.R. against the petitioner on 10.09.2020, which was registered as N.C.R. No. 82 of 2020, under Section 494 IPC. Thereafter, again Smt. Pooja Devi filed an application U/s 155(2) Cr.P.C. before the Judicial Magistrate, Saidpur District-Ghazipur, under Section 494 IPC. On the aforesaid application, the concerned Judicial Magistrate passed order dated 20.10.2020 directing the concerned Station House Officer to investigate the matter. The criminal proceedings with respect to the aforesaid aspect was lodged with the allegations that the petitioner had married for the second time with one Km. Archana Yadav, which was totally biased and false allegation.

5. Though the criminal proceedings is still pending against the petitioner, relying on the same set of facts and evidence, the department has proceeded to initiate the departmental proceedings against the petitioner. Subsequently, show cause notice has been issued to the petitioner on 05.03.2021 and charge sheet has also been issued against him on 30.04.2021.

6. Learned counsel for the petitioner further submits that the respondent no.3 has submitted the impugned inquiry report dated 28.09.2021 without considering the material facts that the criminal proceedings is still pending against the petitioner before the court below for the same cause of action. He further submits that since the allegations are identical and the basis to proceed both departmentally and in criminal trial are same, therefore, prejudice would be caused to the petitioner in case disciplinary proceedings and criminal trial is allowed to go on simultaneously, therefore, the disciplinary proceedings are liable to be quashed.

7. On the other hand, learned counsel for the respondent nos.1 to 3 submits that the acquittal by the criminal court does not vitiate the order of the disciplinary authority while passing the punishment order against the petitioner. Also the findings recorded by the criminal court are not binding, for the purpose of disciplinary proceedings against a delinquent. He further submits that the scope of judicial review is limited to the extent that proceedings have been conducted in accordance with law as it lies against the decision making procedure and not against the decision itself. No illegality in the inquiry report submitted by the Inquiry Officer after holding the enquiry. The Court cannot examine the inquiry report or the order of the disciplinary authority as an appellate authority, rather it has to satisfy itself that the enquiry has been conducted in accordance with law. Thus, the petition is liable to be dismissed.

8. Having heard the learned counsel for the parties and scanned the records, the Court finds that the position of law is well settled regarding that the departmental proceedings and the criminal proceedings can go on simultaneously, except where a departmental proceeding and a criminal proceeding are based on the same set of facts and evidence and where the witnesses are common in the said cases, the Court has to decide taking into account the said features of the case as to whether simultaneously continuance of both the proceedings would be appropriate and proper or not.

9. In the judgment of the apex court in the case of ***Nelson Motis Vs. Union of India & Anr., reported in AIR 1992 SC 1981***, it has been held as under:-

"The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding."

10. In another case of ***State of Karnataka & Anr. Vs T. Venkataramanappa, (1996) 6 SCC 455,*** the Apex Court held that acquittal in a criminal case cannot be held to be a bar to hold departmental enquiry for the same misconduct for the reason that in a criminal trial, standard of proof is different as the case is to be proved beyond reasonable doubt but in the departmental proceeding, such a strict proof of misconduct is not required. In the said case, the departmental proceedings had been quashed by the Tribunal as the delinquent had been acquitted by the criminal court of the same charges.

11. While dealing with a similar issue, a three-Judges Bench of the Hon'ble Supreme Court in ***Ajit Kumar Nag Vs. General Manager (PJ) Indian Oil Corporation Ltd., (2005) 7 SCC 764***, held as under:-

"In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability."

12. The issue as to whether disciplinary proceedings can be held at the time when the delinquent employee is facing the criminal trial, has also been considered from time to time. In ***State of Rajasthan Vs. B.K. Meena & Ors., AIR 1997 SC 13,*** the Hon'ble Supreme Court while dealing with the issue observed as under:-

"It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges.....The only ground suggested

in the above decisions as constituting a valid ground for staying the disciplinary proceedings is that 'the defence of the employee in the criminal case may not be prejudiced'. This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case.....One of the contending considerations is that the disciplinary enquiry cannot be - and should not be - delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons holding high public offices are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion.....If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanour is enquired into promptly. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest....."

13. In another judgment of the Apex Court in the case of Capt. ***M. Paul Anthony Vs. Bharat Gold Mines Ltd., AIR 1999 SC 1416,*** it has been held that there can be no bar for continuing both the proceedings simultaneously. The Court placed reliance upon large number of its earlier judgments, including Delhi Cloth and General Mills Ltd. Vs. Kushal Bhan, AIR 1960 SC 806; Tata Oil Mills Co. Ltd. Vs. The Workmen, AIR 1965 SC 155; Jang Bahadur Singh Vs. Baij Nath Tiwari, AIR 1969 SC 30; Kusheshwar Dubey Vs. M/s. Bharat Coking Coal Ltd. & Ors., AIR 1988 SC 2118; Nelson Motis (Supra); and B.K. Meena (Supra), and held that proceedings in a criminal case and departmental proceedings can go on simultaneously except where **both the proceedings are based on the same set of facts and the evidence in both the proceedings is common**. In departmental proceedings, factors prevailing in the mind of the disciplinary authority may be many, such as enforcement of discipline or to investigate level of integrity of delinquent or other staff. The standard of proof required in those proceedings is also different from that required in a criminal case. While in departmental proceedings, the standard of proof is one of preponderance of probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. Where the charge against

the delinquent employee is of a grave nature which involves complicated questions of law and fact, it is desirable to stay the departmental proceedings till conclusion of the criminal case. Where the nature of charge in a criminal case is grave and wherein complicated questions of fact and law are involved, will depend upon the nature of the defence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet. In case the criminal case does not proceed expeditiously, the departmental proceedings cannot be kept in abeyance for ever and may be resumed and proceeded with so as to conclude the same at the early date. The purpose is that if the employee is found not guilty his cause may be vindictive, and in case he is found guilty, administration may get rid of him at the earliest.

14. Again in the judgment of the Apex Court in the case of ***State Bank of India & Ors. Vs. R.B. Sharma, AIR 2004 SC 4144,*** same view has been reiterated observing that both proceedings can be held simultaneously, except where departmental proceedings in criminal case are based on same set of facts and evidence in both the proceedings is common. The Court observed as under:-

"The purpose of departmental inquiry and of prosecution are to put a distinct aspect. Criminal prosecution is launched for an offence for violation of duty. The offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of a public duty. The departmental inquiry is to maintain discipline in the service and efficiency of public service."

15. While deciding the said case a very heavy reliance has been placed upon the earlier judgment of the Supreme Court in the case of ***Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd Yousuf Miya & Ors., AIR 1997 SC 2232,*** wherein it has been held that both proceedings can be held simultaneously unless the gravity of the charges demand staying the disciplinary proceedings till the trial is concluded as the complicated questions of fact and law are involved in that case.

16. A similar view has been reiterated by the Apex Court in ***Kendriya Vidyalaya Sangathan & Ors. Vs. T. Srinivas, AIR 2004 SC 4127.*** A Three-Judge Bench of the Hon'ble Supreme Court in ***Krishnakali Tea Estate Vs. Akhil Bhartiya Chah Mazdoor Sangh & Anr., (2004) 8 SCC 200*** reconsidered all earlier judgments and reiterated the same view, as the approach and the objective of the criminal proceedings, and the disciplinary proceedings are distinct and different. There can be no bar in carrying on the criminal trial and criminal proceedings simultaneously.

17. Thus, there can be no doubt regarding the settled legal proposition that as the standard of proof in both the proceedings is quite different, and the termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings. Nor such an action of the department can be termed as double jeopardy. The submission

made in this regard is untenable in view of the law discussed herein above.

18. So far as the submission made by learned counsel for the petitioner with respect to quash the inquiry report, the power of judicial review conferred on the constitutional court or on the Tribunal is not that of an appellate authority.

19. In the judgment of Apex Court in the case of ***State of Andhra Pradesh & Ors. vs. S. Sree Rama Rao, AIR 1963 SC 1723,*** a three Judge Bench of this Court has held that the High Court is not a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant. It is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. The Apex Court held as under:-

"7. ...The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence...."

20. In another judgment of ***B.C. Chaturvedi vs. Union of India & Ors., reported in (1995) 6 SCC 749*** again, a three Judge Bench of this Court has held that power of judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the court. The Court/Tribunal in its power of judicial review does not act as an appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. It was held as under:-

"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate

authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented. The appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India vs. H.C. Goel [(1964) 4 SCR 781], this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued."

21. Again in the judgment of the Apex Court in the case of ***State of Karnataka & Anr. v. N. Gangaraj reported in 2020 3 SCC 423***, the Apex Court has held that once the evidence has been accepted by the departmental authority, in exercise of power of judicial review, the Tribunal or the High Court could not interfere with the findings of facts recorded by reappreciating evidence as if the Courts are the Appellate Authority.

22. In another judgment of the Apex Court in the case of ***State Bank of Bikaner and Jaipur vs. Nemi Chand Nalwaya, (2011) 4 SCC 584***, the Apex Court held that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be ground for interfering with the findings in departmental enquiries. The Court held as under:-

"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on

extraneous considerations, (vide B. C. Chaturvedi vs. Union of India - 1995 (6) SCC 749, Union of India vs. G. Gunayuthan - 1997 (7) SCC 463, and Bank of India vs. Degala Suryanarayana - 1999 (5) SCC 762, High Court of Judicature at Bombay vs. Shahsi Kant S Patil - 2001 (1) SCC 416)."

23. In view of the above facts, reasons and case laws so cited by the respective parties, this Court does not find any infirmity or illegality in the impugned inquiry report dated 28.09.2021 submitted by the respondent no.3, Enquiry Officer/Inspector/RPF/Noapara, Metro Railway, Kolkata (Annexure No.10 to the writ petition). Therefore, this writ petitioner is liable to dismissed being misconceived.

24. Accordingly, this writ petition is **dismissed** being misconceived.

25. However, it is always open to the disciplinary authority to proceed against the petitioner strictly, in accordance with law.

(2022)06ILR A927
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ-A No. 42698 of 2010

Dashrath Singh ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri V.S. Chauhan, Sri Devesh Kumar, Sri Dharmendra Singh, Sri Niraj Kumar Singh, Sri Umesh Tripathi, Sri Utkarsh Malviya

Counsel for the Respondents:
C.S.C., Sri Arvind Kumar, Sri Vikram Bahadur Yadav

(A) Service Law - Dismissal from service - The U.P. Police Officers of the Subordinate Ranks (Punishment & Appeal) Rules, 1991 - Rule 14 - Procedure for conducting departmental proceedings.

Petitioner (constable) misbehaved with Station Officer while he was drunk – complaint – medical examination – suspended – preliminary enquiry - no urine test or blood test conducted - Appeal & revision dismissed.

HELD:-Report by Enquiry Officer become erroneous in the absence of two tests. When the Disciplinary Authority was punishing the petitioner, it should have considered the fact that the petitioner had not in any manner indulged in any activity which could be termed as "indiscipline". Impugned order quashed and set aside. Petitioner entitled to all consequential benefits.**(Para - 6)**

Writ Petition Allowed. (E-7)

List of Cases cited:-

1. Bachubhai Hassanalli Karyani Vs St. of Maha. , (1971) 3 SCC 930

2. Krishna Kumar Vs U.O.I. , Writ-A No.67355 of 2007

3. Shiv Raj Singh Vs St. of U.P. & ors. ,Writ-A No.2230 of 2014

4. Supreme Court in St. of Uttaranchal & ors. Vs Kharak Singh , (2008) 8 SCC 236

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

1. Heard Sri Utkarsh Malviya, learned counsel for the petitioner and Sri Vikram Bahadur Yadav, learned counsel for the respondents.

2. This writ petition has been filed against the order dated 31.10.2009 passed by the Superintendent of Police, Lalitpur

dismissing the petitioner from service, the order dated 31.1.2010 passed by the Deputy Inspector General of Police, Jhansi Range, Jhansi dismissing the Appeal and the order dated 29.4.2010 passed by the Additional Director General of Police (Telecommunications), Uttar Pradesh, Lucknow dismissing the Revision filed by the petitioner.

3. The petitioner who was posted as a Constable at Reserve Police Lines, Lalitpur was allegedly found drunk on 20.6.2009. It was alleged that while he was drunk, he had misbehaved with the Station Officer Sri Baljeet Singh. It had, still further, been alleged that after a complaint about the petitioner's drunkenness was made, a medical examination was done and he was suspended on 23.6.2009. A preliminary enquiry was conducted and upon finding that the allegations were prima facie correct, enquiry under Rule 14 of the U.P. Police Officers of the Subordinate Ranks (Punishment & Appeal) Rules, 1991 was conducted. The Enquiry Officer, upon finding that the petitioner was guilty of misbehaviour while he was drunk, submitted his enquiry report on 30.6.2009. In the Preliminary Enquiry report the Enquiry Officer had also given a finding that the petitioner was to be punished with a major penalty. Thereafter under Rule 14(1) of the Rules, the Enquiry Officer issued a charge sheet to the petitioner on 30.7.2009 charging him with the allegation that on 20.6.2009 after consuming liquor, he had misbehaved with the Station Officer. The petitioner replied to the charges on 10.8.2009 and thereafter upon completing the enquiry, the Enquiry Officer on 3.10.2009 submitted his enquiry report again with a recommendation for a major penalty. The Disciplinary Authority i.e. the Superintendent of Police, Lalitpur upon receiving the enquiry report, issued a show-cause notice on 9.9.2009 to the petitioner to submit his reply. The petitioner submitted a detailed reply on 26.10.2009 to the show cause notice with a request to drop all proceedings against the petitioner. Thereafter on 31.10.2009, an order of punishment was passed by the Superintendent of Police, Lalitpur whereby the petitioner was dismissed from service. The petitioner against the order dated 31.1.2010 filed an appeal before the Deputy Inspector General of Police, Jhansi Range, Jhansi which came to be dismissed on 31.1.2010. Thereafter the Revision filed by the petitioner against the order dated 31.1.2010 also met the same fate on 29.4.2010. This order was passed by the Additional Director General of Police (Telecommunications), Uttar Pradesh, Lucknow. Aggrieved thereof the petitioner has filed the instant writ petition.

4. Broadly, the petitioner has made the following submissions:

(i) There was no conclusive medical examination done on the petitioner. Learned counsel for the petitioner submitted that unless a proper urine test or a blood test was done, the fact that the petitioner had consumed alcohol and had thereafter in an inebriated state misbehaved with the Station Officer could not be conclusively proved. Learned counsel, to bolster his case, relied upon a decision of the Supreme Court in **Bachubhai Hassanalli Karyani vs. State of Maharashtra : (1971) 3 SCC 930** and the judgments of this Court in **Krishna Kumar vs. Union of India (Writ-A No.67355 of 2007** decided by order dated 15.5.2019) and in **Shiv Raj singh vs. State of U.P. & Ors.** (Writ-A No.2230 of 2014 decided by order dated 28.3.2018).

(ii) Learned counsel for the petitioner further submitted that the medical report was prepared under the influence of the Station Officer who was physically present at the hospital despite the fact that his presence was not required at all and, therefore, the examining doctor namely Doctor Arjun Singh was under the influence of his presence.

(iii) The Enquiry Officer upon completing the enquiry had given his opinion with regard to the fact as to what punishment the petitioner had to be given. Learned counsel for the petitioner submitted that the job of the Enquiry Officer came to an end upon finding that the petitioner was guilty of the charge. It was the Disciplinary Authority which was required to look into the punishment which was to be given. Learned counsel for the petitioner further submitted that the Disciplinary Authority had to also, while imposing punishment, look into the surrounding circumstances i.e. how long the petitioner had served and how had his conduct been in the past. In the instant case, learned counsel for the petitioner submitted that the petitioner was never punished ever before and this fact was to be looked into by the Disciplinary Authority. To bolster his case, learned counsel for the petitioner has relied upon a decision of the **Supreme Court in State of Uttaranchal & Ors. vs. Kharak Singh : (2008) 8 SCC 236.**

(iv) Learned counsel for the petitioner further submitted that the order of dismissal was not the only order which could have been passed by the Disciplinary Authority. A lesser punishment could also have sufficed and the Disciplinary Authority could have considered awarding a lesser punishment. Learned counsel further submitted that the enquiry was conducted in a slipshod manner and no witness of the incident was ever examined.

5. Learned Standing Counsel, however, opposed the writ petition and submitted that the petitioner was guilty of indiscipline as he had entered into an argument with the Station Officer in an inebriated state and since the police force was a disciplined force, the petitioner was rightly punished.

6. Having considered the submissions raised by learned counsel for the parties, the Court is of the view that the conclusion which the Enquiry Officer had arrived at about the drunkenness of the petitioner was definitely erroneous. In the instant case neither was any urine test done nor was any blood test conducted at that point of time. The finding that the petitioner was in a drunken state which was arrived at simply because the petitioner was smelling of alcohol was an absolutely erroneous decision on the part of the Enquiry Officer. Resultantly, the enquiry itself which was based on a wrong input, was absolutely baseless. The moment an allegation was made with regard to drunkenness, either a urine test ought to have taken place or a blood test ought to have been conducted. In the absence of these two tests, the report by the Enquiry Officer become erroneous. Still further, the Court finds that when the Disciplinary Authority was punishing the petitioner, it should have considered the fact that the petitioner had not in any manner indulged in any activity which could be termed as "indiscipline".

7. Under such circumstances, the Court is of the view that the orders impugned cannot be sustained in the eyes of law. Therefore, the order dated 31.10.2009 passed by the Superintendent of Police, Lalitpur; the order dated 31.1.2010 passed by the Deputy Inspector General of Police, Jhansi Range, Jhansi and the order dated 29.4.2010 passed by the Additional Director General of Police

(Telecommunications), Uttar Pradesh, Lucknow are quashed and are set aside. The petitioner shall be entitled to all consequential benefits.

8. The writ petition, accordingly, stands allowed.

(2022)06ILR A930
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.06.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 3747 of 2022

UP Judicial Services Asso. & Ors.
...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Varadraj Shreedutt Ojha, Purushottam Awasthi

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra

(A) Service Law - Maintainability of Writ - The U.P. Higher Judicial Service Rule 1975 – Rule 5(a), 6 (ii) , 20(2) , 22(1), 22 (3) - source of recruitment - Quota - Writ of Mandamus can be claimed as a consequential relief to issuance of a Writ of Certiorari - absence of a prior demand and its refusal by the authority concerned would not be a bar against the maintainability of the Writ Petition - scope of interference by Court - writ of Certiorari cannot be issued where there can be two opinions about the correctness of the decision.(Para -17,25)

Petitioners seeking implementation of directions - issued by Hon'ble Supreme Court contained in paragraph 28 (1) (a) of judgment (All India Judges Association and other Vs U.O.I) - 50 per cent by promotion from amongst Civil Judges (Senior Division) - on basis of principle of merit-cum-seniority and passing a suitability test. **(Para -19,29)**

(B) Maintainability of petition - issuance of writ of mandamus - pre-condition - person seeking issuance of a writ should have first approached the authority concerned by making a demand of redressal of his grievances by submitting a suitable representation - he can approach this Court only after the demand is refused or no decision is taken in respect of the demand - petitioner approached Court directly by filing a writ petition under Article 226 of the Constitution of India - seeking issuance of a writ of mandamus without submitting any representation for redressal of their grievances - writ petition not maintainable.**(Para -15)**

HELD:-In view of prohibition contained in paragraph 40 of the judgment (All India Judges Association and other Vs U.O.I), Court restrained from entertaining the proceedings for implementation of directions given in the judgment. Writ petition not maintainable**. (Para - 29,30)**

Writ petition dismissed. (E-7)

List of Cases cited:-

1. Umesh Chand Vinod Kumar & ors. Vs Krishi Utpadan Mandi Samiti, Bharthana & anr. , AIR 1984 All 46

2. All India Judges' Association & ors. Vs U.O.I. & ors., (2002) 4 SCC 247

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Sandeep Dixit and Sri. Sanjay Bhasin, Senior Advocates assisted by Sri V. S. Ojha, Sri. Amarjeet Singh Yadav and Sri Purushottam Advocates, the learned Counsel for the petitioners, Sri. Rajesh Tiwari, the learned Additional Chief Standing Counsel for the State-respondent and Sri Gaurav Mehrotra, the learned

Counsel for the opposite party no. 2, i.e. High Court of Judicature at Allahabad.

2. The instant writ petition has been filed by the U. P. Judicial Services Association and 39 others. Briefly stated, the petitioners case is that presently the petitioner nos. 2 to 40 are working on the post of Civil Judge (Senior Division) / Additional Chief Judicial Magistrate / Chief Judicial Magistrate. The year of recruitment of each of the petitioners, the dates of their promotion on the post of Civil Judge (Senior Division) and the respective places of their present posting has been given in the petition in a tabular form. It has further been stated in the writ petition that the services of petitioner nos. 2 to 40 were confirmed on 11.08.2021.

3. On 17.12.2020, this Court had issued an advertisement inviting applications for filling up 98 vacancies of the Higher Judicial Service for the recruitment year 2020 through direct recruitment from amongst the eligible Advocates under 25% quota provided in Rule 6 (ii) of the U.P. Higher Judicial Service Rule 1975 (which will hereinafter referred to as the "Rules of 1975'), out of which 87 were current vacancies and 11 were unfilled vacancies of reserved category of previous recruitment year. The petitioners have stated that as the quota of direct recruitment as provided in Rule 6 (ii) of the Rules of 1975 is 25%, a total of 348 vacancies would be available in the recruitment year 2020 for U. P. Higher Judicial Services and, therefore, after deducting 11 posts of backlog quota from 65% of posts i.e. 226 posts, a total of 215 posts out of 348 vacancies of Higher Judicial Services, which occurred in the recruitment year 2020, are to be filled up by promotion from amongst the Civil Judges (Senior Division).

4. The U.P. Judicial Services Association (the petitioner no.1) claims to have submitted a representation on 21.01.2021 to the Registrar (Selection and Appointment) of this High Court stating that the Judicial Officers in the Civil Judge (Senior Division) Cadre falling in the Zone of consideration (three times of number of vacancies advertised) who have completed more than two years of service in the Civil Judge (Senior Division) Cadre, be permitted to appear in the suitability test for promotion to the Higher Judicial Service Cadre to maintain the quota for promotion as per the Rules of 1975 and to fill the current vacancies, which will increase by the year 2022 due to retirements in the Higher Judicial Service Cadre.

5. On 30.05.2022, a notice has been issued by this Court stating that the suitability test - 2020 for promotion of officers in U.P. Nyayik Seva to U.P. Higher Judicial Services will be held on 11.06.2022. The admit cards of suitability tests may be downloaded by the officers - candidates. A list of 150 officers, who have completed three years' service as on 31.12.2021 in the cadre of Civil Judge (Senior Division), including the names of the officers who are working as Additional District Judge (FTC), and are eligible to appear in the suitability test 2020 under Rule 22 (3) of the Rules of 1975 has been annexed with the aforesaid notice. The petitioners have stated that there are 215 vacancies in the Higher Judicial Service for the recruitment year 2020 available for being filled up by promotion of Civil Judges (Senior Division) under Rule 5 (a) of the Rules of 1975 but the list issued on 30.05.2022 contains the names of only 150 eligible officers, which is not in consonance with the provisions of Rule 20 (2) of the Rules of 1975. As per the petitioners, the fixation of the cut of date as 31.12.2021 and imposition of the condition

of having completed three years' service as on 31.12.2021 in the cadre of Civil Judge (Senior Division) for eligibility to appear in the U. P. Higher Judicial Service Suitability Test 2020 violates Rule 5 (a) of the Rules of 1975, as the condition of having completed three years' service in the cadre of Civil Judge (Senior Division) has not been provided as an eligibility condition in the aforesaid Rule. The promotions are to be made from amongst the Civil Judges (Senior Division) on the basis of merit - cum - seniority and passing the suitability test under Rule-5 (a) of the Rules of 1975, without any reference to the length of their service.

6. The petitioners have further stated that on 18.05.1985, a Full Court Resolution had been passed by this Court providing that "*no officer of the Nyayik Seva shall be appointed to any post in any capacity in the Higher Judicial Service unless he has held the post of Civil Judge / Chief Judicial Magistrate at least for three years and his work and conduct has been satisfactory in all respect.*" The petitioners have submitted that at the time of passing of the aforesaid Resolution on 18.05.1985, there were only two sources of recruitment of Higher Judicial Service; (I) 15% direct recruitment from amongst the Advocates and (II) 85% by promotion and no suitability test was provided for promotion of any service candidates. As per the petitioners, this Resolution has lost its efficacy and applicability since the Rules of 1975 were amended in the year 2007 and the aforesaid Resolution violates of Rule 5 (a) of the Rules of 1975.

7. The petitioners have further submitted that they have completed more three years' service as Civil Judges (Senior Division) as on 30.05.2022 and they have wrongly been left out from the list published on 30.05.2022 against the provision contained in Rule 20 (2) of the Rules of 1975 as the number of officers to be included in the list for suitability test ought to have been four times of the number of vacancies earmarked for being filled up by promotion from the officers of U. P. Nyayik Seva. As per the petitioners, the eligibility list published on 30.05.2022 should consist of 860 candidates in view of Rule 20 (2) of Rules of 1975.

8. The petitioners have prayed for quashing of the aforesaid Resolution No. 2-B passed in the meeting of the Full Court held on 18.05.1985 as also quashing of the Resolution, if any, passed by the Selection and Appointment Committee of this Court to the extent of holding the petitioners no. 2 to 40 to be ineligible for being considered for promotion under rule 22 (1) of the Rules of 1975 for the reason that they have not completed three years of service on the post of Civil Judge (Senior Division) as on 31.12.2021 and they have prayed for a direction to the opposite parties to hold all the remaining Civil Judges (Senior Division), including the petitioners, as eligible for appearing in U. P. Higher Judicial Service Suitability Test 2020. The petitioners have further prayed for issuance of a direction to the opposite parties to modify the notification dated 30.05.2022 so as to include the names of the petitioners no. 2 to 40 as suitable for appearing for U.P. Higher Judicial Services Suitability Test 2020.

9. Per contra, Sri Gaurav Mehrotra, the learned counsel appearing for the opposite party no. 2 - the Hon'ble High Court of Judicature at Allahabad, has raised three-fold preliminary objections against the maintainability of the writ petition. The

first objection raised by Sri Mehrotra is that the petitioner no.1 is an Association and the writ petition filed by an Association seeking relief for its members is not maintainable. To fortify his submission, he has placed reliance on a Full Bench decision of this Court in the case of **Umesh Chand Vinod Kumar and others vs. Krishi Utpadan Mandi Samiti, Bharthana and another**, AIR 1984 All 46 wherein the question "whether an Association or persons, registered or unregistered, can maintain a petition under Article 226 of the Constitution of India for the enforcement of the rights of its members as distinguished from the enforcement of its own rights," was answered in the following words: -

"The position appears to be that an association of persons, regis tered or unregistered, can file a petition under Article 226 for enforcement of the rights of its members as distinguished from the enforcement of its own rights--

(1) In case members of such an association are themselves unable to approach the court by reason of poverty, disability or socially or economically disadvantaged position ("little Indians").

(2) In case of a public injury leading to public interest litigation; provided the association has some concern deeper than that of a wayfarer or a busybody, i.e., it has a special interest in the subject-matter.

(3) Where the rules or regulations of the association specifically authorise it to take legal proceedings on behalf of its members, so that any order passed by the court in such proceedings will be binding on the members.

In other cases an association, whether registered or unregistered, cannot maintain a petition under Article 226 for the enforcement or protection of the rights of its members, as distinguished from the enforcement of its own rights."

9. Sri Mehrotra submits that in the entire writ petition, there is no pleading as to what is the legal character of the petitioner no. 1 Association indicating whether it is a juristic person or not; there is no plea indicating that members of the petitioner no.1 - Association are unable to approach this Court themselves by reason of poverty, disability or socially or economically disadvantageous position; on the contrary the members of the petitioner no.1- Association are holding the post of Civil Judges (Senior Division) and they cannot claim to fall in any disadvantageous position. Sri Mehrotra submits that it is not a case in which there is any allegation of a public injury. Neither the Rules or Regulations of the Association have been brought on record nor is there any pleading to the effect that the Rules or Regulations of the Association authorize it to take legal proceedings on behalf of its members. Sri Mehrotra has submitted that as per the Full Bench decision in the case of **Umesh Chand Vinod Kumar (supra)**, the petitioner no. 1 Association cannot maintain a petition under Article 226 of the Constitution of India for enforcement or protection of any of the alleged rights of its members.

10. Sri Sandeep Dixit, the learned Senior Advocate appearing for the petitioners could not rebut the aforesaid submission of Sri Mehrotra and he proceeded to make submissions regarding the merits of the claim of the petitioners.

11. Keeping in view the law laid down by the Full Bench of this Court in the case of **Umesh Chand Vinod Kumar (supra)**, we are of the considered opinion

that the petitioner no.1 - Association has no right to maintain the writ petition which has been filed for ventilating the grievances of a class of its members.

12. However, as there are 39 other petitioners also, who have approached this Court by joining in filing of the writ petition, we proceed to consider the other submissions made by the contesting parties.

13. Sri Gaurav Mehrotra has raised the second preliminary objection against maintainability of the writ petition on the ground that it seeks issuance of a writ of Mandamus directing the opposite parties to hold all the remaining Civil Judges (Senior Division), including the petitioners, as eligible to appear in U.P. Higher Judicial Services Suitability Test 2020. The learned counsel representing the High Court has submitted that only the petitioner no. 2 to 40 have approached this Court for redressal of their grievances and the remaining Civil Judges (Senior Division) have not joined in filing the writ petition and, therefore, the writ petition so far as the same relates to the other Civil Judge (Senior Division), who have not approached this Court by filing the writ petition, is not maintainable.

14. We find substance in this objection as the petitioner numbers 2 to 40 cannot represent the remaining Civil Judges (Senior Division), who have chosen not to file a Writ Petition and the petitioner numbers 2 to 40 have rightly not filed this Writ Petition in a representative capacity. Therefore, no relief can be sought in this Writ Petition on behalf of the remaining Civil Judges (Senior Division), who have chosen not to file a Writ Petition.

15. A further preliminary objection of Sri Mehrotra is that the writ petition seeking issuance of a writ of mandamus in respect of the petitioner nos. 2 to 40 is also not maintainable for the reason that for maintaining a petition for issuance of a writ of mandamus, it is a pre-condition that the person seeking issuance of a writ should have first approached the authority concerned by making a demand of redressal of his grievances by submitting a suitable representation and he can approach this Court only after the demand is refused or no decision is taken in respect of the demand. As the petitioner nos. 2 to 40 have approached this Court directly by filing a writ petition under Article 226 of the Constitution of India for seeking issuance of a writ of mandamus without submitting any representation for redressal of their grievances, the writ petition filed by them, is not maintainable.

16. Refuting this preliminary objection, Sri. Sandeep Dixit, the learned Senior Advocate representing the petitioners, has submitted that the petitioners have prayed for issuance of a Writ of Certiorari quashing the Resolution No. 2-B passed in the meeting of the Full Court held on 18.05.1985 as also quashing of the Resolution, if any, passed by the Selection and Appointment Committee of this Court to the extent of holding the petitioners no. 2 to 40 to be ineligible for being considered for promotion under rule 22 (1) of the Rules of 1975 for the reason that they have not completed three years of service on the post of Civil Judge (Senior Division) as on 31.12.2021 and they have sought issuance of a Writ of Mandamus to the opposite parties to hold all the remaining Civil Judges (Senior Division), including the petitioners, as eligible for appearing in U. P. Higher Judicial Service Suitability Test 2020 only as a consequence of issuance of the Writ of Certiorari and in

such circumstances, the bar pleaded by the learned Counsel for the High Court would not apply.

17. We find force in the aforesaid submission of Sri. Dixit and this preliminary objection raised by Sri. Mehrotra that the Writ Petition for the relief of issuance of a writ of Mandamus is not maintainable for the reason that the petitioner numbers 2 to 40 have not first approached the authority concerned by making a representation, cannot be accepted. A Writ of Mandamus can be claimed as a consequential relief to issuance of a Writ of Certiorari and absence of a prior demand and its refusal by the authority concerned would not be a bar against the maintainability of the Writ Petition in such circumstances.

18. Now we proceed to examine the further submissions made by the learned Counsel for the petitioners. Sri. Sandeep Dixit has submitted that originally Rule 5 of the Rules of 1975 provided as follows: -

5. Sources of recruitment *- The recruitment to the service shall be made-*

(a) by direct recruitment of pleaders and advocates of not less than seven years' standing on the first day of January next following the year in which the notice inviting applications is published;

(b) by promotion of confirmed members of the Uttar Pradesh Nyayik Sewa (hereinafter referred to as the Nyayik Sewa), who have put in not less than seven years service to be computed on the first day of January next following the year in which the notice inviting application is published.....

19. In the case of **All India Judges' Association and others vs. Union of India and others**, (2002) 4 SCC 247, the Hon'ble Supreme Court had issued the following directions for recruitment to the Higher Judicial Service i.e. the cadre of District Judges: -

*"**28**. As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be:*

(1)(a) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;

(b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

(2) Appropriate rules shall be framed as above by the High Courts as early as possible."

20. Sri. Dixit has submitted that the Rules of 1975 were amended after passing of the aforesaid judgment in All India Judges Association case by means of a notification dated 09.01.2007 so as to provide as follows: -

5. Source of recruitment- *The recruitment to the service shall be made (a) by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test.*

(b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;

(c) by direct recruitment from amongst the Advocates of not less than seven years standing as on the last date fixed for the submission of application forms.

21. He has submitted that although Sub-rule (b) and (c) of Rule-5 of the Rules of 1975 make a reference to a minimum period of experience as an eligibility condition, Sub-rule (a) which contains the provision for making recruitment by promotion from amongst the Civil Judges (Senior Division) on the basis of merit cum seniority and passing a suitability test, does not contain any reference to any number of years put in service as an eligibility condition and he has further submitted that after the amendment made in Rule 5, the Resolution dated 18.05.1985 passed by the Full Court providing that no officer of the Nyayik Seva shall be appointed to any post in any capacity in Higher Judicial Service unless he has held the post of Civil Judge / Chief Judicial Magistrate at least for three years, has lost its efficacy as the same runs contrary to the provision contained in Rule 5 (a) of Rules of 1975.

22. On the contrary Sri Gaurav Mehrotra has submitted that Sub-rule (3) of Rule 20 of the Rules of 1975 provides that "the Selection Committee shall, after examining the record of the officers included in the list prepared under Sub-rule (2) of the Rules of 1975 **make a preliminary selection of the Officers who in its opinion are fit to be appointed on the basis of merit-cum-seniority**. In assessing the merit of a candidate the Selection Committee have due regard to his service record, ability, character and seniority.....". (Emphasis supplied)

23. On the basis of written instructions received, Sri. Gaurav Mehrotra has submitted that the Hon'ble Selection and Appointment Committee of this Court in its meeting held on 30.05.2022 has been pleased to resolve as under: -

".....in light of earlier resolution dated 18.05.1985 of Full Court resolved to fix the cut off date for determining the qualifying service as 31.12.2021. The Committee deliberated over the matter and is of the view that since the determination of vacancies for recruitment of U.P. H.J.S.-2020 accounts for vacancies occurring from 01.01.2020 to 31.12.2021, there is no occasion to go beyond that date to fix any date to determine the qualifying service in Civil Judge (Senior Division) cadre for consideration of their promotion to Higher Judicial cadre. Moreover, any relaxation in the determination of qualifying service of three years would result in higher number of vacancies in the Civil Judge (Senior Division) who possess the requisite qualification qualifying service in that cadre to be considered for promotion to the cadre of Civil Judge (Senior Division). Such a scenario would bring about a situation where the cadre of Civil Judge (Senior Division) will collapse owing to huge number of vacant Courts. Thus, the Committee resolves to reject the request made in the representation."

24. Sri. Mehrotra has further submitted that in paragraph 40 of the judgment in the case of ***All India Judges' Association*** (Supra), the Hon'ble Supreme Court categorically directed that: -

*"**40.** Any clarification that may be required in respect of any matter arising out of this decision will be sought only from this Court. The proceedings, if any, for implementation of the directions given in this judgment shall be filed only in this*

Court and no other court shall entertain them."

25. The scope of interference by this Court while deciding the petition for issuance of Certiorari is limited to examining the decision making process by examining as to whether the decision making process suffers from any illegality or infirmity. The correctness of the decision cannot be examined by this Court while deciding a petition for issuance of a writ of Certiorari. The decision can only be examined on the touchstone of reasonableness and arbitrariness but the sufficiency or correctness of the reasons cannot be gone into by this Court. A writ of Certiorari cannot be issued where there can be two opinions about the correctness of the decision.

27. After giving a careful consideration to submissions advanced on behalf of the contesting parties, we find that the list of only those Civil Judges (Senior Division) who have completed three years' service has been prepared treating them eligible to appear in the Suitability Test 2022 under Rule 22 (3) in furtherance of decision of the Selection and Appointment Committee which has formed a reasoned opinion in exercise of its power under Rule 20 (3) that only those officers are fit to be considered for appointment on the basis of merit-cum-seniority who have completed a minimum period of three years on the post of Civil Judge (Senior Division). This decision has been taken by the Selection and Appointment Committee keeping into consideration that the vacancies had occurring up to 31.12.2021 and it was felt not to be proper to go beyond that date to fix any date to determine the qualifying service in Civil Judge (Senior Division) cadre for consideration of their promotion to Higher Judicial cadre. The Committee was also of the opinion that by inclusion of Civil Judges (Senior Division) who have not completed three years on the said post would result in higher number of the Courts of Civil Judge (Senior Division) falling vacant and this would create a situation where the cadre of Civil Judge (Senior Division) will collapse owing to huge number of vacant Courts. Therefore, the list of officers prepared under Rule 22 (3) of the Rules of 1975 consequent to the aforesaid decision, needs no interference by this Court in exercise of its Writ jurisdiction.

28. Moreover, so far as the submission of the petitioners that the decision is violative of Rule 5A of the Rules 1975 which was framed in furtherance of the judgment of the Hon'ble Supreme Court in the case of All India Judges Association (supra), it is significant to mention that in the same judgment, the Hon'ble Supreme Court had directed ***"any clarification that may be required in respect of any matter arising out of this decision will be sought only from this Court. The proceeding if any for implementation of the directions given in this judgment shall be filed only in this Court and no other Court shall entertain them."***

29. The petitioners are in effect seeking implementation of the directions issued by the Hon'ble Supreme Court contained in paragraph 28 (1) (a) of the judgment in the case of All India Judges Association **(supra)**. In view of the prohibition contained in paragraph 40 of the aforesaid judgment, this Court has been restrained from entertaining the proceedings for implementation of

directions given in the judgment and, therefore, we are of the considered opinion that this Court cannot entertain the present writ petition.

30. Accordingly, the writ petition is not maintainable before this Court and is **dismissed** as such. However, there shall no order as to costs.

(2022)06ILR A938
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No. 111 of 2022

C/M Pandit Ram Murat Ram Surat Mishra Pvt Indu. Training Institute, Azamgarh & Ors. ...Appellants

Versus

Union of India & Ors. ...Respondents

Counsel for the Appellnts:
Sri Ashok Khare (Sr. Adv.), Sri Siddhrth Khare, Sri Parashar Pandey

Counsel for the Respondents:
A.S.G.I., Sri Mahabir Singh, Sri Rajesh Tripathi, Sri Ramanand Pandey (Addl. C.S.C.)

(A) Misc. Law - Order passed by Government of India, Ministry of Skill Development and Entrepreneurship, Directorate General of Training, - appellants-Institutes (40 ITIs) de-affiliated and debarred for three years - no further admissions allowed to them from session 2021 - appellants furnished forged bank guarantee of Rs. 50,000/- per unit – found to be forged - punishment imposed by Central Government - disproportionate. (Para - 2,3,6)

HELD:-40 Institutes inflicted with punishment and only 13 Institutes joined writ petition. Only 8 Institutes come in appeal. One Institute in another appeal. All Institutes not challenged order, realising that they had committed fraud by submitting forged bank guarantees, hence were liable to be punished for the same.**(Para - 9)**

Special Appeal dismissed. (E-7)

(Delivered by Hon'ble Rajesh Bindal, C.J., & Hon'ble J.J. Munir, J.)

1. Order dated January 17, 2022 passed by learned Single Judge has been impugned by filing the present intra-court appeal. Vide aforesaid order, two writ petitions including the writ petition filed by the appellants herein, bearing Writ-C No.28322 of 2021, were dismissed.

2. Challenge in the aforesaid writ petition was to the order dated September 17, 2021 passed by the Government of India, Ministry of Skill Development and Entrepreneurship, Directorate General of Training, vide which the appellants-Institutes were de-affiliated and debarred for three years and no further admissions were to be allowed to them from the session 2021. The relevant portion of the order dated September 17, 2021 is reproduced below:

"Committee approved for De-affiliation of these 40 ITIs and debarred them for 3 years. No further admissions to be allowed to these ITIs from session 2021."

3. The aforesaid order was passed on account of the fact that the appellants had furnished forged bank guarantee of ₹50,000/- per unit.

4. Learned counsel for the appellants submitted that the condition for submission

of bank guarantee was imposed by the State Government vide order dated September 25, 2020. Finding that certain bank guarantees were fake, the State Government recommended to the Central Government that the said Institutes be not allowed to make any admission for the session 2021-22. The imposition of higher penalty by the Central Government was totally uncalled for, as there was no violation of any of the conditions imposed by the Central Government. The penalty imposed was disproportionate to the guilt and the idea for furnishing bank guarantee was to compensate the students in case courses are closed midway. Such an eventuality has not yet arisen. The appellants are ready to furnish fresh bank guarantees.

5. Learned counsel for the appellants further submitted that in a matter pending before the Lucknow Bench of this Court bearing Writ-C No. 1948 of 2022, vide order dated April 5, 2022, the respondents therein have been restrained from taking any coercive action against the petitioners therein, in case they deposit ₹50,000/- each per unit within 7 days with the authority concerned.

6. On the other hand, learned counsel for the respondents submitted that it is a case in which the appellants had furnished forged bank guarantees. Hence, the punishment imposed by the Central Government cannot be said to be disproportionate, seeing their conduct.

7. After hearing learned counsel for the parties, we do not find any case is made out for interference in the present appeal.

8. Vide order dated September 25, 2020, the State Government had imposed a condition that the Institutes are required to furnish bank guarantee of ₹50,000/- per unit. There was no challenge to the aforesaid condition imposed by the State Government which was applicable after the issuance thereof. Rather, in compliance thereof, the appellants furnished bank guarantees, which were found to be forged. Finding the bank guarantees furnished by 40 Institutes to be forged, the State Government recommended to the Central Government that they should not be allowed to make any admission for the session 2021-22. However, the Central Government, finding that it was a case of submission of forged bank guarantee, passed the order dated September 17, 2021, impugned in the writ petition giving rise to the present intra-court appeal.

9. The argument raised by learned counsel for the appellants that the punishment imposed is disproportionate, is merely to be noticed and rejected, for the reason that it was a case of submission of fake bank guarantee and fraud committed on the State, which vitiates everything. The argument that the Central Government had no authority to impose punishment for submission of fake bank guarantee as the condition for submission of bank guarantee was imposed by the State Government is also to be noticed and rejected, for the reason that in case of submission of fake document/bank guarantee, the Institutes concerned have to face the consequences as these are the Institutes which were meant to impart education to students. Still, we find that 40 Institutes have been inflicted with the punishment and only 13 Institutes joined the writ petition. However, in appeal, only 8 Institutes have come in. It was stated by learned counsel for the respondents that there is another special appeal bearing Special Appeal No. 87 of

2022 in which only one Institute is there. That means, all the Institutes have not even challenged the order, realising that they had committed fraud by submitting forged bank guarantees, hence were liable to be punished for the same.

10. We do not find any reason to take a view different than the view taken by the learned Single Judge. There is no merit in the present appeal. The same is, accordingly, **dismissed.**

(2022)06ILR A940
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal No. 212 of 2022

Smt. Girija Singh (In Wric 1004847 of 2012) ...Petitioner
Versus
C/m Intermediate College Amethi & Ors. ...Respondents

Counsel for the Appellant:
Anupam Mehrotra, Diwakar Singh Kaushik

Counsel for the Respondents:
Mahendra Bahadur Singh, C.S.C., Ram Kumar Singh

(A) Election - The Allahabad High Court Rules, 1952 - Chapter VIII Rule 5 - Special Appeal - Societies Registration Act of 1860 - Section 3 - registration of a society, Section 3A - renewal of certificate of the registration of a Society - renewal of certificate of the registration of a Society - applicable in the State of Uttar Pradesh - permits renewal of certificate of registration even after expiry of the period of registration on payment of late fee - Section 6 - Suits by and against societies , Section 25(1) - Disputes regarding election of office –bearers - preliminary objection must be adjudicated upon first - Existence of society will not get extinguished only because of non-renewal of its registration certificate.(Para – 22)

Non renewal of registration of Society - list of 112 members of General Body of Society in question - declared to be valid for purposes of holding election of Executive Body of Society - Single Judge while passing the judgment and order under appeal not considered issue relating to maintainability of writ petition - allowed writ petition - addition in list of 60 members of General Body of the Society – whether legally permissible. **(Para -2,14,21)**

HELD:-Society once duly registered, does not lose its entity as a society on account of non-renewal of certificate of registration. Society will get extinct only when it is dissolved as per the provisions contained in section 13 or 13-A of the Act. Persons added in list of 60 members of General Body of Society were illegally added. No interference in the judgment and order passed by learned Single Judge.**(Para -22,23,28)**

Special Appeal dismissed. (E-7)

List of Cases cited:-

1. PBNC Committee Vs Govt. of A.P., AIR 1958 AP 773

2. Pattada Uthayya Vs Pattada Somayya, AIR 1955 Mysore 149

3. Mahabir Prasad Vs Satyanarain, AIR 1963 Patna 131

4. Arya Samaj Vs Manmohan Tewari, 1994 (12) LCD 205

5. Adare Madarsa Ziaul-Ulum & ors. Vs Assistant Registrar, Firms, Societies & Chits & anr. , 2005 (23) LCD 1021

6. Umesh Chandra Vs Mahila Vidyalaya Society, 2006 (24) LCD 1373

7. Baba Bariyar Shah Association Vs St. of U. P., 2019 (37) LCD 887

8. St. of U.P. Vs C.O.D. Chheoki... Cooperative Society, (1997) 3 SCC 681

9. St. of Maha. Vs R. S. Nayak, AIR 1982 SC 1249

10. Bhagwati Prasad Vs Delhi St. Mineral Development Corporation, (1990) 1 SCC 361

11. Ram Bali Vs St. of U.P., (2004) 10 SCC 598

12. St. of Assam Vs U.O.I., (2010) 10 SCC 408

13. Jitendra Vs St. (NCT of Delhi), (2019) 13 SCC 691

14. Madan Mohan Vs Arun Shourie, AIR 2010 All 66

15. Bishundeo Narain Vs Seogeni Rai, AIR 1951 SC 280

16. Purushottam Kumar Jha Vs St. of Jharkhand, (2006) 9 SCC 458

17. U.O.I. Vs Ranbir Singh Rathaur, (2006) 11 SCC 696

18. St. of Assam Vs U.O.I., (2010) 10 SCC 408

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Subhash Vidyarthi, J.)

1. This intra-court appeal filed under Chapter VIII Rule 5 of the Rules of the Court lays a challenge to the judgment and order dated 28.04.2022 passed by the learned Single Judge in Writ-C No.1004847 of 2012 as corrected by means of the order dated 06.05.2022.

2. At this juncture itself, we may notice that in the aforesaid writ petition under challenge was an order dated 13.08.2012 passed by the Deputy Registrar Firms, Societies and Chits, Kanpur Region, Kanpur whereby a list of 112 members of General Body of the Society in question was declared to be valid for the purposes of holding the election of the Executive Body of the Society.

3. Shri Anupam Mehrotra, learned counsel representing the appellant-Smt. Girja Singh has argued that the learned Single Judge while passing the judgment and order under appeal has not considered the issue relating to maintainability of the writ petition at the instance of the petitioner-society and without, thus, deciding the question of maintainability, has allowed the writ petition thereby the learned Single Judge has erred in law. Elaborating this argument, it has been contended by Shri Mehrotra, learned counsel appearing for the appellant that the last renewal of the registration of the Society was done on 26.09.2003 for a period of five years w.e.f. 10.10.2000 and thereafter its registration has not been renewed and accordingly the writ petition filed by the Society whose registration was not renewed, could not be entertained. It has also been argued that in terms of the provisions contained in section 6 of the Societies Registration Act (hereinafter referred to as 'the Act') it is only a registered society which may sue or be sued. In support of this submission, learned counsel for the appellant has relied upon the judgments in the following cases:

(i) PBNC Committee vs. Govt. of A.P., AIR 1958 AP 773

(ii) Pattada Uthayya vs. Pattada Somayya, AIR 1955 Mysore 149

(iii) Mahabir Prasad vs. Satyanarain, AIR 1963 Patna 131

(iv) Arya Samaj vs. Manmohan Tewari, 1994 (12) LCD 205

(v) Adare Madarsa Ziaul-Ulum and others vs. Assistant Registrar, Firms,

Societies and Chits and another, 2005 (23) LCD 1021

4. It has further been argued on behalf of the appellant that the writ petition even at the behest of the petitioner no.2-Shiv Bahadur Singh was not maintainable as he filed the petition claiming to be a Manager of the Society whereas the fact is that he ceased to be the Manager on 24.05.2008. In support of this submission, the judgments cited by the learned counsel for the appellant are as under:

(i) Umesh Chandra vs. Mahila Vidyalaya Society, 2006 (24) LCD 1373

(ii) Baba Bariyar Shah Association vs. State of U. P., 2019 (37) LCD 887

(iii) State of U.P. vs. C.O.D. Chheoki... Cooperative Society, (1997) 3 SCC 681

5. Shri Mehrotra, learned counsel appearing for the appellant has further submitted that contradiction of statement recorded in the order which was under challenge in the writ petition before the learned Single Judge was not permissible as such statement available in an order is the conclusive proof of its existence and the same cannot be contradicted except before the authority passing the order. The judgments relied upon in this regard are:

(i) State of Maharashtra vs. R. S. Nayak, AIR 1982 SC 1249

(ii) Bhagwati Prasad vs. Delhi State Mineral Development Corporation, (1990) 1 SCC 361

(iii) Ram Bali vs. State of U.P., (2004) 10 SCC 598

(iv) State of Assam vs. Union of India, (2010) 10 SCC 408

(v) Jitendra vs. State (NCT of Delhi), (2019) 13 SCC 691

(vi) Madan Mohan vs. Arun Shourie, AIR 2010 All 66

6. Further submission is that though certain allegations of mala fides were asserted by the petitioners against the Deputy Registrar but since he was not impleaded a party in person hence, in this view as well the writ petition was not maintainable. The judgments relied upon in this context on behalf of the appellant are:

(i) Bishundeo Narain vs. Seogeni Rai, AIR 1951 SC 280

(ii) Purushottam Kumar Jha vs. State of Jharkhand, (2006) 9 SCC 458

(iii) Union of India vs. Ranbir Singh Rathaur, (2006) 11 SCC 696

7. It has further been argued that in absence of necessary parties, namely, the persons who were included in the final list of the members of the General Body by the order dated 13.08.2012, the order could not have been quashed by the learned Single Judge. In this respect, learned counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in the case of State of Assam vs. Union of India, (2010) 10 SCC 408.

8. Several other arguments have also been raised by the learned counsel for the appellant stating that since the writ petition involved adjudication of disputed question of facts as such proper recourse opon to the petitioners was to invoke the remedy of a civil suit and not that of writ petition and that once election process had commenced, no interference in the writ petition was permissible. It is also stated that the petitioner no.2 did not approach the Court with clean hands wrongly claiming to be the Manager of the Society and hence he, being guilty of misrepresentation, could not

have maintained the writ petition. It has also been contended by the learned counsel for the appellant that it is well settled principle of law that preliminary objection must be adjudicated upon first, however, learned Single Judge has completely overlooked the said well settled principle of law by passing the judgment and order under appeal.

9. In view of the aforesaid submissions, Shri Mehrotra has vehemently argued that the learned Single Judge has completely ignored the submissions made on behalf of the appellant as also the legal principles involved in the matter which vitiates the judgment and order under appeal. Accordingly, the prayer is that the judgment and order passed by the learned Single Judge be set aside and the writ petition be also dismissed.

10. Countering the submissions made on behalf of the appellant, Shri Prashant Chandra, learned Senior Advocate assisted by Shri Mahendra Bahadur Singh representing the respondent no.2 has opposed the prayers made in the special appeal and has submitted that having regard to the facts and circumstances of the case the judgment rendered by the learned Single Judge does not call for any interference in this special appeal which is liable to be dismissed at its threshold.

11. We have considered the rival submissions made by the learned counsel representing the respective parties and have also perused the records available before us on this special appeal. Before adverting to the submissions raised for and against the instant special appeal, we may notice certain facts in brief which will have a bearing on the adjudication of the issue involved in this case.

12. A Society in the name of Gandhi Junior High School, Korari Lachhan Shah, Post Korari Heer Shah, Tehsil & District Amethi (earlier District Sultanpur) was registered on 01.12.1969 at File No.I-10279. The registration of the said Society was renewed from time to time and at a subsequent stage the word "Gandhi" occurring in the name of the Society was removed. The registration of the Society in the name of Intermediate College Korari Lachhan Shah, District Sultanpur was renewed on 26.07.2003 with effect from 10.10.1977 which was valid till 09.10.2005. While renewing the Society till 09.10.2005, the change of the name of the Society as also the amended Memorandum of Association and rules were also taken on record/registered.

13. Thereafter, on an application preferred by one Paras Nath Singh on 05.04.2006, the certificate of registration was renewed for a period of five years with effect from 10.10.2005 and accordingly renewed certificate of registration was issued on 27.06.2006.

14. After renewal of the Society on 27.06.2006, the petitioner no.2 in the writ petition, namely, Shiv Bahadur Singh moved an application on 10.09.2009 stating therein that the earlier Manager, Kali Prasad Singh had died on 06.11.2004 whereafter for the remainder period he was elected as Manager in a meeting of the General Body of the Society held on 12.12.2004, however, Paras Nath Singh, who was the former Principal of the School run by the Society fraudulently got a Society registered in the name of Korari Inter College at registration File No.F-17017. Accordingly, a dispute was raised by Shiv Bahadur Singh in respect of the renewal of the registration of the Society

done on 27.06.2006. The matter was considered by the Deputy Registrar, Firms, Societies and Chits, Faizabad Division, Faizabad, who by means of an order dated 21.07.2010 has categorically held that after 25.05.2003 no valid election of the office bearers of the Society was held and accordingly the Deputy Registrar declared the Executive Body of the Society to have become barred by time. The Deputy Registrar, Faizabad also recorded a finding in his order dated 21.07.2010 that the renewal of registration of the Society was made on 26.09.2003 on the basis of the documents/papers presented by Kali Prasad Singh and at that time there was no dispute in the Society. He has also recorded in the order dated 21.07.2010 that the papers presented by Kali Prasad Singh at the time of seeking renewal of the registration of the Society contained a list of the members of the General Body of the Society for the year 2003-04 which comprised of 60 Members. The Deputy Registrar also recorded a finding that the renewal of the registration of the Society made in the year 2006 i.e. on 27.06.2006 was not proper and lawful and as such he withheld the said renewal of the registration of the Society while passing the order dated 21.07.2010.

15. The Deputy Registrar, Faizabad accordingly after giving the aforesaid findings in the order dated 21.07.2010, as observed above, declared the Executive Body of the Society to have become barred by time and accordingly issued the tentative list of the Members of the General Body of the Society comprising of 60 Members which he determined on the basis of list of Members of the General Body for the year 2003-04 presented by Kali Prasad Singh while seeking renewal of the registration of the Society which was done on 26.09.2003. Thus, the Deputy Registrar, Faizabad while passing the order dated 21.07.2010 recorded the following findings:

(a) Renewal of the registration of the Society done on 26.09.2003 on the basis of the documents/papers presented by Kali Prasad Singh was lawful and even undisputed.

(b) Renewal of the registration made in the year 2006 i.e. on 27.06.2006 was improper and incorrect.

(c) The papers presented by Kali Prasad Singh while seeking renewal of the registration of the Society which was made on 26.09.2003 contained a list of 60 Members of the general body of the Society and since no dispute arose on the renewal of the registration of the Society based on these papers including the list of Members, the list of 60 Members of the General Body of the Society appears to be correct.

(d) After 25.05.2003 no valid election of the Society was held as such the Executive Body had become barred by time.

16. After recording the aforesaid findings as noticed in the preceding paragraph, the Deputy Registrar, Faizabad issued a list of 60 Members of the General Body of the Society terming it to be tentative list and inviting objections to the said tentative list so that for the purposes of executive body of the Society final electoral college may be notified

17. It is very significant to note that the aforesaid order dated 21.07.2010 was not challenged by any of the parties to this special appeal neither by any one else before any forum or court. Thus, so far as the findings recorded in the said order dated 21.07.2010 are concerned, the same became final between the parties.

18. Since the electoral college for the purposes of holding election of the Executive Body of the Society, as directed by the Deputy Registrar Faizabad by means of his order dated 21.07.2010, was not being finalized, a writ petition was filed by the respondent no.2-Shiv Bahadur Singh, namely, Writ Petition No.6859 (M/S) of 2011 which was disposed of by a learned Single Judge of this Court dated 17.11.2011 whereby a direction was issued to the authority concerned to publish the final list of the Members of the General Body of the Society within a period of three months.

19. The Deputy Registrar instead of finalizing the electoral college for the purposes of holding election of the Executive Body of the Society pursuant to the earlier order dated 21.07.2010 passed an order on 20.03.2012 whereby he referred the matter for adjudication before the Prescribed Authority under section 25(1) of the Societies Registration Act.

20. The said order dated 20.03.2012 was challenged before this Court by filing writ petition no.1876 (M/S) of 2012. The said writ petition was disposed of by means of an order dated 05.04.2012 by quashing the order dated 20.04.2012 and further permitting the parties to file objections to the tentative list. This Court by the said order dated 05.04.2012 also directed the Deputy Registrar, Firms, Societies and Chits to consider the objections which could be raised by the parties against the tentative list and take final decision and publish the final list to hold the election of the Executive Body of the Society. The court also directed the Incharge Registrar, Firms, Societies and Chits to place the matter before a Deputy Registrar other than the Deputy Registrar Faizabad Region, Faizabad. It is thereafter that the Deputy Registrar Firms, Societies and Chits, Kanpur Division, Kanpur passed the order dated 13.08.2012 which was challenged by the petitioners before the learned Single Judge by instituting Writ Petition No.4847 (M/S) of 2012 (which was assigned new Number as Writ-C No.1004847 of 2012). The judgment and order under challenge herein dated 20.04.2022 has been passed allowing the said writ petition and quashing the order dated 13.08.2012, as a result of which the order dated 21.07.2010 has been revived and accordingly a direction has been issued by the learned Single Judge to the Deputy Registrar to pass a fresh order in respect of the electoral college for the purposes of holding the election of the Executive Body of the Society by including the members who were living out of 60 members as were finalized by means of the order dated 21.07.2010. The learned Single Judge also directed that if required the election of the Executive Body of the Society shall be held under the supervision of the Deputy Registrar. Learned Single Judge has also clarified that no person shall be added in the list over and above 60 persons as mentioned in the order dated 21.07.2010.

21. Having noted the background facts of the case as narrated above, the questions which primarily fall for our consideration are, (a) as to whether, as contended by the learned counsel for the appellant, the writ petition filed by the petitioner nos.1 and 2 was maintainable and, (b) as to whether any addition in the list of 60 members of the General Body of the Society as per the order dated 21.07.2010 passed by the Deputy Registrar, Faizabad is legally permissible.

22. It has been argued on behalf of the appellant that the registration of the Society

having not been renewed after 26.09.2003 (whereby renewal was valid for five years w.e.f. 10.10.2000), the writ petition filed by the petitioner no.1-Society was not maintainable. When we consider this submission, we find that the contention is based solely on the ground of non-renewal of the registration of the Society. Section 3 of the Act provides for registration of a society upon presentation of Memorandum of Association before the Registrar on payment of certain fee. Section 3A of the Act provides for renewal of certificate of the registration of a Society. Scheme of section 3-A of the Act as applicable in the State of Uttar Pradesh permits renewal of certificate of registration even after expiry of the period of registration on payment of late fee. Thus, a society once registered, will not get extinct, that is to say, it will not become non-existent in absence of renewal of the certificate of registration after expiry of the term of registration. The society shall still exist though with a non-renewed certificate. It will still be an entity for the reason that section 3-A permits renewal of certificate of registration even after expiry of the term of registration on payment of late fee. Existence of society will not get extinguished only because of non-renewal of its registration certificate. Section 13 of the Act provides for dissolution of a society and thereupon adjustment of its affairs. Accordingly, we have no hesitation to hold that a society once duly registered, does not lose its entity as a society on account of non-renewal of the certificate of registration. The society will get extinct only when it is dissolved as per the provisions contained in section 13 or 13-A of the Act.

23. So far as the judgments cited by the learned counsel for the appellant in this regard, as mentioned above, are concerned, all the cases related to non-registered society or and unincorporated club and it is in this context that it has been observed that such a society will have the character of an association which cannot sue or be sued except in the name of all the members of the association. In the case of **Arya Samaj (supra)** it has been held by a Division Bench of this Court that as soon as a society is registered, it acquires a legal entity. We are, thus, of the opinion that non-renewal of certificate of registration may have certain consequences, however, that in itself cannot be a cause of extinction of existence of the society as an entity. The existence/entity of a society comes to an end only on its dissolution as envisaged under sections 13 and 13-A of the Act.

24. Reliance placed by the learned counsel for the appellant on paragraphs 12 & 13 of the judgment in the case of **Adare Madarsa and others (supra)** is misplaced. This judgment only holds that since renewal of the society in question was granted on the basis of some illegal list as such the society had become unregistered society within the meaning of section 3-A(v) of the Act and the only remedy available was to hold the fresh election in terms of the provisions of section 25(2) of the Act. Thus, this case does not help the petitioner at all, rather it fortifies the contention of the learned counsel representing the respondents that once the Deputy Registrar in his order dated 21.07.2010 has held the executive body of the society being barred by time, it was appropriate and proper on his part to have proceeded to hold the election under section 25(2) of the Act. Thus, in our opinion, the submission of the learned counsel for the appellant that the writ petition was not maintainable at the behest of the petitioner no.1, is not tenable.

25. Similarly the submission raised by the learned counsel for the appellant that the writ petition was not maintainable at the behest of the petitioner no.2, is also not tenable for the simple reason that he is one of the persons included in the list of 60 members of the General Body of the Society as contained in the order dated 21.07.2010 passed by the Deputy Registrar and he, in our considered opinion, did have adequate locus to challenge the order dated 13.08.2012 passed by the Deputy Registrar, Kanpur Region, Kanpur, who had extended the list of 60 members to 112 members which was contrary to the unchallenged findings recorded by the Deputy Registrar in his earlier order dated 21.07.2010. As regards the submission that the petitioners while impeaching the order dated 13.08.2012 in the writ petition before the learned Single Judge could not be permitted to contradict the statement of facts recorded in the said order as the facts recorded in an order by an authority or tribunal or court is conclusive, we may only refer to the averments made in paragraph 29 of the counter affidavit filed in the writ petition by the Deputy Registrar Firms, Societies and Chits, Faizabad where it has been stated by the Deputy Registrar that there are no provisions under the Act which permit providing copies of the documents submitted by the opposite party no.5 in the writ petition to the petitioners, however, under sections 23 and 24 of the Societies Registration Act related documents can be inspected personally by the Deputy Registrar and that copies of such documents cannot be handed over to any other person.

26. The said submissions were made in reply to paragraphs 54 and 55 of the writ petition, wherein it was stated by the petitioner that the Deputy Registrar did not supply copies of the reply and documents submitted by the opposite party no.5 in the writ petition and further that the Deputy Registrar considered the documents filed by the opposite party no.5 in the writ petition, however, he did not supply copies of those documents to the petitioners and that such documents must have been provided to them so that they were able to put up their case before the Deputy Registrar. If the averments made in paragraph 29 of the counter affidavit filed before the learned Single Judge by the Deputy Registrar Faizabad is read in juxtaposition with the submissions made in paragraphs 52, 54 and 55 of the writ petition, it is abundantly clear that there is admission on the part of the Deputy Registrar that copies of the documents submitted before him by the opposite party no.5 in the writ petition were not supplied to the petitioner. In view of this admission by the Deputy Registrar before the Single Judge as made in paragraph 29 of the counter affidavit filed by the him, the submission made on behalf of the appellant that the petitioners could not be permitted to contradict the submissions of facts recorded in the order of Deputy Registrar, loses significance.

27. Yet another submission made by the learned counsel representing the appellant is that the persons whose names were added amongst 112 members in addition to 60 members, by means of the order dated 13.08.2012 passed by the Deputy Registrar, were not impleaded as parties in the writ petition, hence the writ petition suffered from the vice of non-joinder of necessary parties and as such the same was not maintainable. While considering this submission on behalf of the appellant, what we find is that there is a categorical finding recorded by the Deputy Registrar while he

passed the order dated 21.07.2010 that documents on the basis of which undisputed renewal of the registration of the society was done on 26.09.2003 also contained a list of 60 members of the General Body of the Society and this order dated 21.07.2010 was never challenged by any one, including those persons, who were added in the list of 112 members over and above 60 members of the General Body of the Society. Since the order dated 21.07.2010 passed by the Deputy Registrar was never challenged, hence the finding recorded in respect of the fact regarding validity of 60 members of the General Body of the Society remains undisputed. Any addition of members apart from 60 members of the General Body of the Society made by the subsequent order passed by the Deputy Registrar on 13.08.2012, in our considered opinion, was not permissible. It is also to be noticed in this regard that vide order dated 21.07.2010 the Deputy Registrar had published undisputed list of 60 members terming such list of members of the General Body as tentative list inviting objections so that electoral college may be finalized for the purposes of holding election of the Executive Body of the Society as contemplated under section 25(2) of the Act. Finalization of electoral college pursuant to the order dated 21.07.2010, in our considered opinion, was only meant for removal of such member from amongst 60 members of the General Body of the Society who for some or other reason might have disqualified themselves to be member of the General Body on account of certain exigencies such as death or resignation or any other like situation. Thus, amongst 60 members of the Society, while finalizing the electoral college pursuant to the order dated 21.07.2010 passed by the Deputy Registrar, the only alteration which was permissible in the said list of 60 members was deletion of names of such persons who might have disqualified themselves to be members on account of the reasons as aforesaid, such as death or resignation or any other like situation. The Deputy Registrar, thus, while passing the order dated 13.08.2012 had clearly exceeded his mandate and jurisdiction in view of the undisputed findings recorded in his earlier order dated 21.07.2010.

28. Accordingly, we have no hesitation to hold that those persons, who were added in the list of 60 members of the General Body of the Society by means of the order dated 13.08.2012, were illegally added. Since the Deputy Registrar while passing the order dated 13.08.2012, thus, exceeded his mandate which was available to him only for the purposes of finalizing the electoral college from amongst 60 members of the General Body of the Society by means of the order dated 21.07.2010, the submission made by the learned counsel for petitioner merits rejection, which is hereby thus, not accepted.

29. We also notice that in the writ petition disputed questions of facts relating to membership of the Society were not involved as the issue related only to finalization of the electoral college on the basis of determination of the members of the General Body of the Society made by the Deputy Registrar by means of his order dated 21.07.2010.

30. For the reasons as aforesaid, we are not inclined to interfere in the judgment and order passed by the learned Single Judge.

31. There is yet another reason why no interference in this special appeal is warranted. The dispute relating to election of the Executive Body of the Society has been pending since fairly a long time and

as such we are of the opinion that such dispute should be given quietus which shall be not only in the interest of the warring factions of the society but it shall also be in the interest of the society of the college being run, of the education of the students as also the welfare of the teachers.

32. For all the aforesaid discussion made above, we are of the opinion that the instant appeal lacks merit. Resultantly, the special appeal is, thus, **dismissed.**

33. The Deputy Registrar concerned is directed to ensure compliance of the directions issued by the learned Single Judge in his order dated 28.04.2022 as corrected by means of the order dated 06.05.2022 passed in Writ Petition No.4847 (M/S) of 2012 (New Number: Writ-C No.1004847 of 2012) within the time period specified for the said purpose in the order passed by the learned Single Judge.

34. However, there will be no order as to costs.

(2022)06ILR A949
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal (D) 155 of 2022

State of U.P. & Ors. ...Appellants
Versus
Sita Ram ...Respondent

Counsel for the Appellants:
Sri Chandan Kumar, Standing Counsel

Counsel for the Respondents:
Sri Harindra Prasad

(A) Service Law - Condonation of huge delay - limitation to file appeal - 30 days from date of order - in addition to time spent in obtaining certified copy thereof - Claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available - seeing the repeated inaction and casualness in approach on the part of the authorities in filing the appeals after a huge delay - view had to be revisited. (Para - 10,11)

Condonation of huge delay of more than two years and seven months in filing appeal - on account of bureaucratic set up and impersonal machinery - Covid-19 pandemic - Single Judge allowed prayer for change of date of birth at the fag end of the career of respondent-employe . **(Para -2)**

HELD:-No case made out for condonation of huge delay of more than two years and seven months in filing appeal. Application for condonation of delay rejected. Appeal barred by limitation.**(Para -13)**

Special Appeal Defective dismissed. (E-7)

List of Cases cited:-

1. B.C.C.L. & ors. Vs Shyam Kishore Singh, (2020) 3 SCC 411

2. Postmaster General & ors. Vs Living Media India Ltd. & anr., (2012) 3 SCC 563

3. St. of M.P. & ors. Vs Bherulal, (2020) 10 SCC 654

4. St. of U.P. & ors. Vs Harikesh Singh, Special Appeal Defective No. 23 of 2019

(Delivered by Hon'ble Rajesh Bindal, C.J. & Hon'ble J.J. Munir, J.)

1. The present intra-Court appeal has been filed by the State impugning the order dated July 30, 2019. Along with the appeal

appeal, an application has been filed seeking condonation of delay in filing thereof. The period for which the delay is sought to be condoned is not mentioned in the application. However, as calculated by the Registry, it comes to 948 days, i.e., more than two years and seven months.

2. earned counsel for the applicants/appellants, while trying to make out a case for condonation of huge delay of more than two years and seven months in filing the appeal, referred to the affidavit filed in support of the application seeking condonation of delay. He submitted that it was on account of bureaucratic set up and impersonal machinery which resulted in delay in filing the present appeal. One of the reasons is also Covid-19 pandemic. The submission is that the case otherwise is meritorious. The learned Single Judge has allowed the prayer for change of date of birth at the fag end of the career of the respondent-employee which is totally in contravention of judgments of Hon'ble the Supreme Court. Reliance is placed on the judgment of Hon'ble Supreme Court in **Bharat Coking Coal Limited and others Vs. Shyam Kishore Singh (2020) 3 SCC 411**, wherein relying on the earlier authorities on the issue, it was observed:

"9. This Court has consistently held that the request for change of the date of birth in the service records at the fag end of service is not sustainable."

3. In view of above, it is submitted that the present appeal being meritorious, the delay in filing the appeal be condoned and the appeal be allowed.

4. On the other hand, learned counsel for the respondent submitted that the applicants/appellants in the present appeal cannot take shelter of Covid-19 pandemic as the period of filing the appeal expired much prior to the imposition of first lockdown in March, 2020. The impugned order was passed by learned Single Judge on July 30, 2019. A perusal of the aforesaid contents of the affidavit, filed in support of the application seeking condonation of delay, shows that the file was dealt with at different levels as if there is no period prescribed for filing the appeal and it would be filed by the State at its pleasure.

5. Heard learned counsel for the parties and perused the paper-book.

6. Before the arguments of the parties could be heard and dealt with, there being huge delay in filing the present appeal the application seeking condonation of delay is required to be dealt with first.

7. The following table will show the dates and events after passing of the order by this Court and the action taken by the different departments of the State till such time the present appeal was filed:

Sl. No.	Date	Event
1.	30.07.2019	Learned Single Judge allowed the writ petition.
2.	28.08.2019	Petitioner requested Executive Engineer, Irrigation Division, Firozabad for compliance of the order of learned Single Judge.
3.	18.09.2019	Executive Engineer, Irrigation Division, Firozabad sought direction from Chief Engineer, Department of Irrigation and Water

		Resources, U.P. Lucknow for compliance of the order passed by learned Single Single Judge.
4.	04.10.2019	Chief Engineer, Department of Irrigation and Water Resources, U.P., Lucknow directed the Executive Engineer, Irrigation Division, Firozabad for seeking legal opinion from the office of Chief Standing counsel, High Court, Allahabad for filing review application.
5.	15.11.2019	Chief Engineer, Department of Irrigation and Water Resources, U.P., Lucknow sent reminder to Executive Engineer, Irrigation Division, Firozabad for seeking legal opinion from Chief Standing Counsel, High Court, Allahabad for filing review application.
6.	18.12.2019	Executive Engineer, Irrigation Division, Firozabad sought the legal opinion in the matter from Chief Standing Counsel, High Court, Allahabad.
7.	23.12.2019	Executive Engineer, Irrigation Division, Firozabad informed Chief Engineer, Department of Irrigation and Water Resources, U.P., Lucknow that legal opinion has been sought from Chief Standing Counsel for filing the special appeal.
8.	08.01.2020	Executive Engineer, Irrigation Division, Firozabad submitted narrative (facts of the case) and legal opinion to the office of Superintending Engineer, Drainage Division, Aligarh requesting for approval of narrative.
9.	10.01.2020	Superintending Engineer, Drainage Division, Aligarh requested Chief Engineer (Ganga) Department of Irrigation and Water Resources, U.P., Meerut for seeking approval for filing special appeal in the matter.
10.	10.01.2020	The Chief Engineer (Ganga) Department of Irrigation and Water Resources, U.P., Meerut sought permission from Chief Engineer (West), Stage-1, Department of Irrigation and Water Resources, U.P., Meerut for filing special appeal in the matter.
11.	11.01.2020	The Chief Engineer (West), Stage-1, Department of Irrigation and Water Resources, U.P. Meerut requested Chief Engineer (Complaint), Department of Irrigation and Water Resources, U.P. Lucknow for filing special appeal

		in the matter.
12.	25.02.2020	Chief Engineer (Legal Cell), Department of Irrigation and Water Resources, U.P. sought permission from Under Secretary, Department of Irrigation and Water Resources, Anubhag-7, U.P. Shasan, Lucknow for filing the special appeal in the matter.
13.	17.07.2020	The Under Secretary, Department of Irrigation and Water Resources, Anubhag-7, U.P. Shasan, Lucknow requested Engineer-in-Chief, Head of Department, Department of Irrigation and Water Resources, U.P., Lucknow for filing intra-Court appeal in the matter.
14.	30.07.2020	Executive Engineer, Irrigation Division, Firozabad sought legal opinion from District Government Counsel, Firozabad in the matter.
15.	25.08.2020	Chief Engineer (Ganga), Department of Irrigation and Water Resources, U.P., Meerut directed Executive Engineer, Irrigation Division, Firozabad for proper examination of all points given in the opinion of Chief Standing Counsel.
16.	02.09.2020	Executive Engineer, Irrigation Division, Firozabad submitted all papers/documents to the office of Chief Engineer (Ganga), Department of Irrigation and Water Resources, U.P., Meerut for seeking permission for filing intra-Court appeal.
17.	22.01.2021	Chief Engineer, Karmik asked Executive Engineer, Department of Irrigation, Firozabad for further proceedings of the matter.
18.	23.01.2021	Executive Engineer, Irrigation Division, Firozabad requested Chief Engineer, Department of Irrigation and Water Resources, U.P., Lucknow to seek the permission from the State for filing special appeal in the matter.
19.	25.01.2021	Chief Engineer, Ganga, Department of Irrigation and Water Resources, U.P., Meerut directed Executive Engineer, Irrigation Division, Firozabad to provide all information about the case.
20.	16.06.2021	Chief Engineer, Karmik vide reminder directed Executive Engineer, Department of Irrigation, Firozabad for further proceedings of the matter.
21.	18.06.2021	Executive Engineer, Irrigation Division,

		Firozabad requested Chief Engineer, Department of Irrigation and Water Resources, U.P. Lucknow for seeking permission for filing the special appeal in the matter.
22.	12.01.2022	Executive Engineer, Irrigation Division, Firozabad requested Chief Engineer (Ganga), Department of Irrigation and Water Resources, U.P., Meerut for seeking permission from the State for filing special appeal in the matter.
23.	31.01.2022	Chief Engineer (Coordinate Legal Cell) Department of Irrigation and Water Resources, U.P. requested Under Secretary, Department of Irrigation and Water Resources, Anubhag-7, U.P. Shasan, Lucknow for granting permission to file intra Court appeal in the matter.
24.	28.03.2022	Permission for filing intra-Court appeal was granted and in furtherance thereof Special Secretary and Additional Legal Remembrancer, Uttar Pradesh, Lucknow requested Chief Standing Counsel, High Court, Allahabad for filing intra-Court appeal in the matter.
25.	04.04.2022	Under Secretary, Department of Irrigation and Water Resources, Anubhag-7, U.P. Shasan, Lucknow informed Engineer-In-Chief, Head of Department, Department of Irrigation and Water Resources, U.P. Lucknow about permission letter dated 28.03.2022.
26.	08.04.2022	The office of Chief Standing Counsel allotted the file to Sri Chandan Kumar, Standing Counsel, High Court, Allahabad, who prepared the appeal.
27.	09.05.2022	After being prepared, the special appeal was presented.

8. A perusal of the aforesaid contents of the affidavit show that after the writ petition was allowed by learned Single Judge on July 30, 2019, for a period of about five months, i.e., upto December 23, 2019, the matter remained pending for seeking legal opinion as to whether order passed by learned Single Judge is required to be challenged or complied with. Thereafter, till March 28, 2022 the matter remained pending for approval by the competent authority for permission to file appeal against order passed by learned Single Judge. After the permission to file intra-Court appeal was granted, the Special Secretary and Additional Legal Remembrancer, Uttar Pradesh, Lucknow requested Chief Standing Counsel, High Court, Allahabad for filing intra-Court appeal in the matter, who in turn allotted the file to Sri Chandan Kumar, Standing

Counsel, High Court, Allahabad on April 8, 2022, who prepared the appeal and thereafter the same was presented on May 9, 2022, i.e., after expiry of the period of limitation even if counted from the date the permission to file the appeal was granted.

9. The contents of the affidavit, which have been summarized above, show that officers of the department at different levels have not been vigilant enough to pursue the case in hand. Where the limitation to file the appeal is merely 30 days from the date of order in addition to the time spent in obtaining the certified copy thereof, firstly the matter remained pending only for seeking opinion by the Chief Standing Counsel as to whether review petition should be filed. It is apparent from the record that the decision was taken by the State Government on March 28, 2022. However, the present appeal was presented on May 9, 2022, i.e., 42 days thereafter.

10. The legal issue as to how an application filed by the State seeking condonation of delay has to be dealt with has invited attention of the Courts on a number of occasions. Initially, the view was that the State Machinery being impersonal, the Courts should be liberal in granting condonation of delay, however, seeing the repeated inaction and casualness in approach on the part of the authorities in filing the appeals after a huge delay, the view had to be revisited.

11. In **Postmaster General and Others Vs. Living Media India Limited and Another, (2012) 3 SCC 563** considering the facts of that case, which were similar to the case in hand, the Hon'ble Supreme Court opined that the claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The aforesaid observation was made about a decade back and there is lot of technological advancements thereafter. But apparently, the matters here are being dealt with in the old fashion. Separate period of limitation has not been provided for filing appeals by the State. The relevant paragraphs from the aforesaid judgment are extracted below:-

"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their

agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.

30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."

12. Recently, the Hon'ble Supreme Court in **State of Madhya Pradesh and Others Vs. Bherulal (2020) 10 SCC 654** again considered the application filed by the State seeking condonation of delay in filing the Special Leave Petition. Similar arguments were made in support of the application, however, the same were rejected. Such type of cases were termed as "certificate cases". The application seeking condonation of delay was dismissed subject to costs of ₹ 25,000/-. Relevant paras nos. 4 to 8 thereof are extracted below:-

"4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only "due to unavailability of the documents and the process of arranging the documents". In para 4, a reference has been made to "bureaucratic process works, it is inadvertent that delay occurs".

5. A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.

6. We are also of the view that the aforesaid approach is being adopted in what we have categorised earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the officer concerned responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straightaway the counsel appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.

7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State

authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible.

8. Looking to the period of delay and the casual manner in which the application has been worded, we consider it appropriate to impose costs on the petitioner State of Rs 25,000 (Rupees twenty-five thousand) to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in filing the special leave petition and a certificate of recovery of the said amount be also filed in this Court within the said period of time."

13. For the reasons mentioned above, in our opinion no case is made out for condonation of huge delay of more than two years and seven months in filing the present appeal. Hence, the application for condonation of delay is rejected and the appeal, accordingly, being barred by limitation is also dismissed.

14. Similar issue came up for consideration before a Division Bench of this Court in **Special Appeal Defective No. 23 of 2019 (State of U.P. and others vs. Harikesh Singh) (Lucknow Bench)** where certain directions were issued to streamline the court cases and check delays in filing appeals etc. Relevant para 17 thereof is extracted below :-

"17. We also find it appropriate to record here that from the affidavit filed in support of the application seeking condonation of delay, it is evident that the system being followed after decision of cases needs to be re-visited. Office of Advocate General should ensure that after every case is decided by the Court, certified copy thereof should be applied for, immediately and not on the request made by the Department. Immediately, on receipt of the copy of the order, it should be sent to the Department concerned along with the opinion as to whether the case is fit for filing an appeal or not alongwith suggested grounds, instead of waiting for a letter from the concerned Department seeking opinion. Further, the letter should specifically state as to the date on which the limitation to file an appeal or availing any remedy against the order expires. It has to be ensured that opinion in the case alongwith copy of the order reaches the concerned department well before expiry of time for filing appeal and that date should be specifically mentioned. Benefit should be taken of technological advancements and the process could be online as well."

15. However, on account of inaction by the authorities at different levels in the State, the State exchequer should not be made to suffer as a result of an order passed by learned Single Judge of this Court which is claimed to be contrary to law laid down by Hon'ble the Supreme Court in **Bharat Coking Coal Limited's case (supra)**, in our view an inquiry is required to be conducted by Secretary, Irrigation Department to fix the responsibility of the officer(s)/official(s) concerned, who have slept over the file as a result of which huge delay occurred in filing the present appeal. The amount which is required to be paid to the respondent on account of change in date of birth, which according to the State was not permissible to him as he could not get the date of birth changed at the fag end of his career, be recovered from him/them after affording due opportunity of hearing.

Such an amount shall not be reimbursed by the State to those officer(s)/official(s) under any circumstance.

16. This Court is constrained to pass such order for the reason that repeatedly in the Court the appeals are being filed by the State after huge delay as if no one is responsible for taking care of litigation which otherwise also results in causing huge loss to the State exchequer besides wasting precious time of the Court which is already flooded with the cases and majority of them are on account of inaction or wrong action by the State.

17. Copy of this order shall be sent to the Chief Secretary of the State of Uttar Pradesh and Secretary, Department of Irrigation for information and compliance.

(2022)06ILR A957
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2022

BEFORE

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

Writ-A No. 18154 of 2021

Mritunjay Kumar Nand ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhakar Awasthi, Sri Rajesh Kumar Srivastava

Counsel for the Respondents:
A.S.G.I., Sri Vinay Kumar Singh

(A) Service Law - Constitution of India - Court of Equity - the Armed Forces Tribunal Act, 2007 - Section 3(o),14,15 - When a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution - he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective - "Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem" - it is a law of nature that one should not be enriched by the loss or injury to another - Filing of false affidavit and concealment of material facts amounts to interference in the administration of justice and as such is criminal contempt of Court. (Para -23,30)

Petitioner made false averment - no other efficacious alternative remedy except to invoke the extraordinary writ jurisdiction before this Court - Petitioner misrepresented Court - by means of writ petition - to obtain fruitful order . **(Para – 6,22)**

(B) Extraordinary Jurisdiction - Constitution of India ,1950 - Article 226 - jurisdiction depends on the person or authority passing the order being within those territories - residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction. (Para - 9)

HELD:-Petitioner not approached Court with clean hands by making false averments . Enclosed incomplete copy of advertisement deliberately only in order to obtain a fruitful order. Petition liable to be dismissed on ground of availability of statutory alternative remedy being available to petitioner. **(Para -17,18,22)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. Rajendra Kumar Mishra Vs U.O.I., 2004 0 Supreme (All) 1841

2. Board of Trustees for the Port of Calcutta Vs Bombay Flour Mills Pvt. Ltd., AIR 1995 SC 577

3. O.N.G.C. Vs Uptal Kumar Basu, (1994) 4 SCC 711

4. U.O.I. Vs Adani Exports Ltd. & anr. , AIR 2002 SC 126

5. Rajasthan High Court Advocates Assc. Vs U.O.I. & ors. , AIR 2001 SC 416

6. U.P. Rashtriya Chini Mill Adhikari Parishad Vs St. of U.P. , (1995) 4 SCC 738

7. Navinchandra N.. Majithia Vs St. of Maha. & ors. ,AIR 2000 SC 2966

8. L. Chandra Kumar Vs U.O.I. & ors. , (1997) 3 SCC 261

9. Devi Saran Mishra Vs U.O.I. & ors., 2010 (3) ADJ 593

10. The Ramjas Foundation & ors. Vs U.O.I. & ors., AIR 1993 SC 852

11. K.P. Srinivas Vs R.M. Premchand & ors., (1994) 6 SCC 620)

12. Nooruddin Vs (Dr.) K.L. Anand , (1995) 1 SCC 242

13. Ramniklal N. Bhutta & anr. Vs St. of Maha. & ors., AIR 1997 SC 1236

14. Dr. Buddhi Kota Subbarao Vs K Parasaran & ors., AIR 1996 SC 2687

15. K.K. Modi Vs K.N. Modi & ors., 1998) 3 SCC 573

16. M/s. Tilokchand Motichand & ors. Vs H.B. Munshi & anr., AIR 1970 SC 898

17. St. of Haryana Vs Karnal Distillery, AIR 1977 SC 781

18. Sabia Khan & ors. Vs St. of U.P. & ors., (1999) 1 SCC 271

19. Agriculture & Process Food Products Vs Oswal Agro Furane & ors., AIR 1996 SC 1947

20. King Vs General Commissioner, (1917) 1 KB 486

21. Abdul Rahman Vs Prasony Bai & anr., AIR 2003 SC 718

22. K.D. Sharma Vs SAIL, (2008) 12 SCC 481

23. G. Jayashree Vs Bhagwandas S. Patel , (2009) 3 SCC 141.

24. Sunkara Lakshminarasamma & anr. Vs Sagi Subba Raju & ors. , (2009) 7 SCC 460

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

1. Heard Mr. Prabhakar Awasthi, learned counsel for the petitioner and Mr. Vinay Kumar Singh, learned counsel for the respondent-Union of India.

2. By means of the present writ petition, the petitioner has made following relief:

"i. Issue a writ, order or direction in the nature of Certiorari, calling for the records of the case and to quash the impugned order dated 26thOctober, 2021 passed by Lieutenant Colonel Officer Officer In-Charge Rtg., respondent no.3 (Annexure No.7 to this writ petition)."

ii. Issue a writ, order or direction in the nature of Mandamus commanding the respondents to forthwith issue appointment letter and confer appointment in favour of of petitioner as Draughtsman in General Reserve Engineer Force, Cenre DIGHI Camp Pune, Maharashthra.

...."

It is the case of the petitioner that pursuant to the Advertisement No. 1/2021 dated 20th February, 2021, the petitioner being possessed with matriculation and intermediate mark-sheets/certificates and three Years diploma in Architectural Assistantship, applied for the post of Draughtsman through offline application form. As per the said advertisement, total 43 posts of draughtsman were advertised in following categories: (i) 19 posts for Unreserved category candidates, (ii) 6 posts

for Scheduled Caste category candidates, (iii) 3 posts for Scheduled Tribe Category candidates, (iv) 11 posts for Other Backward Class category candidates and (v) 4 posts for Economic Weaker Section category candidates. The petitioner appeared in the written examination and was declared successful and his name was placed at serial no. 22 of the result. By means of letter dated 20th September, 2021, the petitioner was required to appear in the physical efficiency test and primary medical examination which were scheduled to be held between 25th October, 2021 to 27th October, 2021. Thereafter, the petitioner has received an order dated 26th October, 2021 at his residence at District Azamgarh wherein it has been mentioned that due to overlapping of Intermediate Examination Mark-sheet/certificate and Diploma Degree of the petitioner, he could not be given placement and selection. It is against this order that the present writ petition has been filed.

3. Challenging the order impugned, learned counsel for the petitioner submits that the order impugned cannot sustain the scrutiny of law, as there would be no bar in obtaining two degrees in one and same academic session. The order impugned is an ex parte order, as before passing the same, neither the petitioner has been afforded opportunity of hearing nor any show-cause notice has been issued to him. Even otherwise, the petitioner would submit that he undertook admission in the academic session 2013-2014 in Intermediate as a private student, whereas he took admission in undergoing diploma course in Architectural Assistantship in academic-session 2012-2015 as a regular student. The bar in obtaining two degrees in a particular academic session would be restricted only to regular candidates and not private students. The impugned order does not provide any law based upon which an alleged overlapping was stood to be not taken for consideration for conferring appointment. On the cumulative strength of the aforesaid, learned counsel for the petitioner submits that the order impugned cannot be legally sustained and is liable to be dismissed.

4. Learned counsel for the respondents has raised maintainability of the present writ petition before the High Court of Judicature at Allahabad on the ground that the advertisement No. 1/2021 dated 20th February, 2021 has been issued by the Government of India, Ministry of Defence, Border Roads Wing, Border Roads Organization, General Reserve Engineer Force of which neither the headquarter nor any office of the same is situated within the territorial jurisdiction of the Allahabad High Court of Judicature at Allahabad. The place wherein all the examinations i.e. written examination, physical efficiency test and primary medical examination were held at GREF Centre,Dighi Camp., Pune-15 (Maharashtra) and from where, the impugned order has been passed (by respondent no.3 i.e.Lieutenant Colonel Officer Officer In-Charge Rtg., GREF Centre, Dighi Camp., Pune), is at Pune, Maharashtra, which is also not within the territorial jurisdiction of Allahabad High Court of Judicature at Allahabad. Only on the basis of the fact that the petitioner has received the impugned order at his residence i.e. Village Khand, Post Luchui (Latghat), Azamgarh, no cause of action will arise within the territorial jurisdiction of this Court. In the facts of the present case, the entire cause of action arose at Pune, Maharashtra. Merely because the petitioner is residing at Azamgarh, Uttar

Pradesh, this will not give jurisdiction to this Court. Learned counsel for the respondents, therefore, submits that the present writ petition is not maintainable before this Court, as the same has no territorial jurisdiction to entertain the same.

5. Learned counsel for the respondents next submits that against the order impugned which has been passed by respondent no.3 i.e.Lieutenant Colonel Officer Officer In-Charge Rtg., GREF Centre, Dighi Camp., Pune, the petitioner has efficacious statutory alternative remedy by approaching the concerned Armed Forces Tribunal either at Mumbai or at Delhi under the Armed Forces Tribunal Act, 2007. Learned counsel for the respondents, therefore, submits that the present writ petition be dismissed on the ground of availability of statutory alternative remedy.

6. Apart from the above, learned counsel for the respondents submits that the petitioner has made false averment in paragraph-17 by submitting that the petitioner has no other efficacious alternative remedy except to invoke the extraordinary writ jurisdiction before this Court.

7. When as a matter of fact in the Advertisement No. 1/2021 dated 20th February, 2021 itself pursuant to which the petitioner applied for the post of draughtsman, in sub-clause (j) of Clause-14, which provides for Miscellaneous Information, it has been provided that any legal issues arising out of this Advertisement shall fall within the legal jurisdiction of Hon'ble High Court of Delhi. However, deliberately, the petitioner has enclosed only first page of the said advertisement as Annexure-4 to the writ petition, when as matter of fact the said advertisement contains 31 pages, a copy of which has been placed before this Court by the learned counsel for the respondents which is taken on record. In view of the aforesaid, learned counsel for the petitioner submits that as the petitioner has not approached this Court with clean hands, the present writ petition is liable to be dismissed with exemplary cost, on the ground of fraud and misrepresentation.

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 including the copy of the Advertisement No. 1/2021 dated 20th February, 2021, which has been placed before this Court today by the learned counsel for the respondents.

9. This Court finds substance in the submissions made by the learned counsel for the respondents that this Court has no territorial jurisdiction to entertain the same, as the entire cause of action in the present case arose at Pune. The Full Bench of this Court in the case of **Rajendra Kumar Mishra Vs. Union of India** reported in 2004 0 Supreme (All) 1841, after following various judgments of the Apex Court has answered that for the reasons given above we are of the opinion that the Chief of Army Staff can only be sued either at Delhi where he is located or at a place where the cause of action, wholly or in part, arises. Relevant paragraphs of the aforesaid Full Bench judgment, which are relevant for deciding the present writ petition, read as follows:

"10. In our opinion the observation in the aforesaid decision "The Chief of Army Staff may be sued in any High Court in the Country" cannot be construed to mean that

the Supreme Court has laid down any absolute proposition that it is open to the petitioner to file a writ petition in any High Court in India. Such an absolute proposition as canvassed by the learned Counsel for the petitioner may lead to conflicting decisions because different petitions can be filed in different High Courts by co-accused in the same case and conflicting decisions can be given.

11. It may be noted that the aforesaid observation in the three Judges decision of the Supreme Court in Dinesh Chandra Gahlori's case (supra) is only a laconic observation and it cannot be override Larger Bench decisions of the Supreme Court.

12. In the present case it may be noted that the misconduct was committed at Calcutta and Summary Court Martial was also held at Calcutta. Thus the entire cause of action arose at Calcutta. We, therefore, fail to understand how a writ petition can be entertained at Allahabad High Court where no part of the cause of action had arisen.

13. In our opinion merely because the petitioner is presently residing in Ballia this will not give jurisdiction to this Court in view of the Seven Judges Bench decision of the Supreme Court in Lt. Col. Khajoor Singh Vs. Union of India. AIR 1961 SC 532. In paragraph 13 of the aforesaid decision the Supreme Court observed:

"Now it is clear that the jurisdiction conferred on the High Court by Article 226 does not depend upon the residence or location of the person applying to it for relief; it depends only on the person or authority x against whom a writ is sought being within those territories. It seems to us, therefore, that it is not permissible to read in Article 226 the residence or location of the person affected by the order passed in order to determine the jurisdiction of the High Court. ***That jurisdiction depends on the person or authority passing the order being within those territories and the residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction. Thus if a person residing or located in Bombay, for example, is aggrieved by an order passed by an authority located, say , in Calcutta, the forum in which he has to seek relief is not the Mumbai High Court though the order may affect him in Bombay but the Calcutta High Court where the authority passing the order is located. It would, therefore, in our opinion be wrong to introduce in Article the concept of the place where the order passed has effect in order to determine the jurisdiction of the High Court which can give relief under Article."***

.....

42. In the present case no part of the cause of action has arisen in U.P. Hence in our opinion the writ petition is not maintainable in this Court. It is accordingly dismissed. The decision of the Division Bench in Kailash Nath Tiwari Vs. Union of India (Supra) in our opinion does not lay down the correct law and is overruled."

(Emphasis supplied)

10. In the case of **Board of Trustees for the Port of Calcutta Vs. Bombay Flour Mills Pvt. Ltd.**, reported in AIR 1995 SC 577, the Apex Court has affirmed the principle that the place where the whole or part of the cause of action arises, gives jurisdiction to the Court within whose territory such place is situated. Whether the cause of action has arisen within the territory of the particular Court will have to

be determined in each case on its own facts in the context of the subject matter of the litigation, and relief claimed.

11. In the case of **Oil and Natural Gas Commission Vs. Uptal Kumar Basu**, reported in (1994) 4 SCC 711, it was held by the Apex Court:

"Under Article 226 a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against, whom the direction, order or writ is issued is not within the said territories. The expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. Therefore, in determining the objection of lack of territorial jurisdiction the Court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. Thus, the question of territorial jurisdiction must be decided on the facts pleaded in the petition, the truth or otherwise of the averments made in the petition being immaterial."

12. In **Union of India Vs. Adani Exports Ltd. And Anr**. reported in AIR 2002 SC 126. the Apex Court held that the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the Court to decide a dispute which has, at least in part, arisen within its jurisdiction. Each and every fact pleaded by the party in its application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts, pleaded are such which have a nexus or relevance with the lis that is involved in the case Facts, which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned.

13. Similarly in the case of **Rajasthan High Court Advocates Association Vs. Union of India & Ors.** reported in AIR 2001 SC 416, the Apex Court held that clauses (1) and (2) of Article of the Constitution provide how territorial jurisdiction shall be exercised by any High Court and one of the test may be as to whether the cause of action partly or fully has arisen within its territorial jurisdiction. While deciding the said case reliance was placed upon the Court's earlier judgment in **U.P. Rashtriya Chini Mill Adhikari Parishad Vs. State of U.P.** reported in (1995) 4 SCC 738, wherein it had been held that the expression "cause of action" has acquired a judicially-settled meaning. In the restricted sense, cause of action means the circumstances forming, the infraction of the right of the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove

each fact, comprises the "cause of action". It has to be left to be determined in each individual case as to where the cause of action arises.

14. In **Navinchandra N.. Majithia y. state of Maharashtra and others** reported in AIR 2000 SC 2966, the Apex Court while considering the provisions of clause (2) of Article of the Constitution, observed :

"In legal parlance the expression 'cause of action' is generally understood to mean a situation or State of facts that entities a party to maintain an action in a Court or a Tribunal; a group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.....'Cause of action is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment..:the meaning attributed to the phrase 'cause of action1 in common legal parlance is existence of those facts which give a party a right to judicial interference on his behalf."

15. To the submissions made by the learned counsel for the respondents that against the order impugned the petitioner has efficacious statutory alternative remedy by approaching the concerned Armed Forces Tribunal, this Court is of the opinion that in view of the judgment of the Apex Court in the case of **L. Chandra Kumar Vs. Union of India and others** reported in (1997) 3 SCC 261, specifically after enforcement of Armed Forces Tribunal Act, 2007, the petitioner first should have apportioned the concerned Armed Forces Tribunal against the order impugned.

16. In Devi Saran Mishra Vs. Union of India and Others, reported in 2010 (3) ADJ 593 (paragraphs 23, 24, 25, 26 and 27), a learned Single Judge of this Court has considered in detail the provisions of the Armed Forces Tribunal Act, 2007 (in short "the Act") in the light of various judicial decisions, and has held that in case, the cause of action involved in a Writ Petition is such as falls within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007, such cause of action has to be adjudicated upon in the first instance by the Tribunal. It is only after the decision of the Tribunal, that the matter would come to the High Court under Article 226/227 of the Constitution of India. The cause of action of the present Writ Petition as noted above, is evidently such as falls within the jurisdiction of the Tribunal after enforcement of the Act. This is evident from the provisions contained in Section 14 read with Section 3(o) of the said Act as well as Section 15 of the said Act, 2007.

17. In view of the aforesaid, this Court is of the opinion that the present writ petition is liable to be dismissed on the ground of availability of statutory alternative remedy being available to the petitioner.

18. This Court also agrees with the submissions made by the learned counsel for the respondents that the petitioner has not approached this Court with clean hands by making false averments in paragraph-17 and by enclosing incomplete copy of the advertisement deliberately only in order to obtain a fruitful order from this Court.

19. For ready reference, paragraph-17 of the present writ petition reads as follows:

"17. That petitioners have no other efficacious alternative speedy remedy except to invoke extraordinary writ jurisdiction before this Hon'ble Court under Article 226 of the Constitution of India, on inter alia amongst other."

20. This Court also perused the copy of the complete Advertisement No. 1/2021 dated 20th February, 2021 published by the Government of India, Ministry of Defence, Border Roads Wing, Border Roads Organization, General Reserve Engineer Force, which contains 33 pages, has been placed before by this Court today by the learned counsel for the respondents, when as matter of fact the petitioner has enclosed first page of the said advertisement deliberately. After perusal of the same, this Court finds that as per the terms and conditions mentioned in the said advertisement itself, it has been provided that in case any legal issues arises pursuant to the aforesaid advertisement, the same shall be adjudicated upon before the High Court of Delhi.

21. It would worthwhile to reproduce Clause-14 (j) of the Terms and Conditions mentioned in the aforesaid advertisement, which reads as follows:

"14. Miscellaneous Information

.....

(j) Any legal issues arising out of this Advertisement shall fall within the legal jurisdiction of Hon'ble High Court of Delhi.

..."

22. From the aforesaid it is apparently clear that that the petitioner has misrepresented this Court by means of the present writ petition only in order to obtain fruitful order.

23. When a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. (Vide **The Ramjas Foundation & Ors. Vs. Union of India & Ors.**, AIR 1993 SC 852; **K.P. Srinivas Vs. R.M. Premchand & Ors.,** (1994) 6 SCC 620). Thus, who seeks equity must do equity. The legal maxim "Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another.

In the case of **Nooruddin Vs. (Dr.) K.L. Anand** reported in (1995) 1 SCC 242, the Apex Court observed as under:

"????..Equally, the judicial process should never become an instrument of appreciation or abuse or a means in the process of the Court to subvert justice."

Similarly, in the case of **Ramniklal N. Bhutta & Anr. Vs. State of Maharashtra & Ors.**, reported in AIR 1997 SC 1236, the Apex Court observed as under:-

"*The power under Art. 226 is discretionary. It will be exercised only in furtherance of justice and not merely on the making out of a legal point??. the interest of justice and public interest coalesce. They are very often one and the same. ?? The Courts have to weight the public interest vis--vis the private interest while exercising the power under Art. 226?? indeed any of their discretionary powers.*

(Emphasis added)"

24. 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. Easy, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

25. 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.

26. In **M/s. Tilokchand Motichand & Ors. Vs. H.B. Munshi & Anr.**, reported in AIR 1970 SC 898; State of Haryana Vs. Karnal Distillery, reported in AIR 1977 SC 781; and 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 a litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the Court.

27. In **Agriculture & Process Food Products Vs. Oswal Agro Furane & Ors**., reported in AIR 1996 SC 1947, the Apex Court had taken a serious objection in a case filed by suppressing the material facts and held that if a petitioner is guilty of suppression of very important fact his case cannot be considered on merits. Thus, a litigant is bound to make "full and true disclosure of facts". While deciding the said case, the Apex Court had placed reliance upon the judgment in King Vs. General Commissioner, reported in (1917) 1 KB 486, wherein it has been observed as under:-

"Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent abuse of its process, to refuse to proceed any further with the examination of its merits....."

28. In **Abdul Rahman Vs. Prasony Bai & Anr.**, reported in AIR 2003 SC 718; and S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors., reported in (2004) 7 SCC 166, the Apex Court held that whenever 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 relief to the party. This rule has been evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. However, the suppressed fact must be material one in the sense that had it not been suppressed, it would have led any fact on the merit of the case.

29. In **K.D. Sharma vs. SAIL**, reported in (2008) 12 SCC 481, the Apex Court has held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The

same law was reiterated in **G. Jayashree vs. Bhagwandas S. Patel** reported in (2009) 3 SCC 141.

30. The Apex Court has repeatedly held that filing of false affidavit and concealment of material facts amounts to interference in the administration of justice and as such is criminal contempt of Court. Again the Apex Court in the case of **Sunkara Lakshminarasamma & Anr. Versus Sagi Subba Raju & Ors.** reported in (2009) 7 SCC 460 held that filing of false affidavit knowingly is a contempt and exemplary cost be imposed.

31. In view of the aforesaid, this Court finds no good ground to interfere in the present writ petition. This petition is accordingly **dismissed**. There shall be no order as to costs.

(2022)06ILR A966
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2022

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-B No. 1117 of 2022

Rakesh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Singh Yadav, Sri Ishwar Chandra

Counsel for the Respondents:
C.S.C., Sri Kaushal Kishore Mani, Sri Rohit Kumar Singh

(A) Revenue Law - The U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 195 - Admission to land , Section 198(4) - cancellation of the allotment , The U.P. Zamindari Abolition and Land Reform Rules, 1952 - Rules 173, 174, 175 & 176 - distinction between - cancellation of an order of approval on the ground that the same was without jurisdiction - cancellation of an order of allotment on account of an irregularity - require the procedure under sub-section (4) of Section 198 to be followed - Order made without jurisdiction would be unenforceable and inexecutable and would be devoid of any legal effect. (Para -27,28,30)

Allotment in favour petitioners - proposal approved by Tehsildar - complaint regard to allotment - amended provisions - power to grant approval stood with Assistant Collector incharge of sub-division - District Magistrate passed an order - approval granted by Tehsildar contrary to law - approval cancelled - land directed to be vested in Gaon Sabha - revision before Board of Revenue - rejected - time barred restoration application - rejected by the Board of Revenue - hence writ Petition.**(Para -3,4,5)**

HELD:-Order of the Tahsildar granting approval being without jurisdiction, the same was a nullity and would have no effect. District Magistrate upon receiving a complaint and after getting the matter inquired has rightly held that since the Tahsildar was not empowered to grant approval on the said date in view of the amendment made to Section 195 the order of approval was beyond jurisdiction and accordingly the same was cancelled. **(Para -29,30)**

Writ Petition dismissed. (E-7)

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

1. Heard Sri Ram Singh Yadav, learned counsel for the petitioners, Sri J.P.N. Raj, learned Additional Chief Standing Counsel appearing for the State-respondents and Sri Rohit Kumar Singh, learned counsel appearing for the respondent nos. 6 and 8.

2. The present petition has been filed seeking to raise a challenge to the order dated 27.09.2021 passed by the Member (Judicial), Board of Revenue, U.P. at Allahabad in Case No. RES/1417/2021 (Bal Chandra vs. Collector/District Magistrate and others), the order dated 01.05.2015 passed by the Member (Judicial), Board of Revenue U.P. at Prayagraj in Revision No. 23 of 2004-05 (Bal Chandra vs. Collector) as well as order dated 12.01.2005 passed by the Collector, Muzaffar Nagar.

3. The undisputed facts of the case as evident from the pleadings in the petition are that an allotment referable to the provisions under Section 195 of the U.P. Zamindari Abolition and Land Reforms Act, 19501 was made in favour of the petitioners on a proposal dated 09.01.2004 which was approved by the Tehsildar, Kairana vide order dated 25.10.2004. Upon a complaint received with regard to the allotment and taking notice of the fact that as per terms of the amended provisions of the U.P. Act No. 27 of 2004 (w.e.f. 23.08.2004) the power to grant approval stood with the Assistant Collector incharge of the sub-division, the District Magistrate, Muzaffar Nagar passed an order dated 12.01.2005 wherein it was held that the approval granted by the Tehsildar was contrary to law and accordingly the said approval was cancelled and the land was directed to be vested in the Gaon Sabha.

4. Aggrieved by the aforesaid order, the petitioners and other allottees preferred a revision before the Board of Revenue which was rejected by means of an order dated 01.05.2015 upon taking due notice to the amended provisions of Section 195, in terms of which the Tehsildar was not empowered to grant approval. A time barred restoration application was preferred on 02.08.2021. Apart from the point of delay in filing the restoration application, the grounds taken therein were held to be untenable and the same has been rejected by the Board of Revenue by its order dated 27.09.2021.

5. The aforestated three orders i.e. order dated 12.01.2005 passed by the District Magistrate, Muzaffar Nagar, the order dated 01.05.2015 passed by the Member (Judicial), Board of Revenue rejecting the revision and the order dated 27.09.2021 in terms of which the restoration application has been turned down, are subject to challenge in the present writ petition.

6. Counsel for the petitioners has sought to assail the orders by submitting that on 09.01.2004 i.e. the date of proposal by the Land Management Committee, the Tahsildar was vested with the jurisdiction to grant approval to the allotment as per the provisions of Section 195, as they stood at the relevant point of time. It is further submitted that in the absence of any proceeding for cancellation of the allotment as per the provisions of sub-section (4) of Section 198, having been initiated, the order of cancellation would be unsustainable.

7. Learned Additional Chief Standing Counsel, controverting the aforesaid assertions, has submitted that on the date when the proposal was approved, i.e. 25.10.2004, Section 195 had been amended in terms of the amending Act of 2004, which was effective from 23.08.2004, and the Tehsildar was no longer vested with the powers and jurisdiction to grant approval. The approval order of the Tahsildar being beyond jurisdiction, the same would have

no effect; accordingly the District Magistrate upon a complaint having been received rightly cancelled the said order. It is also pointed out that the order of the District Magistrate is an order of cancellation of the approval order and it is not an order of cancellation of allotment and in view thereof the same cannot be assailed on the ground that the procedure under sub-section (4) of Section 198 was not followed.

8. In order to appreciate the rival contentions, the relevant statutory provisions would be required to be adverted to.

9. The procedure with regard to allotment of land at the relevant point of time was covered under Section 195 of the UPZA & LR Act.

10. Section 195, at it stood prior to the amendments made in the year 2002, is being reproduced below :-

"**195. Admission to land.-** (1) The Land Management Committee with the previous approval of the Assistant Collector in charge of the sub-division shall have the right to admit any person as bhumidhar with non-transferable rights to any land other than land falling in any of the classes mentioned in section 132 where -

(a) the land is vacant land,

(b) the land is vested in the Gaon Sabha under section 117, or

(c) the land has come into the possession of Land Management Committee under Section 194 or under any other provisions of this Act."

11. By U.P. Ordinance No. 4 of 2002, promulgated on June 21, 2002, sub-section (2) was inserted. The said sub-section (2) stood as under :-

"(2) If the Assistant Collector in-charge of the sub-division is satisfied that the Land Management Committee has failed to discharge its duties or to perform its functions under sub-section (1), or it is otherwise necessary or expedient so to do, he may himself admit any person as bhumidhar with non-transferable rights of the land under sub-section (1)."

12. By U.P. Ordinance No. 16 of 2002, promulgated on July, 20, 2002, the word "Tehsildar" was substituted for the words "Assistant Collector in-charge of the sub-division" in sub-section (1) as well as in sub-section (2). Both the Ordinances No. 4 and 16 of 2002 were replaced by U.P. Act No. 11 of 2002 which was made effective from July 20, 2002. In the amending Act, sub-section (2) was omitted. Thus, the amendment introduced by the Ordinance No. 16 of 2002 was retained in the Amending Act of 2002, while the changes made by Ordinance No. 4 of 2002, were not provided for.

13. The amendment made to Section 195 as per terms of U.P. Act No. 11 of 2002 was as follows :-

"**6. Amendment of Section 195.**- In Section 195 of the principal Act for the words "Assistant Collector in charge of the sub-division" wherever occurring, the word "Tehsildar" shall be substituted."

14. Section 195 as it stood consequent to the amending Act of 2002 was as follows :-

"**195. Admission to land.-** (1) The Land Management Committee with the previous approval of the Tahsilar shall have the right to admit any person as bhumidhar with non-transferable rights] to any land

other than land falling in any of the classes mentioned in section 132 where -

(a) the land is vacant land,

(b) the land is vested in the Gaon Sabha under section 117, or

(c) the land has come into the possession of Land Management Committee under Section 194 or under any other provisions of this Act."

15. The provisions were again subject to further amendment by U.P. Act No. 27 of 2004, which came into force on August 23, 2004 and in terms thereof the Assistant Collector in-charge of the sub-division, instead of the Tehsildar, was empowered to admit any person as bhumidhar with non-transferable rights. The amendment made to Section 195 was as follows :-

"8. Amendment of Section 195.- In Section 195 of the principal Act for the word "Tehsildar" the words "Assistant Collector in charge of the sub-division" shall be substituted."

16. The provisions under Section 195, as they stand presently, after the amending Act of 2004, are as follows :-

"195. Admission to land.- (1) The Land Management Committee with the previous approval of the Assistant Collector in charge of the sub-division shall have the right to admit any person as bhumidhar with non-transferable rights to any land other than land being in any of the classes mentioned in section 132 where -

(a) the land is vacant land,

(b) the land is vested in the Gaon Sabha under section 117, or

(c) the land has come into the possession of [Land Management Committee] under Section 194 under any other provisions of this Act."

17. Section 195 contains the provisions with regard to admission to land by the Land Management Committee. As per terms of the provision, the Land Management Committee with the previous approval of the Assistant Collector in charge of the sub-division was empowered to admit any person as bhumidhar with non-transferable rights to any land other than land being in any of the classes mentioned in Section 132 and subject to the condition that (i) the land is vacant land, (ii) the land is vested in the Gaon Sabha under section 117, or (iii) the land has come into the possession of Land Management Committee under Section 194 under any other provisions of this Act.

18. The admission of persons to land under Section 195 was to be made in the order of preference specified under Section 198. The procedure for admission was specified under Rules 173, 174 and 175 of the U.P. Zamindari Abolition and Land Reform Rules, 1952.

19. Upon completion of the aforementioned procedural requirements, the Land Management Committee was required to prepare the documents specified under Rule 176 and thereafter forward the same to the Assistant Collector in charge of the sub-division for approval.

20. The procedure with regard to submission of documents before the Assistant Collector and the manner in which approval was to be accorded thereon was provided for under Rule 176, which is being extracted below :-

"176. - (1) After selecting the person or persons for admission to the land in accordance with Rule 175, the Committee shall prepare—

a) a list of persons so selected in Z.A. Form 57-B;

(b) a certificate of admission to land in Z.A. Form 58; and

(c) a counterpart in Z.A. Form 58-A.

(2) The documents referred to in clauses (a) and (b) of sub-rule (1) shall be duly signed by the Chairman of the Land Management Committee but the document referred to in clause (c) shall be signed by the person so selected for admission to the land.

(3) The document referred to in sub-rule (1) shall then be forwarded to the Assistant Collector-in-charge of the Sub-Division along with—

(a) a copy of the proceedings of the meeting of the Committee in which the decision to settle land was taken; and

(b) a certificate from the Lekhpal concerned to the effect that the particulars of the land mentioned in the list are correct, and that the admission to the land is in accordance with the provisions of the Act and the Rules.

(4) The Assistant Collector in-charge of the Sub-Division shall, on receipt of the documents, referred to in sub-rule (3) scrutinize the decision taken by the Committee and if he is satisfied that the decision of the Committee is in accordance with the Act and the rules made thereunder, he shall record his approval on the list in Z.A. Form 57-B and return the papers to the Land Management Committee within a week of its receipt from the Chairman with the direction that the possession may be delivered to the lessees and the report of mutation be submitted to the Supervisor Kanungo by the Lekhpal immediately after delivery of possession.

(5) If the Assistant Collector in-charge of the Sub-Division finds that the whole or part of the decision taken by the Committee is not in accordance with the provisions of the Act and Rules, he shall record his disapproval on the list in Z.A. Form 57-B and return the papers to the Chairman."

21. The Assistant Collector, on receipt of the documents, was required to scrutinize the decision taken by the Land Management Committee and upon being satisfied that the decision of the Committee was in accordance with the Act and the Rules made thereunder, he was required to record his approval. In the event, the Assistant Collector found that the decision taken by the Committee was not in accordance with the provisions of the Act and the Rules, he was to record his disapproval and return the papers.

22. It would therefore be seen that as per terms of Rule 176 the documents in respect of the proceedings undertaken by the Land Management Committee for grant of admission to land under Section 195, were required to be submitted whereupon the Assistant Collector was required to scrutinize the decision taken by the Committee and to record his approval or disapproval thereon, depending on whether he was satisfied or not that the decision taken by the Committee was in accordance with the Act and the Rules made thereunder.

23. A conjoint reading of the provisions under Section 195 read with Rule 176 would demonstrate that it was the Assistant Collector in charge of the sub-division who was vested with the discretion to approve or to disapprove the proposal submitted by the Land Management Committee after duly scrutinizing the same.

24. In the present case on a complaint received with regard to the allotments the matter was inquired into and the inquiry

report submitted by the Additional Collector indicated that consequent to the amendment made by U.P. Act No. 27 of 2004, effective from 23.08.2004, the power to grant approval was with the Assistant Collector and accordingly the approval granted by the Tehsildar on 25.10.2004 was without jurisdiction. The District Magistrate, upon taking into consideration the fact that the eligibility list was not in the order of preference as per Section 198 and that the approval granted by the Tehsildar on 25.10.2004 was without jurisdiction, passed the order dated 12.01.2005 cancelling the approval granted by the Tehsildar and directing the land to be vested with the Gaon Sabha.

25. In terms of the amendment made to Section 195 by U.P. Act No. 27 of 2004 (effective from 23.08.2004), the Assistant Collector in charge of the sub-division was empowered to grant approval to the proposal submitted by the Land Management Committee for admission of land under Section 195. Accordingly, the approval granted by the Tehsildar on 25.10.2004, i.e. on a date subsequent to 23.08.2004, when the amendment had become effective, the order of approval by the Tehsildar, was clearly beyond jurisdiction.

26. The revision filed thereagainst has been rejected for the same reason that the approval was contrary to the provisions contained under Section 195 (1) and also taking into notice the amendment made to Section 195 (1). The restoration application having been filed with a delay of more than six years, the Board of Revenue held the reason for the delay to be insufficient and the grounds taken in the revision were found to be untenable; accordingly, the restoration application was also rejected.

27. It is well settled that where an authority takes upon itself to exercise a jurisdiction it does not possess the order passed would amount to 'nothing' — a nullity. The concept of voidness and nullity has been explained in de Smith's Judicial Review of Administrative Action,2 while considering whether an order or decision is ultra vires or outside jurisdiction, in the following terms :-

"Void acts and decisions are indeed usually destitute of legal effect; they can be ignored with impunity; their validity can be attacked, if necessary, in collateral (or indirect) proceedings; they confer no legal rights on anybody."

28. It needs to be reiterated that conferment of jurisdiction is a legislative function and if an order is passed by an authority having no jurisdiction in the matter, it would be invalid and would amount to nullity. The order made without jurisdiction would be unenforceable and inexecutable and would be devoid of any legal effect.

29. The defect of jurisdiction strikes at the very root of the matter and the order of approval granted by the Tehsildar being a nullity would be non-est and not enforceable. The order passed by the Collector cancelling the approval granted by the Tehsildar, which was beyond jurisdiction, therefore cannot be faulted with. The order passed by the Board of Revenue rejecting the revision and the restoration application, also cannot be said to suffer from any illegality so as to warrant interference.

30. As regards the contention sought to be raised on behalf of the petitioners that the procedure under sub-section (4) of Section

198 for cancellation of the allotment was not followed, it may only be stated that the order of the Tahsildar granting approval being without jurisdiction, the same was a nullity and would have no effect. The District Magistrate upon receiving a complaint and after getting the matter inquired has rightly held that since the Tahsildar was not empowered to grant approval on the said date in view of the amendment made to Section 195 the order of approval was beyond jurisdiction and accordingly the same was cancelled. It would be pertinent to underscore the distinction between cancellation of an order of approval on the ground that the same was without jurisdiction, and cancellation of an order of allotment on account of an irregularity which would require the procedure under sub-section (4) of Section 198 to be followed.

31. No other ground was urged.

32. In view of the above, the Court finds no material error or illegality in the orders impugned so as to persuade this Court to exercise extra ordinary jurisdiction under Article 226 of the Constitution of India.

33. The petition stands dismissed accordingly.

(2022)06ILR A972
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-B No. 303 of 2022

Ashok Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellnts:
Sri Anup Kumar Srivastava, Sri Dharmendra Prasad

Counsel for the Respondents:
C.S.C., Sri Jamwant Maurya, Sri Krishna Kant Singh, Sri Deena Nath

(A) Revenue Law - The U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 333 – Power to call for cases , The Limitation Act, 1963 - Section 5 - Delay Condonation - Sufficient cause - Rules of procedure are the handmaid of the justice and no party should ordinarily be denied the opportunity of participating in the process of justice dispensation.(Para -15)

Recall application - dismissed by Board of Revenue - substitution application filed with delay - steps not taken for issuance of notice pursuant to the order passed - rejection of revision – ground - not taking steps based on hyper technical reasoning - legally unsustainable. **(Para - 13,14)**

HELD:-Impugned orders set aside. Matter remitted to the Board of Revenue for passing of a fresh order after granting due opportunity to the parties concerned. **(Para - 17)**

Writ Petition Allowed. (E-7)

List of Cases cited:-

1. N. Balakrishnan Vs M. Krishnamurthy, (1998) 7 SCC 123

2. Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nafar Academy & ors., (2013) 12 SCC 649

3. The St. of Punj. & anr. Vs Shamlal Murari & anr. , (1976) 1 SCC 719

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

1. Heard Sri Anup Kumar Srivastava, learned counsel for the petitioners, Sri

J.P.N. Raj, learned Additional Chief respondents, Sri Deena Nath, holding brief of Sri Jamwant Maurya, learned counsel for the respondent nos. 3, 4 and 5 and Sri Krishna Kant Singh, learned counsel appearing for the respondent no.6.

2. The present petition has been filed seeking to raise a challenge to the order dated 10.08.2021 passed by the Board of Revenue, U.P. at Allahabad in Case No. Rev/06/2008-2009, Computerized Case No. AL2008183499956, under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 19501 as well as order dated 22.11.2021 passed in Case No. Rec/1828/2021, Computerized Case No.AL20211834001828 under Section 333 of the Act.

3. It is pointed out that consequent to the death of the sole revisionist on 26.10.2011, a substitution application dated 23.11.2015 was moved on behalf of the petitioners i.e. legal heirs and representatives of the deceased-revisionist along with an application seeking condonation of delay. The said application was rejected by means of an order dated 10.08.2021 assigning the reason that the substitution application had been filed with a delay and that steps had not been taken for issuance of notice pursuant to an order passed with regard to the same.

4. It is further pointed out that a recall application against the aforestated order was moved by the petitioners wherein it was submitted that the applicants i.e. legal heirs and representatives of the deceased-revisionist were already represented by their counsel whose vakalatnama was on record and the contesting respondent nos. 1 and 3 were also represented through their counsel whose vakalatnama was also on Standing Counsel appearing for the State-record. The recall application was also dismissed by the Board of Revenue in terms of an order dated 22.11.2021 reiterating the reasons that the substitution application was filed with delay and that steps were not taken for issuance of notice pursuant to the order passed in regard to the same.

5. On the point of delay in filing the substitution application, learned counsel for the petitioners has submitted that the reasons for the same were fully explained in the affidavit filed in support of the delay condonation application. It is pointed out that the affidavit contained a clear assertion that the applicants were not aware with regard to the pendency of the said case as the pairvi of the revision was being done by their father, Sobaran Singh. It was further averred that the applicants became aware of the pendency of the revision for the first time in the year 2015 upon receiving a communication from the counsel, which was addressed in the name of Sobaran Singh, their deceased father, and soon thereafter they sought legal advice and filed the substitution application along with an application under Section 5 of the Limitation Act, 1963 seeking condonation of delay.

6. It is accordingly submitted that the delay in filing the restoration application having been sufficiently explained and there being no want of bonafides on the part of the petitioners, the Court ought to have adopted a liberal approach and granted condonation of delay.

7. The manner of exercising discretion in matters relating to condonation of delay is fairly well settled and it has been consistently held that while

exercising discretion in such matters, the words "sufficient cause" under Section 5 of The Limitation Act, 1963, should be construed in a liberal manner and in the absence of anything showing malafide or deliberate delay as dilatory tactics, the Court should normally condone the delay.

8. The manner of exercising discretion by Courts in matters relating to condonation of delay was subject matter of consideration in **N. Balakrishnan Vs. M. Krishnamurthy**2 wherein it was observed as under -:

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari, AIR 1969 SC 575 and State of W.B. v. Administrator, Howrah Municipality, (1972) 1 SCC 366 ."

9. The question as to what would be held to be "sufficient cause" while considering an application seeking condonation of delay again came up for consideration in the case of **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others**3, wherein upon considering the obligation of the Court while dealing with an application for condonation of delay and the approach to be adopted while considering the grounds for condonation, the principles to be applied were summarized. The observations made in the judgment in this regard are as follows -:

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

10. Applying the aforesaid principles to the facts of the present case, it would be seen that the affidavit filed in support of application seeking condonation of delay

spelt out the reasons for the delay in filing the substitution application and the reasons specified in that regard could not be held to be insufficient and no want of bonafides could have been imputed to the petitioners.

11. The order dated 10.08.2021 passed by the respondent No.2 does not assign any cogent reason which may have persuaded the Court not to accept the explanation furnished by the petitioners and to reject the application seeking condonation of delay and consequently to dismiss the revision as having been abated.

12. The subsequent order dated 22.11.2021 on the recall application also does not accord any consideration to the reasons which were furnished by the petitioners in support of the delay condonation application.

13. On the question with regard to taking steps pursuant to the order directing issuance of notice, it has been pointed out that the applicants i.e. legal heirs and representatives of the deceased-revisionist were already represented through their counsel and the vakalatnama of their counsel was on record. The contesting respondents were also represented through their counsel whose vakalatnama was also on record. The recall application was also dismissed by the Board of Revenue in terms of an order dated 22.11.2021 reiterating the reasons that the substitution application was filed with delay and that steps were not taken for issuance of notice pursuant to the order passed in regard to the same.

14. It is urged on behalf of the petitioners that the rejection of the revision on the ground of not taking steps is based on hyper technical reasoning and would be legally unsustainable.

15. In this regard, this Court may reiterate the proposition that rules of procedure are the handmaid of the justice and no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. It would be apt to refer to the observations made in **The State of Punjab and another Vs. Shamlal Murari and another**4, wherein it was observed as follows :-

"...processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice..if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum..."

16. Learned counsel appearing for the respondents has not disputed the fact that in matters relating to condonation of delay the court has to adopt a liberal approach and in a case where the delay has been sufficiently explained by giving adequate reasons the application ought not to be rejected on some hyper technical reasoning. Learned counsel also does not dispute that once the parties were duly represented through their counsel the revision ought not to have been dismissed for not taking steps for issuance of notice.

17. Having regard to the aforestated facts and circumstances and looking to the interest of justice, the impugned orders dated 10.08.2021 and 22.11.2021 are set aside and the matter is remitted to the Board of Revenue, U.P. at Allahabad for passing of a fresh order after granting due opportunity to the parties concerned.

18. The writ petition stands **allowed** in the manner as indicated above.

19. The original records received from the Board of Revenue, U.P. at Allahabad, through the Standing Counsel appearing for the State respondents, shall be returned forthwith.

(2022)06ILR A977
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 347 of 2022

Ajay Bhandari ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Alnkur Agarwal

Counsel for the Respondents:
A.S.G.I., Sri Anant Kumar Tiwari, Sri Gaurav Mahajan

(A) Tax - The Income Tax Act, 1961 - Sections 119, 142(1), 144-B, 147, 148, 148-A & 149 - Issue of notice where income has escaped assessment - Constitution of India - Article 142 - Clauses 6.2 and 7.1 of the Board's Circular - if a case does not fall under Clause (b) of sub-Section (i) of Section 149 of the Act, 1961 - for the Assessment Years 2013-14, 2014-15 and 2015-16 (where the income of an assessee escaping assessment to tax is less than Rs.50,00,000/-) - notice not issued within limitation under the unamended provisions of Section 149 - then proceedings under the amended provisions cannot be initiated. (Para-11)

Impugned notice under Section 148 of Income Tax Act, 1961 - reason to believe - income to the tune of Rs. 2,63,324/- - escaped assessment for assessment year 2014-15 **-** re-assessment - Section 147 read with 144B - without jurisdiction - jurisdiction cannot be assumed after expiry of period of limitation - barred by limitation - limitation under the amended provisions of Section 148A and 149 of the Act – expired - allegation of evaded income is Rs. 2,63,324/- - provided to be read as Rs. 26,33,324/- - by notice dated 17.3.2022 under Section 142(1) of the Act - which is much below Rs. 50 Lacs. **(Para - 3,4,6)**

HELD:-Impugned notice under Section 144,148 & Section 147 read with Section 144B of the Act, 1961, for the Assessment Year 2014-15 quashed.**(Para -12)**

Writ Petition Allowed. (E-7)

List of Cases cited:-

1. Civil Appeal No. 3005 of 2022 (U.O.I. & ors. Vs Ashish Agarwal) , 2022 SCC OnLine SC 543

2. Daujee Abhushan Bhandar Pvt. Ltd. Vs U.O.I. & ors. , Writ Tax No. 78 of 2022

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Ankur Agarwal, learned counsel for the petitioner, Shri S.P. Singh, learned Additional Solicitor General of India assisted by Shri Krishna Agarwal, learned Senior Standing Counsel for the respondent/Income Tax Department and Shri Anant Kumar Tiwari, learned Central Government Standing Counsel.

2. With the consent of the learned counsel for the parties, this writ petition is being finally heard without calling for a counter affidavit inasmuch as no disputed

question of fact is involved in the writ petition. The reliefs sought in the writ petition are reproduced below:

"(i) Issue a Writ, Order or Direction in the nature of Certiorari quashing the impugned notice u/s 148 of the Act, dated 31.03.2021, received by the Petitioner on 01.04.2021, issued by Respondent-No.3, for A.Y. 2014-15. ***(Annexure No. 2)***

(ii) Issue a Writ, Order or Direction in the nature of Certiorari quashing the notice u/s 144 of the Act, dated 13.01.2022, issued by Respondent No.4, for A.Y. 2014-15 to the Petitioner. ***(Annexure No. 4)***

(iii) Issues a Writ, Order or Direction in the nature of prohibition restraining the respondents from completing the reassessment proceeding under 148 of the Act against the Petitioner.

(iv) Issue any other writ order or direction which this Hon'ble Court may deem fit

(v) Award the costs of the petition to the petitioner.

*(vi) Issue a writ order or direction in the nature of certiorari quashing the impugned order u/s 147 read with Section 144B of the Act against the petitioner dated 31.03.2022 passed by National Faceless Assessment Centre, Delhi Respondent No. 4 (****Annexure No. 13)"***

3. It has been admitted by the learned counsel for the parties before us that the impugned notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act, 1961') for the assessment year 2014-15 was issued by the respondent no. 3 to the petitioner on 1.4.2021. The "reasons to believe" recorded by the respondent no. 3 for issuing the impugned notice, is as under:

"I have reason to believe that an income to the tune of Rs. 2,63,324/- has escaped assessment for the aforesaid year".

4. The re-assessment order dated 31.3.2022 has been passed by the respondent no. 4 i.e. National Faceless Assessment Centre, Delhi under Section 147 read with 144B of the Act, 1961.

5. **Shri S.P. Singh, learned Additional Solicitor General of India** has placed before us a copy of the two Judges Bench judgement of Hon'ble Supreme Court under Article 142 of the Constitution of India in **Civil Appeal No. 3005 of 2022 (Union of India and others Vs. Ashish Agarwal) decided on 4.5.2022 and reported in 2022 SCC OnLine SC 543** and submits that the notices issued after 1.4.2021 under Section 148 of the Act, 1961 are liable to be treated as notices under Section 148A of the Act, 1961 as substituted by the Finance Act, 2021. He draws out attention to paragraph 27 of the aforesaid judgement. He placed before us **copy of Instruction being F.No 279/Misc./M-51/2022-ITJ,** Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, ITJ Section **dated 11.5.2022, invited our attention to paragraph 7.1 of the aforesaid Instruction and stated that the notices under Section 148 relating to assessment years 2013-14, 2014-15 and 2015-16 shall not attract the judgement of Hon'ble Supreme Court in the case of Ashish Agarwal (supra).** Lastly, Shri S.P. Singh

submits that since the notice has been issued on 1.4.2021 for the assessment year 2014-15, therefore, it shall be covered by a Division Bench's judgement of this Court in the case of **Daujee Abhushan Bhandar Pvt. Ltd. Vs. Union of India and 2 others (Writ Tax No. 78 of 2022) decided on 10.3.2022.**

6. Learned counsel for the petitioner draws our attention to paragraphs 23 and 25 of the judgement of the Hon'ble Supreme Court in the case of **Ashish Agarwal (supra)** and submits that the impugned notice under Section 148 of the Act, 1961 issued by the respondent no. 3 is wholly without jurisdiction inasmuch as jurisdiction cannot be assumed after expiry of the period of limitation. He further submits that conferment of jurisdiction is essentially an act of legislature and the jurisdiction cannot be conferred by any circular or even by orders of Court. He submits that even under the amended provisions, which has no application on facts of the present case, impugned notice under Section 148 of the Act, 1961 would be without jurisdiction and barred by limitation inasmuch as for the assessment year 2014-15, the limitation under the amended provisions of Section 148A and 149 of the Act, 1961 had expired on 31.3.2018 inasmuch as the allegation of evaded income is Rs. 2,63,324/- which has been provided to be read as Rs. 26,33,324/- by notice dated 17.3.2022 under Section 142(1) of the Act, 1961, which is much below Rs. 50 Lacs.

7. We have carefully considered the submissions of the learned counsels for the parties and perused the record of the writ petition, the judgment of Hon'ble Supreme Court in the case of **Ashish Agarwal (supra)** and Circular F.No 279/Misc./M-51/2022-ITJ, dated 11.05.2022 issued by the Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, ITJ Section, New Delhi. Section 147 of the Act, 1961 as it existed till 31.03.2021, empowers the Assessing Officer to assess or reassess or recompute the loss or depreciation allowance or any other allowance, as the case may be, for the concerned assessment year in the case of an assessee if he has reason to believe that income chargeable to tax has escaped assessment, subject to the provisions of Sections 148 to 153. A pre-condition to initiate proceedings under Section 147 is the issuance of notice under Section 148. Thus, notice under Section 148 is jurisdictional notice. Section 149 provides time limit for issuance of notice under Section 148. The time limit is provided under the unamended provisions (existed till 31.03.2021) and the amended provisions (effective from 01.04.2021) as amended by the Finance Act, 2021. Unamended Section 149 and Amended Section 149 are reproduced below:

Time Limit for Notice	
Unamended Section 149 of the Act, 1961	***Amended Section 149 of the Act, 1961***
149. (1) No notice under section 148 shall be issued for the relevant assessment year,- *(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause*	*149. (1) No notice under section 148 shall be issued for the relevant assessment year,-* *(a)* ***if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);***

(b) or clause (c);	*(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of accounts or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset,* ***which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:***	*escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.*	*section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:*
(b) ***if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;***	*Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021,* ***if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions*** *of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:*	*(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.*	***Provided also*** *that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be*
(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located ***outside India,*** *chargeable to tax, has escaped assessment.*	***Provided further*** *that the provisions of this sub-section shall not apply in a case, where a notice under*	*(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of six years from the end of the relevant*	*excluded:*
Explanation. -In determining income chargeable to tax which has			***Provided also*** *that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall*

assessment year. *Explanation. -For the removal of doubts, it is hereby clarified that the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.*	*be extended to seven days and the period of limitation in sub-section (1) shall be deemed to be extended accordingly.* *Explanation.- For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, share and securities, loans and advances, deposits in bank account.* *(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.*

8. In the case of **Ashish Agarwal** (supra), Hon'ble Supreme Court held in Paras 23, 25 and 27, as under:-

"23.However, at the same time, the judgments of the several High Courts would result in no ***reassessment proceedings*** *at all,* ***even if the same are permissible under the Finance Act, 2021*** *and as per substituted sections 147 to 151 of the IT Act. The Revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated. It is true that* ***due to a bonafide mistake and in view of subsequent extension of time vide various notifications, the Revenue issued the impugned notices under section 148 after the amendment was enforced w.e.f. 01.04.2021, under the unamended section 148. In our view the same ought not to have been issued under the unamended Act and ought to have been issued under the substituted provisions of sections 147 to 151 of the IT Act as per the Finance Act, 2021. There appears to be genuine non-application of the amendments as the officers of the Revenue may have been under a bonafide belief that the amendments may not yet have been enforced.*** *Therefore, we are of the opinion that some leeway must be shown in that regard which the High Courts could have done so. Therefore, instead of quashing and setting aside the reassessment notices issued under the unamended provision of IT Act,* ***the High Courts ought to have passed an order construing the notices issued under unamended Act/unamended provision of the IT Act as those deemed to have been issued under section 148A of the IT Act as per the new provision section 148A and the Revenue ought to have been permitted to proceed further with the reassessment proceedings as per the substituted provisions of sections 147 to 151 of the IT Act as per the Finance Act, 2021, subject to compliance of all the procedural requirements and the defences, which may be available to the assessee under the substituted provisions of sections 147 to 151 of the IT Act and which may be available under the Finance Act, 2021 and in law****. Therefore, we propose to modify the judgments and orders passed by the respective High Courts as under:*

(i) The respective impugned section 148 notices issued to the respective assessees shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and treated to be show-cause notices in terms of section 148A(b). The respective assessing

officers shall within thirty days from today provide to the assessees the information and material relied upon by the Revenue so that the assessees can reply to the notices within two weeks thereafter;

(ii) The requirement of conducting any enquiry with the prior approval of the specified authority under section 148A(a) be dispensed with as a one-time measure vis-a-vis those notices which have been issued under Section 148 of the unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts;

(iii) The assessing officers shall thereafter pass an order in terms of section 148A(d) after following the due procedure as required under section 148A(b) in respect of each of the concerned assessees;

(iv) ***All the defences which may be available to the assessee under section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021 are kept open and/or shall continue to be available and;***

(v) The present order shall substitute/modify respective judgments and orders passed by the respective High Courts quashing the similar notices issued under unamended section 148 of the IT Act irrespective of whether they have been assailed before this Court or not.

25. Therefore, we have proposed to pass the present order with a view avoiding filing of further appeals before this Court and burden this Court with approximately 9000 appeals against the similar judgments and orders passed by the various High Courts, the particulars of some of which are referred to hereinabove. ***We have also proposed to pass the aforesaid order in exercise of our powers under Article 142 of the Constitution of India by holding that the present order shall govern, not only the impugned judgments and orders passed by the High Court of Judicature at Allahabad, but shall also be made applicable in respect of the similar judgments and orders passed by various High Courts across the country and therefore the present order shall be applicable to PAN INDIA.***

27. The present order shall be applicable ***PAN INDIA*** *and all judgments and orders passed by different High Courts on the issue and under which similar* ***notices which were issued after 01.04.2021 issued under section 148 of the Act*** *are set aside and shall be governed by the present order and shall stand modified to the aforesaid extent. The present order is passed in exercise of powers under Article 142 of the Constitution of India so as to avoid any further appeals by the Revenue on the very issue by challenging similar judgments and orders, with a view not to burden this Court with approximately 9000 appeals. We also observe that present order shall also govern the pending writ petitions, pending before various High Courts in which similar notices under Section 148 of the Act issued after 01.04.2021 are under challenge."*

9. The judgment of Hon'ble Supreme Court under Article 142 of the Constitution of India, in the case of **Ashish Agarwal (supra)** has been explained for implementation/ clarified by Instruction No.01/2022 being F.No 279/Misc./M-51/2022-ITJ, dated 11.05.2022 issued by the Ministry of Finance, Department of

Revenue, Central Board of Direct Taxes, ITJ Section, New Delhi, in exercise of powers under Section 119 of the Act, 1961, which is reproduced below:-

Instruction No. 01/2022
F. No 279/Misc./M-51/2022-ITJ
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
ITJ Section

New Delhi, Dated: 11th May, 2022

Subject: Implementation of the judgment of the Hon'ble Supreme Court dated 04.05.2022 (2022 SCC Online SC 543) (Union of India v. Ashish Agarwal) -- Instruction regarding

1. Hon'ble Supreme Court, vide its judgment dated 04.05.2022 (2022 SCC Online SC 543), in the case of Union of India v. Ashish Agarwal has adjudicated on the validity of the issue of reassessment notices issued by the Assessing Officers during the period beginning on 1st April, 2021 and ending with 30th June 2021,within the time extended by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 [hereinafter referred to as "TOLA"] and various notifications issued thereunder (these reassessment notices hereinafter referred to as "extended reassessment notices").

2. These extended reassessment notices were issued by the Assessing Officers under the provision of section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") following the procedure prescribed under various sections pertaining to reassessment namely sections 147 to 151, as they existed prior to their amendment by the Finance Act, 2021 (hereinafter referred to as "old law"). With effect from l April 2021, the old law has been substituted with new sections 147-151 (hereinafter referred to as the "new law").

3. Hon'ble Supreme Court has held that these extended reassessment notices issued under the old law shall be deemed to be the show cause notices issued under clause (b) of section 148A of the new law and has directed Assessing Officers to follow the procedure with respect to such notices. It has also held that all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available. Hon'ble Supreme Court has passed this order in exercise of its power under Article 142 of the Constitution of India.

4. The implementation of the judgment of Hon'ble Supreme Court is required to be done in a uniform manner. ***Accordingly, in exercise of its power under section 119 of the Act, the Central Board of Direct Taxes (hereinafter referred to as "the Board") directs that the following may be taken into consideration while implementing this judgment.***

5.0 Scope of the judgment:

5.1 Taking into account the decision of the Hon'ble Supreme Court in various paragraphs, it is clarified that the judgment applies to all cases where extended reassessment notices have been issued. This is irrespective of the fact whether such notices have been challenged or not.

6.0 Operation of the new section 149 of the Act to identify cases where

fresh notice under section 148 of the Act can be issued:

6.1 With respect of operation of new section 149 of the Act, the following may be seen:

- Hon'ble Supreme Court has held that the new law shall operate and all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available.

- Sub-section (I) of new section 149 of the Act as amended by the Finance Act, 2021 (before its amendment by the Finance Act, 2022) reads as under:-

***149.** (1) No notice under section 148 shall be issued for the relevant assessment year,--*

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b):

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing 0fficer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:

- Hon'ble Supreme Court has upheld the views of High Courts that the benefit of new law shall be made available even in respect of proceedings relating to past assessment years. Decision of Hon'ble Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied at that point.

6.2 Based on above, the extended reassessment notices are to be dealt with as under:

***(i) AY 2013-14, AY 2014-15 and AY 2015-16: Fresh notice under section 148 of the Act can be issued in these cases, with the approval of the specified authority, only if the case falls under clause (b) of sub-section (1) of section 149 as amended by the Finance Act, 2021** and reproduced in paragraph 6.1 above. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (ii) of that section.*

***(ii) AY 16-17, AY 17-18: Fresh notice under section 148 can be issued** in these cases, with the approval of the specified authority, under clause (a) of sub-section (1) of new section 149 of the Act, since they are within the period of three years from the end of the relevant assessment year. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (i) of that section.*

7.0 Cases where the Assessing Officer is required to provide the information and material relied upon within 30 days:

7.1 Hon'ble Supreme Court has directed that information and material is required to be provided in all cases within 30 days. ***However, it has also been noticed that notices cannot be issued in a case for AY 2013-14, AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees. Hence, in order to reduce the compliance burden of assessees, it is clarified that information and material may not be provided in a case for AY 2013-14, AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees.*** *Separate instruction shall be issued regarding procedure for disposing these cases.*

8.0 Procedure required to be followed by the Assessing Officers to comply with the Supreme Court judgment:

8.1 The procedure required to be followed by the Jurisdictional Assessing Officer/Assessing Officer, in compliance with the order of the Hon'ble Supreme Court, is as under:

- The extended reassessment notices are deemed to be show cause notices under clause (b) of 148A of the Act in accordance with the judgment of Hon'ble Supreme Court. Therefore, all requirement of new law prior to that show cause notice shall be deemed to have been complied with.

- The Assessing Officer shall exclude cases as per clarification in paragraph 7.1 above.

- Within 30 days i.e. by 2nd June 2022, the Assessing Officer shall provide to the assessees, in remaining cases, the information and material relied upon for issuance of extended reassessment notices.

- The assessee has two weeks to reply as to why a notice under section 148 of the Act should not be issued, on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year. The time period of two weeks shall be counted from the date of last communication of information and material by the Assessing Officer to the assessee.

- In view of the observation of Hon'ble Supreme Court that all the defences of the new law are available to the assessee, if assessee makes a request by making an application that more time be given to him to file reply to the show cause notice, then such a request shall be considered by the Assessing Officer on merit and time may be extended by the Assessing Officer as provided in clause (b) of new section 148A of the Act.

- After receiving the reply, the Assessing Officer shall decide on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148 of the Act. The Assessing Officer is required to pass an order under clause (d) of section 148A of the Act to that effect, with the prior approval of the specified authority of the new law. This order is required to be passed within one month from the end of the month in which the reply is received by him from the assessee. In case no such reply is furnished by the assessee, then the order is required to be passed within one month from the end of

the month in which time or extended time allowed to furnish a reply expires. If it is a fit case to issue a notice under section 148 of the Act, the Assessing Officer shall serve on the assessee a notice under section 148 after obtaining the approval of the specified authority under section 151 of the new law. The copy of the order passed under clause (d) of section 148A of the Act shall also be served with the notice u/s 148.

- If it is not a fit case to issue a notice under section 148 of the Act, the order passed under clause (d) of section 148A to that effect shall be served on the assessee.

Tanay Sharma
DCIT(OSD), ITJ-I

Copy to:

1. Chairman, Members and all other officer in CBDT of the rank of Under Secretary and above.

2. All Pr. Chief Commissioner of Income Tax and all Directors General of Income tax with a request to bring to the attention of all officers.

3. ADG(PR. P&P), Mayur Bhawan, New Delhi for printing in the quarterly Tax Bulletin and for circulation as per usual mailing list.

4. The Comptroller and Auditors General of india.

5. ADG (Vigilance), Mayur Bhawan, New Delhi.

6. Joint Secretary & Legal Advisor, Ministry of Law & Justice, New Delhi.

7. All Directorates of Income-tax, New Delhi and Pr. DGIT (NADT), Nagpur.

8. ITCC (3 copies).

9. ADG (System)-4, for uploading on the Department's website.

10. Data Base Cell for uploading or irsofficeronline.gov.in.

11. njrs Support@nsdl.co.in for uploading on NJRS.

12. Hindi Cell for translation.

13. Guard file."

10. Learned Additional Solicitor General of India has made a statement before us, as noted in paragraph-5 above, that as per Clause-7.1 of the Board's circular dated 11.05.2022, the notices under Section 148 relating to the Assessment Years 2013-14, 2014-15 and 2015-16, shall not attract the judgment of Hon'ble Supreme Court in the case of **Ashish Agarwal** (supra) and the impugned notice under Section 148 issued on 01.04.2021 for the Assessment Year 2014-15 is, therefore, clearly barred by limitation and consequently without jurisdiction. Therefore, in view of the admission made by the learned Additional Solicitor General on behalf of the respondents, we do not propose to deal with the other arguments of learned counsel for the petitioner as noted in paragraph-6 above and thus all other questions including the question of conferment of jurisdiction etc., are left open.

11. As per Clauses 6.2 and 7.1 of the Board's Circular dated 11.05.2022, if a case

does not fall under Clause (b) of sub-Section (i) of Section 149 of the Act, 1961 for the Assessment Years 2013-14, 2014-15 and 2015-16 (where the income of an assessee escaping assessment to tax is less than Rs.50,00,000/-) and notice has not been issued within limitation under the unamended provisions of Section 149, then proceedings under the amended provisions cannot be initiated.

12. For all the reasons aforestated, the impugned notice under Section 148 of the Act, 1961 issued on 01.04.2021 for the Assessment Year 2014-15 and the impugned notice dated 13.01.2022 under Section 144 of the Act, 1961 and the reassessment order dated 13.01.2022 under Section 147 read with Section 144B of the Act, 1961 for the Assessment Year 2014-15 passed by the respondent No.4 are hereby quashed. **The writ petition is allowed.**

(2022)06ILR A987
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 133 of 2021

Modi Distillery ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Pratik J. Nagar, Sri Atulya Kishore, Sri Rajat Bose

Counsel for the Respondents:
C.S.C.

(A) Tax Law - The Uttar Pradesh Excise Act, 1910 - Sections 2, 3, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 28 & 40 - The U.P. Excise Manual - paragraph Nos. 605, 608, 609, 610, 613, 615(5), 617(3), 814 - ''import', ''importer' and ''imported' - The Customs Act , 1962 - Section 45, 46, 47, 49, 57, 58, 59, 68 , Indian Stamp Act, 1899 - 'bond' - for the purpose of levy of Consideration fee/*''Pratiphal Shulk'*, on excess transportation loss of HSMS, the applicable law for computation of that regulatory fee would remain the laws of the State of Uttar Pradesh, only - Consideration fee/*''Pratipahal Shulk'* would be imposed in accordance with the rates prescribed in the State of Uttar Pradesh and not any other State - statutory authorities must act within the confines of the law. (Para - 71)

Consideration Fee/*'Pratiphal Shulk'* - imposed on petitioner - alleged - excess loss of High Strength Malt Spirit (HSMS) - against two transactions - order confirmed in appeal - remedy of revision - filed directly before this Court - plea of lack of jurisdiction - entire quantities of HSMS subjected to Consideration Fee*/Pratiphal Shulk'* - imported into the country - said goods fell outside the scope of levy of Excise duty by State of U.P. - State revenue authorities to impose Consideration fee/'Pratiphal Shulk', against alleged loss of revenue on foreign liquor - springing from excess loss of the commodity HSMS - during its transportation from a bonded warehouse at I.C.D. Dadri, Gautam Budh Nagar - to petitioner's distillery at Modi Nagar - whether permissible.**(Para -2,3,39)**

HELD:-Consideration fee/''Pratiphal Shulk' may be levied on excess loss of HSMS, whether imported from outside the country or procured from another State of India. Injunction sought against that levy, by looking at the provision of law providing for levy of Consideration fee/''Pratiphal Shulk' on excess loss of HSMS when transported within the State, from a distillery inside the State of Uttar Pradesh, is misconceived and inapplicable. Petitioner bound to compensate loss to revenue arising from excessive loss of HSMS during transportation, inside the State of Uttar Pradesh, at rates prescribed under amended Paragraph 814 of the Manual.**(Para - 60)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. M/s Jain Distillery Pvt. Ltd. Vs St. of U.P. & ors., Writ Tax No. 378 of 2021

2. Garden Silk Mills Ltd. & anr. Vs U.O.I. & ors., (1999) 8 SCC 744

3. Kiran Spinning Mills Vs Collector of Customs, (2000) 10 SCC 228

4. I.T.D.C. Ltd. Through Hotel Ashoka Vs A.C.T. & anr. (2012) 3 SCC 204

5. Mohan Meakin Breweries Ltd. Vs Excise & Taxation Commr., Chandigarh & ors., (1976) 3 SCC 421

6. St. of U.P. & ors. Vs. Modi Distillery & ors., (1995) 5 SCC 753

7. I.O.C. Ltd. Vs St. of U.P. & ors., 2018 (6) ADJ 706

8. St. of U.P. & ors. Vs Delhi Cloth Mills & anr. , (1991) 1 SCC 454

9. St. of Jhar. & ors. Vs Ajanta Bottlers & Blenders Pvt. Ltd, (2019) 7 SCC 545

10. Dhandhania Kedia & Co. Vs CIT AIR 1959 SC 219

11. St. of Kerala & ors. Vs Mc. Dowell & Co. Ltd., 1994 Supp. (2) SCC 605

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

1. Heard Sri Rajat Bose along with Sri Pratik J. Nagar & Sri Atulya Kishore, learned counsel for the petitioner and Sri Manish Goyal, learned Additional Advocate General along with Sri A.K. Goyal, learned Additional Chief Standing Counsel and Sri Jagdish Mishra, learned Standing Counsel, for the State respondents.

2. Present petition has been filed against the orders dated 08.07.2019 and 25.01.2021. By order dated 08.07.2019, passed by respondent no.3/Deputy Commissioner, Excise, Meerut Region, Meerut, Consideration Fee/'*Pratiphal Shulk*' Rs. 15,51,042.50 has been imposed on the petitioner, on alleged excess loss of High Strength Malt Spirit (hereinafter referred to as the HSMS), against two transactions. That order has been confirmed in appeal, vide order dated 27.01.2021, passed by the Excise Commissioner.

3. Admittedly, the petitioner has a remedy of revision against the order dated 27.01.2021, under Section 11 of the Uttar Pradesh Excise Act, 1910 (hereinafter referred to as the Act). However, the present petition was filed directly before this Court, on the plea of lack of jurisdiction. Thus, it has been submitted, the entire quantities of HSMS subjected to Consideration Fee*/Pratiphal Shulk*' had been imported into the country from M/s William Grant & Sons Distillers Limited, Giravan Distillery, Grangestone Industrial Estate, Girvan, Scotland, United Kingdom (hereinafter referred to as William Grant). Therefore, the said goods fell outside the scope of levy of Excise duty by the State of U.P. Accordingly, the matter was entertained, and Counter Affidavit called. Pleadings are complete. The matter was thus heard. Here, it may be noted, the plea of alternative remedy has not been urged at the stage of final hearing. The State has also sought a decision on merits.

4. Learned counsel for the petitioner states, the petitioner is a duly incorporated company having its distillery at Modi Nagar, Ghaziabad. It first imported into the country, 24,400 Bulk litres of HSMS from William Grant, against Bill of Entry BE

No. 7590551 dated 10.08.2018. Those goods entered the country through a seaport, in the State of Gujarat. They were then transshipped to I.C.D., Dadri during that import. At Dadri, those goods were imported into the country and cleared for home consumption against payment of Custom Duty @ 150% of the value of goods. As per the Certificate of Analysis, Goods Note, Certificate of Origin and Age Certificate, issued by the Custom Authorities in the United Kingdom, HSMS thus imported were having alcoholic strength, 68%. Thereafter, the petitioner applied for permission to "import'/"transport' those 24,400 Bulk litres of HSMS from I.C.D., Dadri, to its distillery at Modi Nagar, Ghaziabad. That permission was granted vide order dated 21.08.2018, under the Act and Rules framed thereunder. Perusal of that order reveals, the permission was granted on Form FL-22 [under Paras 609, 615(5) & 617(3) of the Excise Manual] against payment of Import fee @ Rs. 4/- bulk litre. No amount of Excise duty was prepaid, yet the petitioner was allowed to transport the goods, against bond [under Para 610(c) of the Excise Manual]. That consignment was dispatched from the I.C.D., Dadri, in a sealed tanker bearing registration No. HR-55-AI-2419. It reached the petitioner's distillery at Modi Nagar, Ghaziabad, on 2.9.2018. At that stage, the HSMS thus imported was measured, having alcoholic strength 66.21% v/v.

5. Thus, against 24,400 Bulk litres of HSMS of strength 68% v/v dispatched, only 24,346 Bulk litres of HSMS, of strength 66.2% v/v, were received at the petitioner's distillery. Thus, against allowable transit loss of 82.96 Alcoholic litres, 474.9 Alcoholic litres were found short. Thus, 391.94 Alcoholic litres or 915.75 Bulk litres excess loss was found. Arising from the aforesaid discrepancy, demand notice dated 05.09.2018 was issued to hold the petitioner liable to pay Consideration Fee/"Pratiphal Shulk' (on excess transit loss), Rs. 10,91,879.25. The petitioner submitted its reply on 11.10.2018. It objected to the applicability of Rule 5 of Rules relating to Issue of Spirit from Distilleries Working in Private Premises or in Premises Owned by the State Government Rules (hereinafter referred to as the Distillery Rules). According to the petitioner, the said Rule would apply only in case of transportation of such goods from a distillery and not in case of goods dispatched to a distillery.

6. Similarly, in the second transaction, the petitioner sought to import 24596 Bulk litres of HSMS from William Grant. Similar procedures were followed, and similar communications were issued leading to similar result. In that case, against 24596 Bulk litres of HSMS of strength 67.6% v/v, measured by the Custom Authorities of United Kingdom, upon receipt at the petitioner's distillery, the same were found to be 24593 Bulk litres of HSMS of 66.6% strength. Against allowable transit loss 164.82 Alcoholic litres, loss suffered was found to be 248 Alcoholic litres. Thus, 164.82 Alcoholic litres or 385.10 Bulk litres excess loss was found. On 22.09.2018, a second demand notice no.484 was issued demanding Consideration Fee/excise duty/"Pratiphal Shulk' Rs.4,59,385.20. The petitioner filed its reply dated 11.10.2018, to that notice.

7. Thereafter, the date of personal hearing was fixed for 08.05.2019. On 08.07.2019, a common order was passed confirming the demand of Consideration Fee/"*Pratiphal Shulk'*, on excess transit loss at Rs.15,51,042.50, on both transactions

(described above), @ Rs. 1192.33 per Bulk litre.

8. Against that common order, the petitioner filed appeal no.57 of 2019 under Section 11(1) of the Act. It was dismissed by order dated 27.01.2021. Further, by a separate letter dated 27.01.2021, the petitioner was required to deposit the disputed demand. However, within three days therefrom, on 05.02.2021, the entire disputed demand of Consideration Fee/"Pratiphal Shulk' was recovered, much before expiry of normal period of limitation to file a revision. It may be noted, under the scheme of the Act, under Section 11, upon a revision being filed and 25% of the disputed demand being paid, the balance disputed demand would remain stayed during pendency of the revision application.

9. Learned counsel for the petitioner would submit, the State of U.P. has no legislative competence to levy Excise duty on HSMS imported from outside the country. Consequently, it also does not have any competence to impose Consideration fee/'Pratiphal Shulk', that is Excise duty, in another garb. First, reference has been made to Entry 51 read with Entry 8 of List-II of Seventh Schedule of the Constitution of India to submit, the competence of the State legislature extends to enact laws to levy excise duty on manufacture or production (inside Uttar Pradesh), of alcoholic liquor for human consumption. As to the meaning of intoxicating liquor, reference has been made to a division bench decision in **M/s Jain Distillery Private Limited Vs. State of U.P. & 5 Others, Writ Tax No. 378 of 2021**, decided on 28.9.2021.

10 . Referring to the definition clause under the Act, it has been stated, under:- Section 3(3a) of the Act, "excise duty' and "countervailing duty' have the same meaning as may be assigned to those terms under Entry 51 of List-II to the Seventh Schedule to the Constitution; Section 3(8) of the Act, the word 'spirit' means any liquor containing alcohol obtained by distillation whether denatured or not; Section 3(11) of the Act, the word '*liquor'* means all intoxicating liquor including those specified by the Act or as may be notified by the State Government; Section 3(13) of the Act, the word 'intoxicant' means a liquor or any intoxicating drug under the Act; Section 3(17) of the Act, the word *'import'* implies bringing into Uttar Pradesh (any excisable goods) otherwise across the customs frontier as defined by the Central Government; Section 3(18) of the Act, a corresponding definition of 'export' exists; Section 3(19) of the Act, the word '*transport'* means movement from one place to another within the State of Uttar Pradesh; Section 3(20) of the Act, the word *'manufacture*' includes every process whether natural or artificial, by which an intoxicant may be produced or prepared and last; under Section 3(22a) of the Act, "excisable articles' means, any alcoholic liquor for human consumption or any intoxicating drug.

11. Thus, relying on the aforesaid provisions of the Act, it has been vehemently urged, HSMS were imported by the petitioner from William Grant, across the customs frontier of the country, (as defined by the Central Government) namely, the I.C.D., Dadri. They were neither excisable goods nor they were goods produced inside the State of U.P. nor they were brought inside the State of U.P. from any other State within the country. Therefore, by very description of their arrival into the country and/or the State of

U.P., from abroad, the goods HSMS were not amenable to Excise duty under the Act. Therefore, they were not liable to suffer levy of Consideration Fee/*''Pratiphal Shulk'*, either.

12. By way of elaboration of his submissions learned counsel for the petitioner has relied on the provisions of Section 12 of the Act. While sub-Section (1) of the said provision refers to grant of permission by the State Government-for the purpose of import of excisable goods, sub-Section (2) thereof makes it plain - nothing in sub-Section (1) would apply to the goods that may be imported into the country, after suffering liability of Customs duty. HSMS having suffered Custom duty under the Indian Customs Act, 1962 (hereinafter referred to as the Customs Act), upon its import across the customs frontiers of the country i.e. at the I.C.D. Dadri, the same were not liable to suffer Excise duty or any other levy, by whatever name called, under the Act.

13. Then, reliance has also been placed on provisions of Section 28 of the Act. It is the levy provision. It levies Excise duty or a Countervailing duty on any excisable article that may be imported (into the State from any other part of the country) or exported or transported to any other part of the country, in accordance with Section 12 or 13 respectively or manufactured, cultivated, or collected under Section 17 or manufactured in any distillery established under Section 18. The fact that HSMS were transported and the fact, by some process of reasoning they may be described as an excisable article, would not invite levy of Excise duty and/or Consideration fee/'Pratiphal Shulk' on that transportation. That is the clear effect of the first proviso to Section 28(1) read with Section 12(2) of the Act. It would injunct the levy of Excise duty on HSMS, since those goods had been imported into the country, upon sufferance of import duty under the Customs Act.

14. Learned counsel for the petitioner would rely on the principle - import of HSMS into the country was not complete till the goods HSMS reached the I.C.D., Dadri. Only after the goods reached the petitioner's distillery, the import of HSMS (into the country), was complete. Therefore, by virtue of Section 12(2) read with proviso (I) to Section 28(1) of the Act, no Excise duty or Consideration Fee/"Pratiphal Shulk' could be imposed on any quantity of HSMS lost in the course of import of those goods into the country. Reliance has been placed on **Garden Silk Mills Ltd. & Anr. Vs Union of India & Ors., (1999) 8 SCC 744; Kiran Spinning Mills vs Collector of Customs, (2000) 10 SCC 228 and Indian Tourist Development Corporation Limited Through Hotel Ashoka vs. Assistant Commercial Tax & Anr. (2012) 3 SCC 204**. In that context, reliance has also been placed on Circular No.50 of 2020 dated 05.11.2020 issued by the Government of India, declaring I.C.Ds. to be "self-contained Customs station".

15. Second, in the alternative, it has been submitted, in any case, the levy of Consideration Fee/'Pratiphal Shulk' may arise under the Act only in the event of transportation loss suffered during, and upon it exceeding, permissible limits, only when that excisable article may be in transit from a distillery. Assuming, HSMS were excisable goods, the excess loss was suffered while those goods were in transit from the ICD, Dadri to the petitioner's distillery. That transaction would fall

outside the levy provision even if that provision were to apply. Here, referring to paragraph No. 612 read with paragraph Nos. 613 and 814 of the U.P. Excise Manual (under Chapter-VIII), it has been submitted, those provisions apply only to dispatches made by and from the distillery and not - to the distillery. In that regard, reliance has been placed on **Mohan Meakin Breweries Ltd. Vs Excise & Taxation Commr., Chandigarh & Ors., (1976) 3 SCC 421.**

16. Last, still in the alternative, in any case, conceptually and as also according to the statutory scheme itself, Consideration Fee/'Pratiphal Shulk' may be levied under the Act, only by the State of export. In case of inter-State trade within the country, such levy may arise in the consignor State, upon receipt of intimation of excess loss, sent by the consignee State. In the instant case, undisputedly, the goods had been dispatched from Scotland in United Kingdom. Therefore, theoretically, and in view of the earlier submissions advanced, the levy could not arise at the instance of or by the State of import namely the State of Uttar Pradesh. Reliance has been placed on **Mohan Meakin Breweries Ltd. (supra) and State of U.P. & Ors Vs. Modi Distillery & Ors., (1995) 5 SCC 753**.

17. Countering the submissions advanced by learned counsel for the petitioner, learned Additional Advocate General would submit, there are no pleadings made in the writ petition and no grounds have been raised to assail the legislative competence of the State of U.P. to enact any law to subject loss of imported HSMS- to Consideration Fee/''*Pratiphal Shulk*' . Reference has been made to the pleadings and grounds raised in the writ petition.

18. Then, it has been further submitted, such a ground was not raised by the petitioner in its reply dated 11.10.2018 furnished to the show cause notice dated 05.9.2018. On the contrary, the petitioner applied for issuance of permission to import quantities of HSMS. The petitioner paid the import fee, chargeable thereon. The only plea raised at the stage of reply to the show-cause notice and even in the present writ petition is - Chapter VIII of the Rules (framed under the Act) does not apply to import of excisable goods into State of U.P. and that those Rules apply only to export from inside the State of U.P., to another State.

19. Without prejudice to the above objection - of absence of plea, it has been submitted, Section 12(2) of the Act read with Section 3(17) of the Act do not create a bar against levy of Excise duty on transit loss or Consideration Fee/''*Pratiphal Shulk*' on excess transit loss, because the actual dispatch of the goods may have been made from the ICD Dadri. Referring to **Indian Oil Corporation Limited Vs. State of U.P. & Ors., 2018 (6) ADJ 706,** it has been submitted, regulatory provisions cannot be cited to define the custom frontiers under the Act. Merely because Section 60 of the Customs Act permits clearance of goods from a Customs warehouse, it cannot be said - upon clearance/dispatch of goods from such warehouse, the goods first crossed the custom frontier of the country. Those are only facilitative provisions for the benefit of the importer or owner of the goods. The Inland Container Depots (I.C.Ds.) are creatures of statute. They are not determinative of occurrence of the taxable event under the Act.

20. In the present case, undisputedly, the goods landed in the country through the

seaport at Gujarat. Therefore, the entry of HSMS, across the customs frontier was complete at that point of time. Their storage at I.C.D. Dadri was only a facilitation arrangement to ensure further compliances of the provisions of the Customs Act. It was not determinative of the physical crossing of the goods across the customs frontier of the country.

21. Then, reference has been made to the permission to transport, obtained by the petitioner on Form FL-22, issued under paragraph Nos. 609, 615(5) and 617(3) of the U.P. Excise Manual. It was thus submitted, the petitioner twice obtained permissions under the Act, to transport 24,400 Bulk litres and 24596 Bulk litres, HSMS, against payment of import fee @ Rs. 4 per Bulk litre. That permission was sought and was granted on the own application made by the petitioner, under the Act. Thus, the petitioner was permitted to transport desired quantities of HSMS, from ICD Dadri to its distillery at Modi Nagar Ghaziabad. No amount of Excise duty was pre-paid, at that stage as the consignments were transported under respective bonds issued by the petitioner.

22. Further, relying on the application dated 02.8.2018 made by the petitioner with respect to the first transaction, and the other application dated 31.8.2018, made by the petitioner with respect to the second transaction (Annexure SCA-1 and SCA-2), it has been submitted, the petitioner had itself sought permission to transport the (imported) High Strength Malt Spirits, from Dadri to Modi Nagar via Ghaziabad. That permission was granted subject to the conditions specified in the communication dated 20.8.2020 (Annexure CA-1 to the counter affidavit).

23. Referring to the transaction thus conducted, it has been strenuously urged, the concept of crossing the custom frontier [contemplated under Section 3(17) of the Act] is wholly inapplicable to the goods that were dispatched from Dadri in Gautam Budh Nagar to Modi Nagar in Ghaziabad. Though that transportation began at I.C.D. Dadri, it cannot be said, the goods crossed the custom frontiers of the country, at Dadri. In fact, the goods were transported from one place to another, both inside the State of U.P.

24. Coming to the levy provisions, it has been submitted, similarly under Section 28 of the Act, the exclusion provided under the first proviso to sub-Section (1) would remain inapplicable to the facts of the present case, for the reasons noted above.

25. Then, it has been submitted, undisputedly the strength of the HSMS imported against the two transactions was 68% and 67.6%, London Proof. At that strength, per se, that liquor (as a category) was fit for human consumption. Its dilution for the purpose of making it marketable in the domestic tariff area, amounted to 'manufacture' as defined under Section 3(20) of the Act. It made those manufactured goods liable to suffer Excise duty under the Act. Yet, it would not render the imported article HSMS unfit for human consumption. It did not make them fall outside the legislative competence of the State of U.P., to impose Excise duty under the Act.

26. In such circumstances, it must be presumed, the goods that were dispatched against the two disputed transactions from I.C.D. Dadri were of requisite strength i.e., 68% & 67.6% v/v, measuring 24,440 & 24,596 Bulk litres, respectively. However,

upon the same being tested for strength, upon their arrival at Modi Nagar, they were found to be of strength 67% and 66.21% v/v. It represented excessive loss, beyond the permissible limit i.e. 0.5%. It also represented excess loss of quantity 1300.85 Bulk litres. It is for that purpose that the Rule provides for realisation of Consideration Fee/*"Pratiphal Shulk',* to ensure, no quantity of excisable goods is dealt with except in compliance with the regulatory law enacted by the State. Relying on the amended law providing for permissible loss @ of 0.5%, as approved by the Supreme Court in **State of U.P. and Others Vs. Delhi Cloth Mills and another, (1991) 1 SCC 454,** it has been urged that the demand of Consideration Fee/"*Pratiphal Shulk*', is wholly in accordance with law.

27. The decision of the Supreme Court in **State of U.P. & Ors. Vs. Modi Distilleries & Ors. (supra)** is stated to be distinguishable. In that, the High Court quashed the orders demanding Excise duty. The Supreme Court categorised the cases into four types. Group-A cases involved demand of Excise duty on wastage of Indian Made Foreign Liquor (IMFL) exported outside the State of U.P. Group-B cases involved demand of Excise duty on wastage during transportation (in containers) - of High Strength Spirit of strength 80-85%, from distilleries to warehouse. Group-C cases involved demand of Excise duty on obscuration. The last category - Group-D cases involved Excise duty levied on pipeline wastage. In the submission of the learned Additional Advocate General, the present case falls in neither of the categories A, B, C or D, dealt with by the Supreme Court. Looking at the strength of HSMS, at below 68%, it was an alcohol fit for human consumption. Therefore, it cannot be equated with a commodity that was only a raw material to produce alcoholic liquor fit for human consumption. For that reason, the ratio in the case of **State of U.P. Vs. Modi Distillery (supra),** would not apply to the present case.

28. In the present case, since the goods in question were being transported within the State, the concept of levy of Consideration Fee/"*Pratiphal Shulk'* on excess loss suffered during export to another State, also would not apply. Here, the transaction was covered as loss was suffered, during transportation within the State. It would be a transaction covered under Section 28(1)(c) of the Act, read with Section 3(19) of the Act.

29. In the rejoinder arguments, Shri Bose, has referred to pleadings made in the Supplementary Rejoinder Affidavit and the Rejoinder Affidavit to submit - the plea of lack of legislative competence was raised. In any case, it has been submitted, that plea is purely legal. It arises on the undisputed facts of the case. Therefore, the same may not be barred from being raised. As to the submission based on definition of a custom frontier, strong objection has been raised. Though 'custom frontier' has not been defined under the Act, yet the same has been defined under Section 2(4) of the IGST Act. It means limits of the custom area as defined under Section 52 of the Customs Act. Then, the phrase 'crossing the custom frontier of India' has been defined under Section 2(a)(b) of the CST Act. It means crossing the limits of the area of a customs station within which imported goods or exported goods are ordinarily kept, before clearance by a custom authority. In turn, 'customs area' has been defined under Section 2(11) of the Customs Act. It reads:

"2(11). "customs area' means the area of a customs station [or a warehouse] and includes any area in which imported goods or export goods are ordinarily kept before clearance by customs authorities."

30. Heard learned counsel for the parties (over a long period of time, interspersed with adjournments). In face of the first issue raised being purely legal, and in absence of any dispute as to fact, the objection raised by the State - to availability of pleadings (in the writ petition) - to support the first ground of challenge raised, is not accepted. To deal with the first submission advanced by learned counsel for the petitioner, it is relevant to take note of certain provisions of the Act, namely, sub-Sections (3-a), (11), (13), (17), (19), (20) and (22-a) of Section 3 of the Act may be seen. They read as below:

*"**3. Interpretation.**- In this Act, unless there is something repugnant in this subject or context:*

(3a) "Excise Duty" and "countervailing duty" means any Excise Duty or countervailing duty, as the case may be, as is mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution;

(11) "liquor" means intoxicating liquor and includes spirits of wine, spirit, wine, tari, pachwai, beer and all liquid consisting of or containing alcohol, also any substance which the State Government may by notification declare to be liquor for the purposes of the Act.

(13) "intoxicant" means any liquor or intoxicating drug as defined by this Act;

(17) "import" (except in the phrase "import to India") means to bring into Uttar Pradesh otherwise than across a customs frontier as defined by the Central Government;

(19) "Transport" means to move from one place to another within Uttar Pradesh;

(20)"Manufacture" includes every process weather natural or artificial, by which any intoxicant is produced or prepared, and also re distillation and every process for the rectification, flavouring, blending or colouring of liquor;

(22-a) "excisable article" means-

(a) any alcoholic liquor for human consumption; or

(b) any intoxicating drug;"

31. Then, Section 12 of the Act reads as below:

*"**12. Import of intoxicants. -** (1) No intoxicant shall be imported unless-*

(a) the State Government has given permission, either general or special, for its imports;

(b) such conditions (if any) as the State Government may impose have been satisfied; and

(c) the duty (if any) imposed under Section 28 has been paid or a bond has been executed for the payment thereof.

(2) Sub-section (1) shall not apply to any article which has been

imported into India and was liable on such importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1878.

(3) Clauses (a) and (b) of sub-section (1) shall not apply to liquor manufactured in India and declared under Section 4 to be foreign liquor."

32. The levy provision - Section 28 of the Act reads as below:

"28. Duty on excisable articles. *- (1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed, either generally or for any specified local area, on any excisable article-*

(a) imported in accordance with the provisions of Section 12 (1); or

(b) exported in accordance with the provisions of Section 13; or

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted under Section 17; or

(e) manufactured in any distillery established, or any distillery or brewery licensed, under Section 18 :

Provided as follows-

(i) duty shall not be so imposed on any article which has been imported into [***]India and was liable on such importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1887;

(ii) [* *].*

Explanation. - (1) Duty may be imposed under this section at different rates according to the places to which any excisable article is to be removed for consumption, or according to the varying strength and quality of such article.

[(2) The State Government shall, in imposing an Excise duty or a countervailing duty as aforesaid and in fixing its rate, be guided by the directive principles specified in Article 47 of the Constitution of India.

(3) Such duty shall not exceed the maximum as provided hereinafter:"

33. Read in the backdrop of Entry 51 of List II of the 7th Schedule to the Constitution of India, together with the definition clause of 'Excise duty' and 'import' [Section 3 (3-a) and 3(17) of the Act] together with Section 28 of the Act, it is plain - the State of U.P., could not and it did not levy Excise duty on any Excisable article imported across the customs frontier of the country, after payment of Customs duty etc. However, that embargo in law, operates against levy of Excise duty (under the Act) on an imported article, cleared or made available, as such, for home consumption. It would not extend or apply to any "excisable article' manufactured from that imported and Customs duty paid, article.

34. Here, as a fact, the impost of Consideration fee/'Pratiphal Shulk' is not on the quantities of HSMS received by the petitioner, at its distillery. Rather, that impost has arisen on the excess and therefore, unaccounted loss of HSMS, while that imported article was transported

inside the State of Uttar Pradesh. The text of the show-cause-notices dated 22.09.2018 and 26.09.2018 (Annexure No. 7 to the writ petition), clearly refers to the facts - against two transactions of 24,400 and 24,596 Bulk litres of Malt Spirit of strength 68% and 67.6% v/v, imported from William Grant, as cleared by the Customs authorities, 24346 and 24593 Bulk litres, were received at the petitioner's distillery, bearing strength 66.2% and 66.6% v/v, respectively.

35. Accordingly, it was assumed, at that stage, the balance quantity of that commodity had been lost during transportation (against the two transactions). That loss was more than the loss allowable @ 0.5%. Accordingly, the revenue loss was estimated at Rs. 10,91,879.5 and Rs. 4,59,385/- respectively. It appears to have been demanded and recovered against the bond executed by the petitioner, as Consideration fee/'*Pratiphal Shulk*'.

36. Therefore, the contention of learned counsel for the petitioner-ICD Dadri, Gautam Buddh Nagar was the custom frontier of the country - for the purpose of import of goods, is not central or relevant to the core issue involved in the dispute. Whether the goods HSMS are treated to have been imported into the country at the seaport at Gujarat or at land port-ICD Dadri, Gautam Buddh Nagar (inside the State of U.P.), would make no difference to the determination of that issue. It would have been relevant if the impost under challenge had been of Excise duty on clearance/receipt of HSMS, in that form and condition. Here, it may be noted, undisputedly, the petitioner manufactures foreign liquor from HSMS at its distillery at Modi Nagar, Ghaziabad, by making adequate dilutions to HSMS under a pre-defined process; it thus obtains foreign liquor of strength 42.8% v/v; bottles the same and clears those excisable goods against payment of Excise duty, inside the State of U.P. Therefore, it is not the case of the petitioner that foreign liquor manufactured from HSMS was not dutiable under the Act. In fact, its case is otherwise.

37. In view of the above, the frontal aspect of the first submission advanced by learned counsel for the petitioner, is found to be misconceived. In absence of any impost of Excise duty under the Act, on HSMS, that aspect of the submission advanced, is academic. Strictly, it does not arise in the facts of the present case. However, it's other aspect may be examined a little later.

38. Also, in view of the discussion made above, the ratio arising from **Golden Silk Mills Ltd (supra); Kiran Spinning Mills (supra); Indian Tourist Development Corporation Ltd. (supra),** does not conflict with the impost of Consideration Fee/'Pratiphal Shulk'.

39. Insofar as the second submission is concerned, it must be examined -whether it was permissible for the State revenue authorities to impose Consideration fee/'Pratiphal Shulk', against alleged loss of revenue on foreign liquor, springing from excess loss of the commodity HSMS, during its transportation from a bonded warehouse at I.C.D. Dadri, Gautam Budh Nagar, to the petitioner's distillery at Modi Nagar.

40. Before making any further discussion on that count, again, it may be relevant to take note of certain provisions of the law. The statutory requirement to obtain Pass, to amongst others, import

and/or transport intoxicants within the State of U.P., is contained in Section 15 & 16 of the Act. The rule making power under the Act is contained in Section 40. Relevant to the present discussion, Sections 15, 16 & 40(1), (2) and (2-d) read as below:

15. Passes necessary for import, export and transport. *- No Intoxicant exceeding such quantity as the Government may prescribe by notification, either generally for the whole of Uttar Pradesh or for any local area comprised therein, shall be imported, exported or transported except under the provisions of the next following section:*

Provided that, in the case of duty-paid foreign liquor other than denatured spirit such passes shall be dispensed with unless the [State Government] shall by notification otherwise direct to any local area :

Provided also, unless the State Government shall otherwise direct, that no pass shall be required for the transport of any [intoxicant] exported under a pass issued by an officer duly authorised in this behalf from any place beyond the limits of [Uttar Pradesh] to any other place beyond the said limits.

16. Grant of passes for import, exports and transport*. - Passes for the import, export or transport of intoxicants may be granted by the Collector.*

Such passes may be either general for the definite periods and kinds of [intoxicants] or special for specified occasions and particular consignments only."

"40. Power of State Government to make rules. *- (1) The [State may make rules for the purpose of Government] carrying out the provisions of this Act or other law for the time being in force relating to excise revenue :*

...

(2) In particular and without prejudice to the generality of the foregoing provision, the State Government may make rules-

...

(d) regulating the import, export, transport or possession of any [intoxicant]"

(emphasis supplied)

41. Under the Act, numerous Rules have been framed from time to time. Apparently, for the sake of convenience and ready reference, they have been compiled in a compendium, popularly known as the U.P. Excise Manual (hereinafter referred to as the 'Excise Manual'). That compendium has been arranged in Chapters, broken into Sections, further structured into Parts, with various individual Rule numbers mentioned as paragraphs of that compendium, numbered consecutively, in a single series. Paragraph no. 12 of the Excise Manual reads as below:

"12. Foreign liquor. *- Foreign Liquor means-*

(1) beer and spirit, wines and liquors, which have been imported into India and are intended for human consumption and were liable, on such importation, to duty under the Indian Tariff

Act, 1894 (read with the Indian Tariff Act, 1934), or the Sea Customs Act, 1878;

(2) spirit made in India and sophisticated or coloured so as to resemble in flavour or colour, liquor imported into India;

(3) beer brewed in India;

(4) wines and liquors made in India, and

(5) all rectified, perfumed, medicated and denatured spirits, wherever made."

(emphasis supplied)

42. Thus, the fine distinction that may otherwise exist between foreign liquor imported into India and similar beverages manufactured inside the country, has been blurred. While liquors manufactured outside the country are first included in the term foreign liquor, as described under sub-paragraph 1 of paragraph 12 of the Manual, similar liquors distilled or manufactured inside the country are included within the meaning of that term - under Sub-paragraphs 2, 3 and 4 of paragraph 12 of the Excise Manual.

43. Then, under Paragraph 37 of the Excise Manual, amongst others, it has been provided as below:

*"**37.** The following duties are imposed in Uttar Pradesh :*

(1) On Indian-made foreign liquor imported or manufactured in, and issued from distilleries, a fixed still-head duty calculated on either the gallonage in terms of London Proof or per gallon at fixed strength."

44. Again, Paragraph 41 of the Excise Manual provides for forms of wholesale vends. Amongst others, with respect to foreign liquor, it has been provided as below:

*"**41. Forms of wholesale vend.** - The following forms of vend by wholesale are- permitted within Uttar Pradesh :*

...

(2) Foreign liquor - Licence for wholesale vend may be issued by the Collector with the previous sanction of the Excise Commissioner to distillers, brewers, importers, exporters, vendors, and (in certain cases) to auctioneers."

45. Coming to the specific provision under the Excise Manual, contained in Chapter VIII, it provides for a set of Rules relating to foreign liquor. Section XXXVIII thereof refers to import, export, and transport of foreign liquor other than denatured spirit. Paragraph Nos. 605, 606 contained therein, read as below:

*"**605.** Foreign liquor is defined in paragraph 12 of Chapter I and is classified in paragraph 7 of the same Chapter.*

***606. Quantitative limits of import etc.** - (1) No quantitative limit is prescribed for the export, transport or possession of foreign liquor (other than denatured spirit) obtained from overseas.*

Note. - No duty-paid foreign liquor imported from foreign countries (other than denatured spirit) exceeding 6

quart bottles shall be imported in Uttar Pradesh in the local areas mentioned in the following Schedule except under a pass issued in accordance with paragraphs 609 to 610 infra.

SCHEDULE

(1) All Municipal areas, (2) all town areas, (3) all cantonment areas, (4) all notified areas, and (5) all railway stations.

(2) A bona fide traveller coming into Uttar Pradesh may import for his own personal use, Indian-made foreign liquor not exceeding two quart bottles in all. Indian-made foreign liquor may be imported in larger quantities only in accordance with the rules hereinafter following. There is no quantitative limit for transport of Indian-made foreign liquor.

(3) No denatured spirit in excess of limit of retail sale shall be imported, exported or transported except under a pass as provided for in Sections 15 and 16 of the Act.

46. Part (A-1) of Chapter VIII, Section XXXVIII of the Excise Manual pertains to Import of IMFL. It contains Rules pertaining to import of IMFL into the State of U.P., from any other State in the country. Paragraph Nos. 608, 609, 610 and 613 of the Manual read as below:

608. Methods of import. *- Indian-made foreign liquor may be imported either-*

(1) in bond for payment of duty in Uttar Pradesh;

(2) on repayment of duty in Uttar Pradesh; or

(3) on repayment of duty in the State or Union Territory of export, at the rates leviable in Uttar Pradesh to be subsequently transferred to this State by book transfer;

(4) free duty or a reduced rate of duty under the conditions laid down in the rules hereinafter following.

(1) Import in Bond

609. Conditions to be fulfilled by importer. *- Any person holding a licence for the vend of foreign liquor and also regimental units in Uttar Pradesh may import Indian-made foreign liquor from a distillery, brewery, bonded warehouses or bonded laboratory in another State or Union Territory under a bond for payment of the duty imposed under Section 28 of the United Provinces Excise Act, 1910 (Act IV of 1910) after he or his agent has-*

(a) obtained a permit from the Collector of the district of import in prescribed Form (F.L. 27);

(b) executed a bond (which may be either general or special) in favour of the Collector of the district of import for payment of the duty leviable on the liquor to be imported;

(c) obey all the rules in force in the district, State or Union Territory from which the exp ort is to be made.

610. Permit for import. *- (a) The importer shall present an application to the Collector of the district of import*

specifying-(1) the quantity and description of the Indian-made foreign liquor to be imported, (2) the name of the distillery, brewery, bonded warehouse or bonded laboratory from which the liquor is to be imported, (3) the quantity of liquor to be imported in terms of L.P. and the amount of duty leviable thereon in this State, and (4) the name of the bonded warehouse to which the liquor is to be consigned.

(b) The licensed retail vendor shall also deposit in the treasury a fee at the rate of rupees five per quart bottle on spirits, cordials and wines and sixty paise per quart bottle or beer, stout and other fermented liquors, in advance and shall attach the treasury challan with his application presented to the Collector of the district of import. The Collector shall issue a permit as laid down in sub-rule (d) only when the treasury challan evidencing payment of the fee is produced.

(c) The importer shall also execute (unless a general bond previously executed by him still in force) either a general or a special bond in the prescribed form in favour of the Collector of the district of import for the payment of duty leviable under Section 28 on the actual import and on the excess loss in transit according to the rule in force in the exporting State or Union Territory.

(d) The Collector shall, unless there is any reason to the contrary, prepare a permit in triplicate in Form F.L. 22 sanctioning the import under bond. The permit shall contain all the particulars specified in sub-clause (a) and shall clearly specify that a bond for payment of duty has been executed in the district of import. One copy of the permit shall be made over to the importer, the second copy shall be forwarded to the Chief Revenue Authority of the district of export and the third shall be retained by the Collector for record and verification of the consignment on arrival. The permit shall remain in force up to the date specified therein.

...

***613. Pass to be verified by Assistant Excise Commissioner**. - (1) As soon as may be after such arrival the officer in-charge of the bonded warehouse shall certify on the importer's copy of the pass full details regarding the liquor received in such form as may be prescribed in the pass or required by the authorities of the district or place of export and shall return it to the officer who granted it after verification by the Assistant Excise Commissioner.*

(2) Within fifteen days of the date of receipt of the warehouse the importer shall clear the whole consignment on payment of duty in the treasury of the district of import. If he fails to do so, the Collector may charge storage fees at such rates as he thinks fit for the period it remains in the warehouse in excess of 15 days. The Collector may dispose it of as he thinks proper, at the risk of the importer, if it is not cleared within three months from the date of receipt.

(3) The importer shall also be liable to pay duty on excess transit wastages according to the rules in force in the State or Union Territory of export.

Note. - Clause (2) of this rule does not apply to cases where spirit has been imported by distillers and stored in the distillery building."

(emphasis supplied)

47. It may be noted, under Part (A-II) of Chapter VIII, Section XXXVIII of the Excise Manual, other Rules exist to regulate the Import of Overseas Foreign Liquor in Scheduled Areas in U.P. Since, in the present case, the permit was not sought (by the petitioner), under that provision and no action has been taken thereunder, no further reference is required to be made to that set of Rules. However, as noted above, as a commodity IMFL is also included in 'Foreign Liquor', under Paragraph 12 of the Excise Manual. Therefore, there is no inherent or patent lack or error, of jurisdiction or authority involved, in the facts of this case.

48. Again, as a fact, the petitioner made applications under Part (A-1) of Chapter VIII, Section XXXVIII of the Manual, to cover the proposed transaction - to transport HSMS from the bonded warehouse at I.C.D. Dadri, in Gautam Budh Nagar to Modi Nagar in Ghaziabad. It described the transaction as one of import (into the State of U.P.), of HSMS. As to the nature of the commodity, there can be no dispute, HSMS at 68% and 67.6% strength v/v did not render itself alcoholic liquor unfit for human consumption. At present, that principle or test maybe available, only with respect to alcoholic liquors of much higher strength i.e., above 80-85%. This observation is being recorded, on the strength of the undisputed individual facts of this case, seen in the light of the decision of the Supreme Court in **State of U.P. & Ors. Vs. Modi Distilleries & Ors. (supra)**, wherein while dealing with Group-B cases (involving cases of high strength malt spirit of 80-85% strength), it was observed as below:-

"10. What the State seeks to levy excise duty upon in the Group "B' cases is the wastage of liquor after distillation, but before dilution; and, in the Group "D' cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption."

(emphasis supplied)

49. Second, even otherwise, it would be one thing to say - HSMS, if it had been cleared inside the State of U.P. for consumption in that form itself, would not have attracted levy of Excise duty under the Act (by virtue of its import from outside the country), and it would be completely another thing to say - that commodity would therefore fall outside the regulatory provisions of the Act.

50. The applicable provisions - Section 15 and 16 of the Act have been quoted in paragraph 40 above. Clearly, those provisions are regulatory laws and not levy provisions. Therefore, under the Scheme of the Act, intoxicant, or liquor (as defined under Section 3 and 11 of the Act) including HSMS, stood covered under the regulatory provisions under the Act. Thus, amongst others, by virtue of Section 15 of the Act, HSMS could not be imported or transported within the State of Uttar Pradesh, except in accordance with the provisions of Section 16 of the Act. That provision of the Act mandatorily prescribes issuance of Pass, amongst others, for import and/or transportation of intoxicant including liquors, inside the State of U.P.

51. Section 12(2) of the Act only excludes the applicability of Section 12(1) of the Act, to intoxicants imported in India against Customs duty payment under Central enactments. Plainly, it has no application to Section 15 & 16 of the Act. There is no similar exclusion clause under those regulatory law provisions. Upon a co-joint reading of Sections 12, 15 and 16 of the Act, though no prior permission (under section 12) may be required under the Act to import into India, HSMS, yet a Pass (under section 16) was mandatory to be obtained, to transport the HSMS from I.C.D. Dadri, in Gautam Budh Nagar to the petitioner's distillery at Modi Nagar, in Ghaziabad.

52. Therefore, at the superficial level, a piquant situation arises. Though, the regulatory law obligated the petitioner to transport the goods from Gautam Budh Nagar, Ghaziabad against valid Permit/Pass issued under the Act, it may have remained true that the nature of transaction was one of import of goods from outside the country, pursuant whereto the goods reached the I.C.D., Dadri at Gautam Budh Nagar, in the State of U.P. Hence, they were not liable to suffer Excise duty under the Act by virtue of specific exemption created under Proviso (i) to Section 28(1) of the Act.

53. However, that does not offer any legal mystery or difficulty as to operation and/or order of primacy of enacted laws, noticed above. In this situation, two mutually independent consequences arose, under two different laws, neither in conflict with the other. Each law was enacted by the competent legislature for its own independent and (mutually) exclusive purpose. The Customs Act sought to levy Customs duty on the import of HSMS while the Act, amongst others, sought to regulate transportation of the commodity/article thus cleared for home consumption (under the Customs Act), inside the State of U.P. Therefore, there is no conflict between the two laws.

54. For the imposition of tax or Customs duty liability, on imported HSMS, it must be accepted and recognised, the goods were imported across the customs frontiers of the country at I.C.D. Dadri, in Gautam Budh Nagar. Therefore, no amount of Excise duty may have been imposed under the Act, on those goods till they remained HSMS. Yet, by way of a regulatory measure, the State legislature could bind the importer/petitioner to account for the entire quantity of HSMS thus imported, to ensure it was used wholly to manufacture excisable articles inside the State of Uttar Pradesh. Consequently, to enforce that regulatory measure, it could impose fee on excessive loss of that imported commodity, during its transportation inside the State of Uttar Pradesh i.e., upon their clearance from the bonded warehouse at Dadri to its distillery at Modi Nagar, Ghaziabad.

55. Merely because no Excise duty could be levied under the Act on HSMS, there is no reason to accept - those goods imported into the country would be exempt from operation of the regulatory law, inside the State of Uttar Pradesh though similar goods originating in any part of the country, would be subject to such regulatory law when imported into the State of Uttar Pradesh.

56. In **State of Jharkhand and Others Vs. Ajanta Bottlers and Blenders Pvt. Ltd, (2019) 7 SCC 545**, an issue arose as to the validity of a regulatory import fee,

imposed under State Excise laws. Finding that applicable law to be regulatory, the Supreme Court reversed the decision of the High Court, and held as under:

14. Indeed, if the State legislation was to provide for levy on the imported rectified spirit per se the same would be without jurisdiction, as consistently held, including by the Constitution Bench in Deccan Sugar & Abkari Co. Ltd. v. Commr. of Excise [Deccan Sugar & Abkari Co. Ltd. v. Commr. of Excise, (2004) 1 SCC 243] , para 2 of this decision, which reads thus: (SCC p. 244)

"2. It is settled by the decision of this Court in Synthetics and Chemicals Ltd. v. State of U.P. [Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. v. State of U.P. [Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] has been followed in State of U.P. v. Modi Distillery [State of U.P. v. Modi Distillery, (1995) 5 SCC 753] where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd. [Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] came to the conclusion that this cannot be done."

15. The next question is whether the levy is in the nature of tax or excise duty. If it is a case of excise duty on potable liquor produced by use of imported rectified spirit, the State has jurisdiction to legislate in respect of duty on the production or manufacture of such goods produced or manufactured within the State. In the present case, we find merits in the submissions of the appellant State that the impost is neither in the nature of a tax nor excise duty but it is towards the charges by whatever name, for regulating the production of potable liquor to preserve public health and morality including for parting with its rights or privileges regarding manufacture, supply or sale of potable liquor or intoxicating liquor and to regulate the use of imported rectified spirit for production and sale of potable liquor. In such a case, the State need bear no quid pro quo to the services rendered to the licensee for production of foreign liquor (IMFL).

16. The fact that the manufacturer-respondent has already obtained requisite licences for import of rectified spirit and production of foreign liquor (IMFL) on payment of fixed rates does not mean that the State has surrendered all facets of its rights in respect of every form of activity in relation to potable liquor -- its manufacture, storage, export, import, sale and possession. The amended provision is an enabling provision authorising the State to levy charges or impost for ceding its one or more of the activity in respect of foreign liquor (IMFL) produced by use of imported rectified spirit. Such impost can be in addition to the general power of the State to issue licence on payment of fees for production and sale of potable liquor. As observed in Har Shankar [Har Shankar v. Excise & Taxation Commr., (1975) 1 SCC 737] , in para 56, the State need bear no quid pro quo to the services rendered to the licensees of producer of foreign liquor.

17. The respondent respondent, however, placed heavy reliance on the decision in State of U.P. v. Vam Organic

Chemicals Ltd. [State of U.P. v. Vam Organic Chemicals Ltd., (2004) 1 SCC 225] , to contend that the State is obliged to justify the impost based on quid pro quo. We are afraid, this decision is of no avail to the respondent. In that case, the Court was dealing with challenge to Rule 3(a) therein on the ground that the State Legislature did not have legislative competence to legislate on "denatured spirit" which is unfit for human consumption. In that context, this Court relied on the decision in Synthetics and Chemicals Ltd. v. State of U.P. [Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] and answered the issue. If the case under consideration was to be regarding legislation on imported rectified spirit as such, this decision would have come handy. However, having opined that the purport of the impugned Rule 106(Tha), is to permit impost on the final processed product being foreign liquor "IMFL", before bottling as fit for human consumption, the State has jurisdiction to legislate on that subject and need bear no quid pro quo to the services rendered to the licensee of manufacturer of foreign liquor (IMFL).

(emphasis supplied)

57. A clear distinction exists, in interpretation of provisions of substantive levy of tax or duty and provisions for levy of fee under a regulatory law. That may be recognised and maintained. The two cannot be equated as may result in the regulatory law being rendered toothless or as may allow it to be circumvented by devices that may not have been contemplated by the legislature.

58. The provisions of Sections 15 and 16 of the Act read with Paragraph Nos. 605 to 613 of the Excise Manual are part of the regulatory laws. The clear intent of those provisions is to ensure, no quantity of foreign liquor, suffers excessive loss, amongst others during its transportation inside the State of Uttar Pradesh, as may result in a corresponding revenue loss. It is clearly a provision in the interest of revenue to prevent unscrupulous importers from drawing excessive profits at the cost of corresponding undue loss of revenue to the State-by arranging the import/export/transport transaction/s in a manner whereby excessive quantities of foreign liquor may be claimed lost, though the same may have been unscrupulously removed during their transportation, to obtain liquor, either of same strength or lesser strength. In the present case, as recorded in the show cause notices, the goods HSMS were lost both in quantity and strength.

59. Undisputedly, under Section 3 of the Act, where the context otherwise requires, the statutory definition of any word or phrase, may be departed. There is no exception to doubt the same. In **Dhandhania Kedia & Co. Vs CIT AIR 1959 SC 219**, a three-Judge bench of the Supreme Court had the occasion to consider if the statutory definition given to the phrase "previous year" incorporated under section 2(11) of the Indian Finance Act, 1950, being period of twelve months ending last day of March next, preceding the year for which assessment was to be made, would apply to words "six previous years' used in Section 6 of that Act for the purpose of computation of accumulated profits of a company preceding the date of its liquidation. That dispute arose, since, to the erstwhile State of Udaipur, the Income Tax Act first came in force on 01.04.1950 whereas the disputed dividend Rs. 26000/- first arose upon liquidation of the company

in question, on 22.04.1950. Negating the submission based on the statutory definition of "previous year', the Supreme Court found, that meaning to be plainly repugnant to the definition of "dividend' in Section 2 (6A)(c) of that Act.

60. In view of the discussion made above, the words "import', "importer' and "imported' used in Paragraphs 608, 609, 610, 613 etc. of the Excise Manual must be read in their complete/wider/natural sense - to include within their sweep, a transaction of transportation (inside the State of Uttar Pradesh) of goods imported into India. That context (of regulatory law), requires, a departure to be made from the narrower statutory meaning of the word "import', as contained in Section 3(17) of the Act. In other words, to preserve the efficacy of the regulatory law, it must be given - the word "import' used in the regulatory provisions of the Act and the Excise Manual must be given a wider more generic meaning than the narrower meaning given under Section 3(17) of the Act. That interpretation is permissible and necessary to be adopted by virtue of the opening words of Section 3 of the act namely, "In this Act, unless there is something repugnant in the subject or context". Therefore, Consideration fee/"Pratiphal Shulk' may be levied on excess loss of HSMS, whether imported from outside the country or procured from another State of India. Therefore, the injunction sought against that levy, by looking at the provision of law providing for levy of Consideration fee/"Pratiphal Shulk' on excess loss of HSMS when transported within the State, from a distillery inside the State of Uttar Pradesh, is misconceived and inapplicable.

61. Again, as a fact, reference may be made to the application made by the petitioner for grant of Form FL-22. Copies of letters dated 02.08.2018 and 31.08.2018 issued by the petitioner to import 24,400 Bulk litres of HSMS and 24,346 Bulk litres of HSMS respectively, have been annexed as Annexure no.1 & 1A to the Supplementary Counter Affidavit, filed by the State. For ready reference, contents of letter dated 02.08.2018 are quoted hereinbelow:

"Ref. CE/AL/

02/08/18

To,
The Excise Commissioner,
UP Excise
ALLAHABAD, Uttar Pradesh

Subject: ***Import/Lifting of 24400.00 BL(16608.5 AL with 68.0% v/v alcoholic strength) Imported Malt Scotch from L.C.D. Dadri, Dist. Gautam Budh Nagar (U.P).***

Dear Sir,

We wish to submit that we want to Import/purchase 24400.0 B.L. (16608.5 AL with 68.0% v/v alcoholic strength) of 3 years old Vatted Malt Scotch from M/s William Grant & Sons Distillers Ltd., Giravan Distillery, Grangestone Industrial Estate, Girvan, Scotland via invoice no.3003501 dt. 06/06/2018 for the development of IMFL products in our distillery. The 24400.00 BL Malt Scotch will come to India in tanker through Ship to India and then will come to custom ware house I.C.D, Dadri, Dist. Gautam Budh Nagar (U.P).

We will import this scotch malt from ICD Dadri, Dist. Gautam Budh Nagar

(U.P), to our distillery at Modinagar. The route to transport this Imported Malt Spirit will be as under.

Dadri-Ghaziabad-Modinagar.

We are enclosing herewith the Performa invoice issued by M/s William Grant & Sons Distillers Ltd., Scotland. Therefore it is requested to kindly grant your permission to import 24400.0 B.L.Malt Scotch from LC.D. Dadri, Dist. Gautam Budih Nagar ((UP), with 60 days time.

Thanking you

For Modi Distillery

-sd/-
(Mukesh Sharma) G.M. (Plant)

Enclosure: As above"
(emphasis supplied)

62. On that application, the Pass on Form FL-22 was issued to the petitioner. Again, for ready reference, the contents of one such Pass dated 21.08.2018 (with respect to 24,400 Bulk litres of HSMS), are quoted below:

"PARAS 609,615(5)& 617(3)
GHAZIABAD DISTRICT, UTTAR PRADESH

FL-22

Permit For import/Tranportation of Indian Made Foreign Liquor/Malti/ G.N.A./E.N.A, in Bulk

Permit No 40
Dated:21/8/18

Current Up to 30/8/18 1. Import in Bulk 24400.0 BL Malt Scotch (68.0% v/v)

1 Name & Address of the Consignor : ***M/s I.C.D Dadri,***

Dist. Gautambudh Nagar,UP

2 Name and Address of consignee : ***M/s. Modi Distillery (A Unit of Modi industries Ltd.) Modi Nagar, Distt-Ghaziabad, U.P.***

3 Description of Liquor :
Malt Scotch

4 Quartity of Malt Spint :
24400.0 BL

Consignment imported under Excise Commissioner, U.P Order no.10495/no- 281 F(19)/Modi, Dated 20/08/18

5 Rute by Road via :
Dadri-Ghaziabad-Modinagar

6. Rate of Import Fee : RS. 4/- Per Bulk Litre

7 Amount of duty pre-paid Utter Pradesh: ***UNDER BOND***
or to be realised in the State of Export

8.Pemitt fee any realised Rs 97600/- Deposited vide Treasury Challan no. 15 Dated: 20/08/2018

SEAL OF THE OFFICE OF ISSUE
-sd/-

21/08118

DISTRICT EXCISE OFFICER GHAZIABAD DISTRICT, GHAZIABAD (UP)"

63. Thus, in view of the scheme of Sections 15 & 16 of the Act, the petitioner sought permission to transport quantities of HSMS cleared in its favour, by the Customs authorities at I.C.D. at Dadri, Gautam Budh Nagar, for 'transportation' to its distillery, at Modi Nagar, Ghaziabad. It was described by the petitioner as a transaction of import, from I.C.D. Dadri. Yet, the nature of that transaction involved inter-play of the laws enacted by the State legislature i.e. the Act read with the Rules framed thereunder and the laws enacted by the Parliament, namely, the Customs Act and the Rules framed thereunder.

64. There is no conflict between the Customs laws enacted by the Parliament and the regulatory laws enacted by the State legislature. Under Chapter VIII of the Customs Act, the procedure is prescribed to obtain clearance of goods, for import and export. Section 45 of the Customs Act places restriction on the custody and removal of imported goods. Thus, goods imported from outside the country are unloaded in a customs area. They remain in the custody of the person approved by the Principal Commissioner of Customs or Commissioner of Customs, until they are cleared for consumption or warehousing or transit, in accordance with the provisions of the Customs Act. Under Section 46 of the Customs Act, a detailed procedure is provided for entry of goods on importation, on the strength of bill of entries etc. Section 47 of the Customs Act provides for clearance of goods for home consumption upon payment of import duty. Section 49 of the Customs Act provides for storage of goods in warehouse, pending their clearance or removal. For ready reference, that provision reads as below:

"49. Storage of imported goods in warehouse pending clearance or removal.-

Where, -

(a) in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time;

(b) in the case of any imported dutiable goods, entered for warehousing, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be removed for deposit in a warehouse within a reasonable time, the goods may pending clearance or removal, as the case may be, be permitted to be stored in a public warehouse for a period not exceeding thirty days:

PROVIDED that the provisions of Chapter IX shall not apply to goods permitted to be stored in a public warehouse under this section:

PROVIDED FURTHER that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time.]"

65. Under Chapter IX of the Customs Act, provisions have been made for warehousing (as contemplated under

Section 49 of the Customs Act). Sections 57 and 58 of the Customs Act deal with licensing of public and private warehouses, respectively. Section 59 provides for issuance of bond for goods warehoused. Section 68 provides for clearance of warehoused goods, for home consumption. For ready reference, relevant extract of Section 68 of the Customs Act reads as below:

"68. Clearance of warehoused goods for home consumption

Any warehoused goods may be cleared from the warehouse for home consumption, if-

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and]

(c) an order for clearance of such goods for home consumption has been made by the proper officer;"

66. In the context of the above-described Custom laws, Circular no. 50/2020 dated 05.11.2020 (relied upon by learned counsel for the petitioner), was issued. Contents of paragraph nos. 2, 2.1, 2.1.1, 2.1.2, 2.4, 2.4.1, 2.4.2, 2.4.3 and 2.4.4 are quoted below:

" 2. Distinction between ICD, CFS and AFS

2.1 Inland Container Depot (ICD) :

2.1.1. An off seaport (or port) facility. having such fixed installations or otherwise, equipment, machinery etc. providing services for handling / clearance of laden import, export containers for home use, warehousing, temporary admissions, re-export etc under customs control and with storage facility for customs bonded or non-bonded cargo.

2.1.2. An ICD is a "self-contained Customs station" like a port or air cargo unit where filing of Customs manifests, Bills of Entries, Shipping Bills and other declarations, assessment and all the activities related to clearance of goods for home use, warehousing, temporary admissions, re-export, temporary storage for onward transit and outright export, transshipment, etc., take place. An ICD would have its own automated system/ with a separate station code (such as INTKD 6, INSNF6 etc.) being allotted by Ministry of Commerce and with in-built capacity to enter examination reports and enable assessment of documents, processing of manifest, amendments, etc.

2.2. Container Freight Station

2.2.1. An of seaport (or port) facility having such fixed installations or otherwise, equipment, machinery etc. Providing services for handling / clearance of laden import, export containers for home use, warehousing, temporary admissions, re-export *etc under customs control and with storage facility for customs bonded or non-bonded cargo.*

2.2.2. Though by definition, both ICD and CFS are similar, a CFS is only a Customs area notified under section 8 of the Customs Act, 1962, located in the jurisdiction of a Commissioner of Customs exercising control over a specified Customs port, airport, ICS/ICD while an ICD is

notified under section " of the Customs Act, 1962. A CFS cannot have an independent existence and has to be linked to a Customs station within the jurisdiction of Commissioner of Customs. It is an extension of a Customs port set up with the main objective of decongestion. In a CFS only a part of the Customs processes mainly the examination of goods is normally carried out by Customs besides stuffing/de stuffing of containers and aggregation/ segregation of cargo. Thus, Custom's functions relating to processing of manifest, import/ export declarations and assessment of Bill of Entry/Shipping Bill are performed in the Custom House/Custom Office that exercises jurisdiction over the parent port/airport/ICD/LCS to which the said CFS is attached. In the case of Customs Stations having facility of automated processing of documents, minals are provided at such CFSs for recording the result of examination, etc. In some CFSs, extension Service Centers are available for filing documents, amendments etc. However, the assessment of the documents etc. is carried out centrally.

2.2.3. An ICD may also have several CFSS attached to it within the jurisdiction of the Commissioner of Customs just as in the case of a port.

2.3. Air Freight Station (AFS)

2.3.1. An off-airport common user facility equipped with fixed installations of minimum crement and offering services for handling and temporary storage of import and export cargo etc.

2.3.2. While CFS handles maritime cargo, an AFS is meant to handle air cargo.

2.4. Important centers of activity relating to ICDs/CFSs/AFSS

2.4.1 Pail Siding (in case of a rail-based terminal): The place where container trains are ved, dispatched and handled in a terminal. Similarly, the containers are loaded on and unloaded from rail wagons at the siding through overhead cranes and / or other the equipment.

2.4.2 Container Yard: Container yard occupies the largest area in the ICD/CFS. It is acting area where the export containers are aggregated prior to dispatch to port, pt containers are stored till Customs clearance and where empty containers await movement. Likewise, some stacking areas are earmarked for keeping special ners such as refrigerated, hazardous, overweight/ over-length etc.

2.4.3. Warehouse: Public warehouse appointed under section 57 or private warehouse licensed under section 58 is a covered space/shed where export cargo is received and import cargo stored/delivered; containers are stuffed/stripped or reworked; LCL exports are consolidated and import LCLS are unpacked; and cargo is physically examined by Customs. Export and import consignments are generally handled either at separate areas in a warehouse or in different nominated warehouses/sheds.

2.4.4. Gate Complex: The gate complex regulates the entry and exits of road vehicles carrying cargo and containers through the terminal. It is place where documentation, security and container inspection procedures are undertaken."

67. Thus, it may be true, the I.C.D. at Dadri is a Self-contained Custom Station or Off Seaport (or port) facility. To that limited extent, for the purpose of the Customs Act, mainly for the levy of Customs duty and clearance of goods for home consumption, it may be considered a custom frontier of the country, irrespective of its geographical location, well inside the mainland. Yet, that status under that law would have no impact on the definition and identity of the geographical boundaries of the State of U.P., for the limited purpose of a regulatory law enacted by that State.

68. As to the third submission advanced by learned counsel for the petitioner, limits of permissible wastage (during transportation) have been prescribed, under Rule 5 of the Distillery Rules. The same limit has been made applicable to cases of import of foreign liquor by virtue of the provisions of Paragraph No. 613(3) of the Excise Manual, quoted above. Here, it may also be noted, the Rules Relating to Issue on Spirit From Distilleries Working in Private Premises or Premises Owned by the State Government, that prescribe the permissible limits of loss, have been amended by Notification dated 08.02.1978. Rule 5 of those Rules (Paragraph 814 of the Manual) provides for (revised) permissible limit of loss during transportation. The above-described amended Rule 5 reads as below:

"एतद्द्वारा प्रतिस्थापित नियम

5- लकड़ी के पीपे या धातु के पात्र में बन्ध-पत्र के अधीन परिवहित या निर्यातित स्प्रिट के अभिवहन में क्षरण, वाष्पीकरण या अन्य अपरिहार्य कारण से हुई वास्तविक हानि के लिए 0.5 प्रतिशत तक की छूट दी जायगी।

इस नियम के अधीन दी जाने वाली छूट असावनी भेजी गई स्प्रिट की मात्रा से गन्तव्य स्थान पर प्राप्त मात्रा को कम करके अवधारित की जायगी। दोनों मात्रा को लीटर अल्कोहल में उल्लिखित किया जायगा। छूट की गणना पारेषण में सम्मिलित प्रत्येक लकड़ी के पीपे या धातु के पात्र में विद्यमान मात्रा पर की जायगी। यदि ऐसे अधिकारी की, जिसके द्वारा स्प्रिट के पारेषण की उसके गन्तव्य स्थान पर माप की गई हो और उसे प्रमाणित किया गया हो, रिपोर्ट से यह प्रकट हो कि अनुज्ञेय सीमा से अधिक छीजन हुई है तो बन्ध-पत्र निष्पादित करने वाला व्यक्ति उतनी कमी पर, जितनी छूट से अधिक हो शुल्क का देनदार होगा। उद्ग्रहणीय शुल्क की दर इस राज्य में ऐसी स्प्रिट पर उद्ग्रहणीय शुल्क की उच्चतम दर होगी।"

69. The fact that quantities of HSMS had been received at I.C.D., Dadri, Gautam Budh Nagar from a (geographical) place situated in the State of Gujarat, may also not lead to the conclusion that HSMS had been imported from Gujarat. To that extent alone the reasoning offered by learned counsel for the petitioner, may not be faulted.

70. The import of HSMS from Scotland, in United Kingdom was not complete till the goods were cleared for home consumption, at I.C.D., Dadri. There is no fact allegation made by the petitioner of any loss of strength or volume suffered before the goods reached the I.C.D. Dadri. Therefore, the excessive loss - of strength and volume (of HSMS), occurred during the transportation of those goods, from the bonded warehouse at I.C.D., Dadri, to the petitioner's distillery at Modi Nagar, Ghaziabad, after their clearance for human consumption.

71. Examined in the context of discussion made above, the geographical place where the goods HSMS commenced their journey (upon being cleared from home consumption) remained inside the State of Uttar Pradesh, i.e., at Dadri, in Gautam Budh Nagar. Yet, HSMS had not been produced inside the State of Uttar Pradesh. In fact, they were imported into the country, at the I.C.D., Dadri, in Gautam Budh Nagar. Therefore, those goods became available for home consumption, under the umbrella of local regulatory laws of the State of Uttar Pradesh, only. Keeping these facts in mind, for the purpose of levy of Consideration fee/''*Pratiphal Shulk*', on excess transportation loss of HSMS, the applicable law for computation of that regulatory fee would remain the laws of the State of Uttar Pradesh, only. Any other construction may lead to redundancy of the regulatory law, a consequence to be avoided. Therefore, in such circumstance, Consideration fee/''*Pratipahal Shulk'* would be imposed in accordance with the rates prescribed in the State of Uttar Pradesh and not any other State. Thus, upon excessive loss of HSMS, the petitioner became obligated to pay Consideration Fee/'*Pratiphal Shulk'*. To that transaction, it was no longer relevant that the goods originated from Scotland in United Kingdom. By virtue of Paragraph 613(3) of the Excise Manual the petitioner was bound to compensate the loss to revenue arising from excessive loss of HSMS during transportation, inside the State of Uttar Pradesh, at rates prescribed under amended Paragraph 814 of the Manual.

72. In the absence of any pleading or evidence led by the State, though not part of the true reasoning, yet, it may be observed in the passing, under the terms of the bond executed by the petitioner, it became legally bound to that liability. The parties to the dispute have not brought on record the contents of the bond submitted by the petitioner. Yet, its issuance is admitted on Form FL 22 (as annexed to the Writ Petition), itself. Normally, under the Act, bonds are issued on Form PD15. It is the proforma for bonds to be issued for removal of spirits from distilleries. For ready reference, proforma bond on Form PD15 reads as below:

" P.D. 15

Form of general bond to be executed for the removal of spirits from distilleries

for transport/export without pre-payment of duty.

This Indemnity Bond made the.....day of.....19.....Between..... .....son of.....resident of.....(and..... .....son of ..... resident of .....) (hereinafter called the distiller/the distillers which expression shall include his/their heirs, representatives, successors and assigns) of the one part AND the Governor of Uttar Pradesh (hereinafter called the Governor which expression shall include his successor and assigns) of the other part;

Whereas under the rules of the Government of Uttar Pradesh in the Excise Department the distiller is/distillers are permitted from time to time to transport/export spirits from his/their distillery at. ...to all or any of the bonded warehouses mentioned in the passes covering such transport/export without

previous payment of duty on the distiller/ distillers executing an indemnity bond on the terms and conditions hereinafter mentioned;

Now this Bond witnesses and the distiller/distillers hereby convents/convent with the Governor as follows:

1. That the distiller/distillers shall not at any one time to so transport/export any quantity of spirits the duty on which at the rate prescribed therefor at the time or the aggregate of such duty and the duty at the aforesaid rate on any quantity previously transported/exported and not yet delivered at destination shall exceed the sum of Rupees Provided that any allowance sanctioned for dryage and wastage and any quantity not delivered at destination for which duty has been paid under clause (3) hereinafter following shall not be included in the calculation of the quantity not delivered at destination

2. That the distiller/distillers shall within the time mentioned in his/their pass issued by the officer-in-charge of the distillery on each occasion of the transport/export of spirits or within such further time as may be granted by way of extension by the Collector of the transporting/exporting district, deliver or cause to be delivered the spirits so transported/exported on that occasion into the custody of the officer-in-charge of the bonded warehouse. mentioned in the pass

3. That if the whole or any quantity of spirit transported/exported on any occasion shall not have been delivered at the destination as hereinbefore agreed, the distiller/distillers shall indemnify the Governor of any loss of duty which the Governor may suffer by reason of such non-delivery or short delivery by paying to him on demand the duty at the rate then in force on any quantity of spirit not so delivered.

In witness whereof the distiller has/distillers have hereunto set his hand/their hands the day of the years first above written.

In the presence of.....

Signed by.....
Distiller/Distillers.....
(emphasis supplied)

73. In the face of such bond, if issued, by way of a pure contractual liability, the same would be fully enforceable. Interestingly, in **State of Kerala and Others Vs. Mc. Dowell and Company Ltd., 1994 Supp. (2) SCC 605**, an issue arose as to the levy of stamp duty (under Indian Stamp Act, 1899), on a 'bond' issued under the Kerala Abkari Act. There, 'bond' was defined under the Kerala Abkari Act as an instrument whereby a person obligated himself to pay money to another, on the condition that the obligation shall be void if a specified act was performed or not performed. The majority view (of two Judges) opined, that the instrument (in that case), was a 'bond' under the Indian Stamp Act, 1899, because the issuer had bound himself to pay the promised money in the event of specified quantities of liquor (that were removed from warehouses without payments of State Excise duty), being not actually exported out of the State and that liability would cease to exist if all quantities were exported. In his dissenting opinion, Justice Ram Manohar Sahai opined - since the liability to pay State Excise duty was pre-existing, the 'bond' in question was only an agreement.

74. Under the Act, 'bond' has not been defined. However, whether we treat the bond (that may have been issued in the present case), to be a bond simplicitor or an agreement, once issued, it would bind the issuer to account for the entire quantities of the Excisable article (as they existed at the beginning of their journey), at the end of that journey. For that reason also, exact terms of the bond apart, the nature of liability to pay Consideration fee/"*Pratiphal Shulk*' against excess loss of HSMS may remain enforceable, by way of a pure contractual liability.

75. For reasons noted above, it would not be right to say - the Act and the Excise Manual create levy of Consideration Fee/"*Pratiphal Shulk*' only on dispatches made from the distillery and not to the distillery. All transportation of liquor within the State, is covered within the regulatory sweep of Sections 15 & 16 of the Act. The petitioner applied and the respondents granted Pass to the petitioner (to transport HSMS from I.C.D. Dadri, in Gautam Budh Nagar to petitioner's distillery at Modi Nagar, Ghaziabad), on Form FL-22, against bond. That procedure was not contrary to the law. The petitioner was bound by the terms of the Pass read with the Excise Manual.

76. Accordingly, for reasons noted above, the writ petition lacks merit. No further challenge has been raised to the computation method adopted by the revenue authorities, to determine the amount of Consideration Fee/"*Pratiphal Shulk*'. Thus, it is not the petitioner's case that computation made is excessive or that it should have been computed through any other method.

77. Before parting, it may be observed, statutory authorities must act within the confines of the law. In the present case, they ought to have waited for expiry of the period of limitation that was available to the petitioner, to file revision, before recovering the disputed amount. The beauty and predictability of the rule of law may not take seed and it may not bear fruit in a civil society, unless the State authorities discharge their powers and functions, with the exactitude advised by the law. That degree of self-restraint alone lays the foundation of trust between the almighty State and its functionaries on one side and the citizen (and his associations, corporations, entities etc.), on the other. The citizen is tiny, yet he is the omnipresent entity for whom the modern-day State exists. It is his labour that generates both, the fuel i.e., the revenue as also the spark i.e., the means generated by the laws, that combusts the fuel and drives the giant engine of the State machinery, with purpose. Therefore, the State and its functionaries may never seek to outwit the citizen, either deliberately or inadvertently, by adopting any doubtful method. The citizen and all associations, corporations, entities that he forms, must be able to trust blindly, the State for compliance of the laws, as enacted and enforced, even if the former be perceived, standing in violation of the law. That, amongst others would be one test to ascertain adherence to the rule of law, under the Constitutional scheme of governance.

78. Last, a regret is expressed - to the delay caused in conclusion of these proceedings. In the first place, the hearing was disrupted on certain dates owing to unavoidable circumstances. Thereafter, dictation of order, though commenced upon conclusion of hearing, could not be concluded earlier, for reasons, both, avoidable and unavoidable.

79. The Writ Petition fails and is **dismissed**. No order as to costs.

(2022)06ILR A1015
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.06.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Crl. Misc. Bail Appl. No. 18303 of 2020

Wali Hassan ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Siddharth Mishra, Sri Ali Hasan, Sri Istiyaq Ali, Sri Rakesh Kumar Yadav, Sri Rakesh Kumar Yadav

Counsel for the Opp. Party:
G.A., Sri Abhishek Mishra (A.G.A.), Sri Janardan Prakash (A.G.A.), Sri Daya Shankar Mishra (Sr. Adv.)

A. Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 52 - Standing Order / Instruction No.1 of 1989 issued by Government of India u/S 52 of NDPS Act- Have legal sanction and are required to be strictly followed by the Police/arresting authorities as they are mandatory in nature.

B. Failure to comply with the provisions made for doing a particular act in a particular manner renders the action non-est.

C. Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 37 -- While considering the bail application with reference to section-37 of the Act is not called upon the record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about existence of such grounds.

Application allowed. (E-12)

List of Cases cited:-

1. Phool Chand Ali Vs U.O.I. reported in 2020 O Supreme (All) 797

2. Om Prakash Verma Vs St. of U.P. reported in 2022 O Supreme (All) 323.

3. Amrik Singh Vs St. of U.P. order dated 9.1.2014 passed in Criminal Appeal No.1106 of 2013

4. Gaunter Edwin Kircher Vs St. of Goa reported in (1993) 3 SCC 145

5. Taylor Vs Taylor [(1875) 1 Ch.D 426, 431] ,

6. Ramchandra Vs Govind AIR 1975 SC 915

7. Chettiam Vettil Ahamad Vs Taluk Land Board (1979) 3 SCR 839,

8. Shivcharan Sharma Vs U.O.I. & ors. 1981 A.L.J. 641

9. A.R. Antalay Vs Ramdas Sriniwas Nayak & anr. 1984 2 SCC 500

10. Bharat Chaudhary Vs U.O.I. with Raja Chandrasekharan Vs the Intelligence Officer reported in 2021 O Supreme (SC) 811.

11. U.O.I. Vs Shiv Shankar Keshari (2007) 7 SCC 798

12. U.O.I. Vs Rattan Malik (2009) 2 SCC 624

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

1. Heard Mr. Daya Shankar Mishra, learned Senior Advocate assisted by Mr. Abhishek Mishra, learned counsel for the applicant and learned A.G.A. for the opposite party-State.

2. The present criminal misc. bail application has been filed on behalf of applicant- Wali Hasan to release him on bail in Case No.1392 of 2019, under

Sections 8, 20, 29, 60 and 3 of N.D.P.S. Act, Police Station- Baradari, District- Bareilly.

3. Learned Senior Counsel on behalf of the applicant submitted that sub-Inspector lodged a first information report on 17.11.2019 against the applicant and two others with the allegation that on the basis of information received, first informant seized a truck on 17.11.2019 at 12:45 hours, which was alleged to be driven by applicant and carrying 91 packets of Ganja weighting about 201 K.G. He further submitted that 91 packets of alleged contraband (Ganja) in 8 Bags (Bora) was alleged to be recovered from inside of truck but only 1 packet weighting 1 K.G. (Ganja) out of 91 Packets was sent for chemical examination so utmost 1 K.G. can be said to be Ganja but remaining 200 K.G. cannot be said to be Ganja or any other contraband unless there is proper sampling and its chemical examination. He further submitted that it is not mentioned in the recovery memo that from each 91 packets, sample of alleged contraband (Ganja) was taken and sent for chemical examination, as such, the procedure of sampling adopted by the police authority is in violation of Standing Order / Instruction No.1 of 1989 dated 13.6.1989 issued by the Government of India under Section 52 A of N.D.P.S. Act. He has placed reliance upon Clause 2.1 to 2.8 of Standing Order / Instruction No.1 of 1989, which are as follows:

2.1 All drugs shall be classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the persons from whose possession the drug is recovered and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) were a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects the packages/container may be carefully bunched in lots of 10 package/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of, 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample the in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

4. He next submitted that there is no evidence on record regarding taking of samples as provided in standing order / instructions mentioned above, as such, taking of proper sample is highly doubtful.

5. On the point of sampling of contraband, learned counsel placed reliance upon following judgments and orders:

(i) Phool Chand Ali Vs. Union of India reported in 2020 O Supreme (All) 797.

(ii) Om Prakash Verma Vs. State of U.P. reported in 2022 O Supreme (All) 323.

(iii) Amrik Singh Vs. State of U.P. order dated 9.1.2014 passed in Criminal Appeal No.1106 of 2013

(iv) Gaunter Edwin Kircher Vs. State of Goa reported in (1993) 3 SCC 145

6. Learned counsel for applicant further submitted that standing instruction and the guidelines issued by the authority having legal sanction are required to be strictly followed by the police / arresting authorities as held by the Apex Court in the case of Noor Aga Vs. State of Punjab (2008) 3 JIC 640 (S.C.), the paragraph nos.123, 124 and 125 of the judgment are as follows:

123. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-`-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

124. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

125. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

7. Learned counsel further submitted that if power is given under the Act / statute / Rules to do a certain thing in a particular way, the thing must be done in that way or not at all. The other method are forbidden. On this point, learned Counsel placed reliance upon the case of ***Taylor Vs. Taylor [(1875) 1 Ch.D 426, 431] , Ramchandra***

vs. Govind AIR 1975 SC 915 Chettiam Vettil Ahamad Vs. Taluk Land Board (1979) 3 SCR 839, Shivcharan Sharma Vs. Union of India and Others 1981 A.L.J. 641 and A.R. Antalay Vs. Ramdas Sriniwas Nayak and Another 1984 2 SCC 500 wherein Hon'ble Court have held that failure to comply with the provisions made for doing a particular act renders the action nonest.

8. Learned counsel further submitted that vide order dated 31.8.2020, this Court has directed learned A.G.A. to file counter affidavit, accordingly, counter affidavit has been filed in this case but there is no categorical averment in the counter affidavit that sampling was done according to standing order / instruction. He further submitted that this Court vide order dated 6.9.2021 directed the counsel for applicant to inform the Court about the status of the trial, accordingly, supplementary affidavit was filed by applicant on 13.9.2021 annexing the certified copy of the order sheet in order to demonstrate that trial has not been concluded and prosecution has not produced any witness in the Court, therefore, custody of the applicant is against the provision of Article 21 of the Constitution of India. He further submitted that trial is still pending.

9. Learned counsel lastly submitted that applicant has no other criminal antecedents and is languishing in jail since 17.11.2019.

10. On the other hand, learned A.G.A. submitted that search was made in accordance with law and total 91 packets weighting 201 K.G. contraband was recovered from which sample has been taken and sent for chemical examination, in which, it was found that sample weighting 1 K.G. was Ganja. He further submitted that investigation was conducted in free and fair manner, accordingly, charge sheet was submitted against the applicant under Sections 8, 20, 29, 60, 3 of N.D.P.S. Act. He further submitted that although it is admitted that applicant has no criminal history but accused applicant is a man of criminal nature, as such, is not entitled to be released on bail, otherwise it will be harmful to the society. On the point of compliance of Standing Order / instruction no.1 of 1989 and its averment in any document (F.I.R., recovery memo or in the counter affidavit before this Court), learned A.G.A. could not satisfy the Court that compliance of standing order / instruction was made in respect to sampling of alleged contraband from 91 packets.

11. In reply, learned counsel for the applicant submitted that the applicant is in custody from more than 2 ½ years and trial is still pending and there is fair chance of acquittal of the applicant on the ground mentioned above, so applicant is entitled to be released on bail. On the point of custody, learned counsel for the applicant placed reliance upon a case arising out of N.D.P.S. Act in which point of sampling etc. were involved and the Apex Court has released the accused on bail in which accused (Raja Chandrasekharan) remained in custody for over a period of two years, the reference of the case is as follows:

Bharat Chaudhary Vs. Union of India with Raja Chandrasekharan Vs. the Intelligence Officer reported in 2021 O Supreme (SC) 811.

12. The Court while considering the provisions of Section 37 of the N.D.P.S. Act finds that State was granted time to reply and the State has filed counter affidavit, which has been taken into consideration. So far as other conditions is concerned, it will be relevant to

mention that the Apex Court in the case of ***Union of India vs. Shiv Shankar Keshari (2007) 7 SCC 798*** as well as in ***Union of India Vs. Rattan Malik (2009) 2 SCC 624*** has held that court while considering the bail application with reference to section-37 of the Act is not called upon the record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about existence of such grounds. It is further material to state that the applicant has no criminal history which is not disputed by the State.

13. Considering the submissions of both the parties and keeping in mind the twin conditions of Section 37 of N.D.P.S. Act and perusing the evidence on the record, it is very much established that sampling was done contrary to the Standing Order / Instruction No.1 of 1989 dated 13.6.1989, which are mandatory in nature, as such chances of applicant conviction is weak on the basis of sampling of contraband done in the present matter as well as on the basis of the ratio of the judgment in the case of ***Union of India vs. Shiv Shankar Keshri (supra)*** larger mandate of Article 21 of the constitution of India without expressing any opinion on the merit of the case, I am of the view after applying section 37 of the N.D.P.S. act that the applicant is entitled to be released on bail.

14. Let the applicant- ***Wali Hassan*** involved in aforesaid case be released on bail on their furnishing a personal bonds and two heavy sureties each in the like amount to the satisfaction of the Court concerned with the following conditions:-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 of the Indian Penal Code.

(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. 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.

(iv) 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 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)06ILR A1019
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. 2nd Bail Application No. 12379 of 2022

Hariom Sharma ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Shashi Kant Rai

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 – Section 344 - It is high time for the trial court to resort to Section 344 Cr.P.C in appropriate cases. In the present case since the prosecutrix before the trial Court has turned hostile and completely denied the prosecution version, therefore she is not entitled to the benefit of any compensation paid by the Government, which has been collected from the taxpayers of the country.

Application allowed. (E-12)

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

1- Heard Mr. Shashi Kant Rai, learned counsel for the applicant, learned Additional Government Advocate representing the State and perused the record.

2- By means of this application under Section 439 of Cr.P.C., applicant, who is involved in Case Crime No. 661 of 2020, under Section 376/34 IPC, P.S. Anoopshahr, District Bulandshahr seeks enlargement on bail during the pendency of trial.

3- This is the second bail application. The first bail application of the applicant was rejected by this Court vide order dated 13.08.2021 passed in Criminal Misc. Bail Application No. 23073 of 2021 on the ground that victim in her statement under Section 164 Cr.P.C. has made allegation of rape against all the three accused person and in the vagina of the victim a circular wooden piece of 12 cm long and 2.5 cm in circumference was found.

4- The main substratum of argument of learned counsel for the applicant is that the evidence of the victim has been recorded before the trial court on 30.07.2021 as PW-1 in which she has not supported the prosecution case and has been declared hostile. She stated that she had made the allegation of rape in her statement under Section 164 Cr.P.C. at the behest of her husband and police. It is also pointed out that other co-accused namely, Solanki Sharma and Rajesh Sharma have been granted bail by the co-ordinate Bench of this Court vide order dated 25.02.2022 and 26.04.2022 passed in Criminal Misc. Bail Application No. 52622 of 2021 and Criminal Misc. Bail Application No. 36862 of 2021, respectively. The case of the applicant stands on better footing than that of the aforesaid co-accused. The applicant has no criminal history to his credit and he is languishing in jail since 29.12.2020.

5- Per contra, learned A.G.A. for the State opposed the prayer for bail of the applicant by contending that possibility of winning over of the victim cannot be ruled out, but does not dispute the aforesaid factum of the case as argued on behalf of the applicant.

6- Considering the facts and circumstances of the case as well as keeping in view the nature of the offence, evidence, complicity of the accused as well as considering the fact that the victim in her evidence before the trial court has not supported the prosecution case and that the other co-accused namely Solanki Sharma and Rajesh Sharma have been granted bail by the co-ordinate Bench of this Court, this Court is of the opinion that the applicant has made out a case for bail. Hence, the bail application is hereby ***allowed.***

7- Let the applicant-**Hariom Sharma** be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions, which are being imposed in the interest of justice:-

(i) That the applicant shall cooperate in the expeditious disposal of the trial and shall regularly attend the court unless inevitable.

(ii) That the applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence.

(iii) That after his release, the applicant shall not involve in any criminal activity.

(iv) The identity, status and residential proof of sureties will be verified by court concerned.

8- In case of breach of any of the conditions mentioned above, court concerned will be at liberty to cancel the bail and send the applicant to prison.

9- It is clarified that anything said in this order is limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case.

10- Before parting with this case, I would like to observe that nowadays the practice of stating falsehood are being increased and the same is on higher side. On account of allegation of rape against the applicant, the image of the applicant has been tarnished in the society. He was arrested and suffered the ignominy of being involved in most hatred offence of rape. He lost reverence in the society whereas every one has right to live with dignity in the society. On acquittal of the accused on the ground that victim turned hostile, the stigma against him may be washed away to the certain extent but that is not enough. It is well settled that presumption of innocence will have to be balanced with the right of victim and accused as well as above all societal interest for enforcing the rule of law. Neither accused nor victim or any witnesses should be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it theatre of the absurd. Dispensation of justice in a criminal trial is a serious issue and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses /victims to turn hostile as a ground of acquittal. Complainants should also be accountable and should take responsibility on their shoulder.

11- Considering the societal interest, it is high time for the trial court to resort to Section 344 Cr.P.C in appropriate cases. In the present case since the prosecutrix before the trial Court has turned hostile and completely denied the prosecution version, therefore she is not entitled to the benefit of any compensation paid by the Government, which has been collected from the taxpayers of the country.

12- In view of the above trial Court shall consider the issuance of necessary direction against the alleged prosecutrix/ victim to refund the amount of

compensation, if any received by her, in the appropriate head of the treasury account and shall also ensure the compliance of provisions of section 344 Cr.P.C at the appropriate stage, if it deems fit and proper under the facts and circumstances of the case.

13- Office is directed to transmit a copy of this order to the court concerned within a week for compliance.

(2022)06ILR A1022
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.05.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 4691 of 2022

Zeba Rizwan ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Anil Kumar Tripathi, Vivek Pandey

Counsel for the Opposite Party:
G.A., Arvind Kumar Mishra, Mohammad Airaj Siddiqui, Sharvan Kumar Nayak, Sushil Kumar Singh, Versha Rani Srivastava

A. Criminal Law - U.P. Gangsters and Anti-Social Activities Prevention Act,1986 - Section 19(4) - The accused person, who has been prosecuted for serious offences including murder, attempt to murder and criminal conspiracy, should not be granted bail under the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986

B. Criminal Law - Code of Criminal Procedure, 1973 – Sections 2(wa), 24(8), 372 & 301 - The matter in question is under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, and not under the IPC or any other Special Act and the complainant of the said case is the S.H.O. of the police station. So the counsel for the victim of the predicate offence i.e. FIR No. 002 of 2022 does not come within the category of "victim" pertaining to the present case. If the said victims of the predicate offence are permitted to appear and oppose the bail applications in the matters of Gangsters Act, it shall open a Pandora's box and prove hurdle in proper disposal of the case.

Application allowed. (E-12)

List of Cases cited:-

1. Jagjeet Singh & ors. Vs Ashish Mishra @ Monu & anr. 2022(1) BLJ 169

2. Sudha Singh Vs St. of U.P. Criminal Appeal No. 448/2021

3. Sabir Ali Khan Vs St. of U.P Criminal Misc. Bail Application No. 18588/2021

(Delivered by Hon'ble Krishan Pahal, J.)

1. Counter Affidavit filed by learned counsel, Sri Sushil Kumar Singh, is taken on record.

2. Heard Sri Vivek Pandey, learned counsel for the applicant, Sri Sushil Kumar Singh, learned counsel for the victim (in the case of murder), and learned A.G.A. for the State and perused the material placed on record.

3. By means of the present bail application, the applicant seeks bail in Case Crime No. 54 of 2022, under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, Police Station-Tulsipur, District- Balrampur, during the pendency of trial.

RIVAL CONTENTIONS:-

4. Learned counsel for applicant has stated that applicant is a lady, aged 28 years and has her children to tender to. It is argued by the learned counsel that the prosecution under the Gangsters Act has been launched against the applicant on the basis of one criminal case shown in the gang chart, in which she has already been enlarged on bail by this Court on 20.4.2022. The details of criminal case have been mentioned in paragraph 6 of the affidavit accompanying the bail application. In the said criminal case, the role of the applicant is shown to be of criminal conspiracy only. She has been falsely implicated in the present case due to political rivalry. She is not the member of any gang. It is further stated that there is no other criminal history of the applicant. The applicant is languishing in jail since 10.1.2022. In case, the applicant is released on bail, she will not misuse the liberty of bail.

5. Per contra, learned A.G.A. and learned counsel for the victim, Sri Sushil Kumar Singh (in the said case of murder in which applicant is on bail) has vehemently argued that he has a right to be heard and he has relied on the judgements of the Apex Court as well as of this Court, wherein it has been opined that the bails of the Gangsters Act should not be leniently taken up.

6. Learned counsel for the victim of the predicate offence under Section 302 IPC has placed much reliance on Section 19(4) of the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, which reads as follows :-

"Section-19(4)- *Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless :*

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

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

7. Learned counsel has further stated that the provisions of Clause 19(4) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 are at par with Section 37 of the NDPS Act, wherein twin conditions are in matters of commercial recovery of contraband.

8. Learned counsel has relied on the judgment of the Supreme Court passed in ***Jagjeet Singh & Others versus Ashish Mishra @ Monu & Another1,*** wherein it has been stated that a 'victim' within the meaning of Cr.P.C. cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings.

9. Learned counsel has further relied on the judgement of the Supreme Court passed in ***Sudha Singh versus State of Uttar Pradesh2***, wherein it has been opined that the accused person, who has been prosecuted in fifteen cases for serious offences including murder, attempt to murder and criminal conspiracy, should not have been granted bail under the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, and the said bail was set aside by the Supreme Court.

10. The learned counsel has further stated that the property worth crores of rupees

belonging to the father of the applicant has been attached and even his three bank accounts have also been attached by the State. Learned counsel has next stated that the deep involvement of the applicant as the active member of the gang in a very sensitive matter and same has to be considered as per the provision of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, as any member of the gang, collectively or individually, is equally instrumental. Therefore, the individual act or the registration of previous case by him or her is to be judged by entire activity of gang in totality. Learned counsel has further stated that she is likely to inherit the illegally gained property of her father and husband.

11. Learned counsel has placed reliance on the judgement of this Court passed in ***Sabir Ali Khan versus State of U.P.3,*** wherein it has been stated that the Court has to be satisfied regarding the fact that there is no likelihood of the applicant committing any offence, whatsoever, in future also.

12. Learned counsel has further stated that there is a criminal history of thirteen cases of the father of applicant, which includes four cases of murder. He has next stated that there is a criminal history of two cases assigned to the husband of applicant also.

13. Learned counsel for the applicant has stated that the said case laws are not applicable to the present applicant as she is a lady and the criminal history referred to regarding father and husband of applicant by the learned counsel for the said victim does not apply to the applicant. The applicant was not named in the said FIR under Section 302 IPC, and her name has come up later on during investigation. The FIR was filed against unknown persons. The father of applicant is an Ex-M.P. and all have been implicated out of political rivalry.

CONCLUSION:-

14. A perusal of the record suggests that the FIR in the subject matter has been lodged by Awdhesh Raj Singh, S.H.O. P.S. Bilaspur, District- Balrampur, U.P. and there are only police witnesses in it. The victim/complainant of the predicate offence i.e. FIR No. 002 of 2022 is neither a victim nor a witness in the offence under the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986,

15. If the said victims of the predicate offence are permitted to appear and oppose the bail applications in the matters of Gangsters Act, it shall open a Pandora's box and prove hurdle in proper disposal of the case.

16. It is true that the victim has been defined under Section 2(wa) of Cr.P.C., and the victim has been accorded the opportunity to file an appeal against any order of acquittal under proviso to Section 372 Cr.P.C.. Section 2 (wa) Cr.P.C. is being reproduced herinunder:-

"Section 2(wa)- *"victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."*

17. Section 24(8) of Cr.P.C. reads as follows:-

"Section 24(8)- *The Central Government or the State Government may appoint, for the purposes of any case or*

class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:

[Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under the sub-section.]

18. Under proviso to Section 24(8) Cr.P.C., permission is accorded to the advocate of the choice of the victim to assist the prosecution and not to the public prosecutor. This has of late been added vide amendment of Cr.P.C. dated 31.12.2009.

19. Section 372 Cr.P.C. is being reproduced hereinunder:-

*"**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.]"

20. Despite the said amendments in the Cr.P.C., Section 301 has not been amended to date. Section 301 of the Code reads hereinunder:-

*"**301. Appearance by Public Prosecutors**.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.*

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

21. Section 301 applies to the complainant of the case, who can get himself represented in Court through his Advocate. The reason is that the complainant may or may not be the stranger to the offence, but the victim is the person, who suffers due to that offence.

22. Of late, the criminal jurisprudence has developed that the victim is being accorded proper opportunity of being heard not only at the various stages of trial and even at the stage of disposal of bail. But the story herein is a bit different. The matter in question is under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, and not under the IPC or any other Special Act and the complainant of the said case is the S.H.O. of the police station. So the counsel for the victim of the predicate offence i.e. FIR No. 002 of 2022 does not come within the category of "victim" pertaining to the present case. Inspite of the provisions discussed above, the counsel for victim in the offence u/s 302 IPC has been heard at length.

23. After hearing the learned counsel for the parties and seeing the circumstances

of the case and considering the fact that there is only one case pending against the applicant and that too of a criminal conspiracy, the twin conditions referred to in Section 19(4) of the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, stand satisfied and it is a fit case for bail.

24. Without expressing any opinion on the merits, the bail application is allowed. Let the applicant **Zeba Rizwan,** involved in aforesaid case crime be released on bail on her furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions that :-

1. The applicant shall not tamper with the prosecution evidence by intimidating/ pressurizing the witnesses, during the investigation or trial.

2. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

3. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

25. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

(2022)06ILR A1026

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 27.05.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 5425 of 2022

Maulana Kaleem Siddiqui ...Applicant

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Ishan Baghel, Mohemmed Amir Naqvi

Counsel for the Opposite Party:
G.A.

A. The National Investigation Agency Act,2008 - Section 21 - Scheduled offences, whether investigated by the National Investigation Agency or by the investigating agencies of the St. Government, are to be tried exclusively by Special Courts set up under the NIA Act. When the cases pertaining to the scheduled offence are to be tried by a Special Court, then Section 21 of the NIA Act would 9 categorically apply to the case and an appeal shall only lie to the said case, before a division bench of the High Court, therefore, against the bail rejected by Special Court appeal would lie before the Division Bench of the High Court. Bail Application dismissed as non maintainable.

Held: Application allowed. (E-12)

List of Cases cited:-

1. Vineet Kumar Dixit Vs St. of U.P. Bail No. 8778 of 2018

2. Cherukuri Kutumbayya Vs The Municipal Council, Vijayawada

3. Bikramjit Singh Vs St. of Pun. (2020)10 SCC 616

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri I.B. Singh, learned Senior Counsel assisted by Sri Ishan Baghel, learned counsel for the applicant, Sri Shiv Nath Tilhari, learned A.G.A.-I for the State and perused the material available on record.

2. At the outset, learned A.G.A.-I for the State has raised a preliminary objection

that the present bail is not maintainable as it cannot be heard before this Court as it is hit by Section 21 of The National Investigation Agency Act, 2008 (hereinafter referred to as "the NIA Act"). An appeal ought to have been filed on behalf of the applicant under Section 21 of the NIA Act to be heard by a division bench.

3. Learned Senior Counsel for the applicant has pressed the bail application on the ground that trial of the case by Special Court without following Section 6 of the NIA Act is illegal. The case has not been notified to the Central Government as provided under Section 6 of the NIA Act, which is being reproduced hereinbelow :-

"6. Investigation of Scheduled Offences.-(1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.

(8) Where the Central Government is of the opinion that a Scheduled Offence has been committed at any place outside India to which this Act extends, it may direct the Agency to register the case and take up investigation as if such offence has been committed in India.

(9) For the purposes of sub-section (8), the Special Court at New Delhi shall have the jurisdiction."

4. Learned Senior Counsel for the applicant has placed much reliance on the judgment of this Court dated 26.2.2019 passed in **Vineet Kumar Dixit vs. State of U.P.1,** wherein it has been opined after

relying on the judgments of Patna High Court and Rajasthan High Court, that the cases even where scheduled offences punishable under the provisions of Schedule have been alleged, shall be tried by the courts as provided for under the Code of Criminal Procedure, 1973, and not in accordance with the special procedure provided under the Act unless (i) The investigation of such cases is entrusted by the Central Government to the N.I.A. and (ii) The N.I.A. transfers the same to the investigating agency of State Government. The special procedure under the NIA Act would attract only when the Central Government entrusted the investigation to the NIA, who in turn either entered into the investigation itself or transfers the investigation to the State Investigation Agency as prescribed in Sections 6 and 7 of the NIA Act. There is nothing on record which may suggest that in the instant case, any of the eventuality mentioned in Sections 6 and 7 of the NIA Act exists and therefore, the bail application filed by the applicants/accused persons is maintainable under Section 439 of the Cr.P.C. The objection of the learned A.G.A.-I, is therefore, without any substance and is not acceptable.

5. Learned Senior Counsel has also placed reliance on the judgments of the Andhra Pradesh High Court in **Cherukuri Kutumbayya v. The Municipal Council, Vijayawada,** wherein it has been opined that :-

"6. The expression "save as otherwise provided" in Sub-Section (2) means "except to the extent specific provision is made'. In other words Sub-Section (2) will come into play only in cases which are not governed by any other specific provisions of law. Therefore, it is only where there is no other special provision in respect to any other type of land this Sub-Section is attracted. Since the legislature has enacted a specific provision in regard to agricultural lands, it is reasonable to infer that that category of lands contemplated by that Sub-Section should be governed by it.

6. Per contra, learned A.G.A.-I has vehemently opposed the bail application on the ground that the applicant has not raised any objection at the trial court regarding non-compliance of Section 6, regarding the case being tried by the Special Court under the NIA Act. Had so been the case, the trial would have been proceeded before the Sessions Judge.

7. He has further placed much reliance on Section 10 of the NIA Act, which reads as follows :-

" **10. Power of State Government to investigate Scheduled Offences.-** Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force."

8. Learned A.G.A.-I has also placed much reliance on Section 21 of the NIA Act, which reads as under :-

"21. Appeals.-(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a bench of two

Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty 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 thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days."

9. Learned A.G.A.-I has stated that as per sub-section (4) of Section 21, it is stated that notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court regarding bail. The same has to be heard by a division bench of the High Court. Learned A.G.A.-I has further stated that offence committed herein is also under Section 121(A) which is the scheduled offence and the said scheduled offence can be tried by a Special Court as provided under Section 10 of the NIA Act. The Schedule is being reproduced hereinunder :-

THE SCHEDULE

[See Section 2(1)(f)]

1. The Explosive Substances Act, 1908 (6 of 1908)

1-A. The Atomic Energy Act, 1962 (33 of 1962);

2. The Unlawful Activities (Prevention) Act, 1967 (37 of 1967);

3. The Anti-Hijacking Act, 1982 [2016 (30 of 2016)];

4. The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982 (66 of 1982);

5. The SAARC Convention (Suppression of Terrorism) Act, 1993 (36 of 1993);

6. The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (69 of 2002);

7. The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (21 of 2005);

8. Offences under-

a. Chapter VI of the Indian Penal Code (45 of 1860) [sections 121 to 130 (both inclusive);

b. Sections 370 and 370-A of Chapter XVI of the Indian Penal Code (45 of 1860);

c. Sections 489-A to 489-E (both inclusive) of the Indian Penal Code (45 of 1860)..

d. Sub-section (1-AA) of section 25 of Chapter V of the Arms Act, 1959 (54 of 1959);

e. Section 66-F of Chapter XI of the Information Technology Act, 2000 (21 of 2000).

10. Learned A.G.A.-I has stated that the judgment referred to by the learned Senior Counsel does not apply to the present case, as by that time, there was no notification by the State Government for establishing the Special Courts. The Special Court has been established in the State of U.P. on 20.04.2021. The notification is as under:-

UTTAR PRADESH SHASAN
GRIH (POLICE) ANUBHAG-9

In pursuance of the provisions of clause (3) of Article 348 of the Constitution of India, the Governor is pleased to order the publication of the following English translation of notification no. 1002/VI-P-9-21-31(75)/2017, dated April 20, 2021.

NOTIFICATION
No. 1002/VI-P-9-21-31(75)/2017
Lucknow: Dated: April 20, 2021

In exercise of the powers conferred under sub-section (1) of Section 22 of the National Investigation Agency Act, 2008 (Act No. 34 of 2008), the Governor with the concurrence of Hon'ble High Court of Judicature at Allahabad, is pleased to designate the 3rd Senior most Court of Additional District and Session Judge, Lucknow as Special Court having territorial jurisdiction of whole state of Uttar Pradesh for the trial of all offences as specified in the Schedule appended to the aforesaid Act, which are investigated by Anti-Terror Squad/State Police of Uttar Pradesh.

By Order,

(Awanish Kumar Awasthi)
Additional Chief Secretary

11. Learned A.G.A.-I has further stated that the present FIR No. 09 of 2020 was lodged on 20.6.2021 i.e. after the notification of the State Government and the applicant is in jail since 22.9.2021 and the bail was rejected on 03.02.2022. All these events have occurred after the establishment of Special Courts by the State Government.

12. Learned A.G.A.-I has further stated that in the present subject matter, a letter has been sent by the Inspector General, ATS, Uttar Pradesh, Lucknow, Dr. G.K. Goswami, on September, 2, 2021 wherein a report has been sent to the Home Department vide letter no. ATS-25-2-(09)/2021/6939 regarding the present case. It has further been stated that the Special Secretary, Home State of U.P. has sent a letter to the Ministry of Home Affairs, Government of India to the same effect.

13. Learned A.G.A.-I has placed much reliance on Section 22 of the NIA Act, which reads as under :-

" 22. Power of State Government to designate Court of Session as Special Courts.-- (1) The State Government may designate one or more Courts of Session as Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts designated by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely:-

(i) references to "Central Government" in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government";

(iii) reference to "Attorney-General for India" in sub-section (3) of section 13 shall be construed as reference to "Advocate-General of the State".

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is designated by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is designated by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted."

14. Learned A.G.A.-I has stated that on the date when the Special Court was designated by the State Government, the trial of any offence investigated by the State Government under the provisions of the NIA Act, it would have been required to be held before the Special Court shall stand transferred to that Court on the date, it is constituted.

15. Learned A.G.A.-I has further stated that under Section 22, the word "Agency" which has been used in sub-section (1) of Section 13 shall be construed as a reference to "Investigation Agency of the State Government". To buttress his arguments, learned Senior counsel has placed much reliance on the judgment of the Supreme Court passed in **Bikramjit Singh versus State of Punjab,2** wherein it has been stated that:-

"26. Before the NIA Act was enacted, offences under the UAPA were of two kinds - those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's Courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Session. This Scheme has been completely done away with by the NIA Act, 2008 as all Scheduled Offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Sessions alone. Thus, under the aforesaid Scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgement has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial inter alia upon a police report of such facts."

16. Learned A.G.A.-I has stated that scheduled offences, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under the NIA Act.

Section 13(1) of the NIA Act, which begins in a notion reads as under :-

"13. Jurisdiction of Special Courts.-(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed."

17. The aforesaid Section 13(1) of the NIA Act begins with a *non-obstante* clause, which is notwithstanding anything contained in the Code, read with Section 22(2)(ii), states that every Scheduled Offence that is investigated by the Investigation Agency of the State Government is to be tried exclusively by the Special Court within whose jurisdiction it was committed.

18. When the cases pertaining to the scheduled offence are to be tried by a Special Court, then Section 21 of the NIA Act would categorically apply to the case and an appeal shall only lie to the said case, before a division bench of the High Court.

19. Thus, it follows from the aforesaid averments of the parties that the Special Court in the State has been established vide notification no. 1002/VI-P-9-21-31(75)/2017, and the bail application of the applicant has been rejected by the Special Court under NIA Act vide order dated 3.2.2022. No objection whatsoever, has been raised by the applicant before the designated court and the provisions of Section 21(4) are applicable to the present case. Furthermore, Section 6 of the NIA Act has been complied with. The bail application filed without jurisdiction before this Court is, thus, not maintainable.

20. The bail application is **dismissed** with a liberty to file an application for appeal under Section 21 of the NIA Act before the appropriate bench.

21. The counsel for the applicant shall be returned the certified copies of the orders and other relevant documents, after keeping photocopies thereof, as per the Rules of the Allahabad High Court.

(2022)06ILR A1032
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.06.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 12510 of 2019

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

Counsel for the Applicant:
Mahesh Singh Yadav, Avdhesh Kumar Singh Yadav, Ganga Sagar Mishra, Ratnesh Singh Tomar

Counsel for the Opposite Party:
G.A., Munni Lal Yadav

A. Stringent provisions of the P.O.C.S.O. Act can be done away with under the extra-ordinary circumstances of the case.

Application allowed. (E-12)

List of Cases cited:-

1. Atul Mishra Vs St. of U.P. & ors. 2022(3) ALJ 78

2. Dataram Singh Vs St. of U.P. & anr. (2018)3 SCC 22

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the material placed on record.

2. Applicant seeks bail in Case Crime No.193 of 2019, under Sections 363, 366, 504, 506, 376 IPC & Sections 3/4 of P.O.C.S.O. Act, Police Station Mitauli, Distric

3. The counsel for the victim is regularly absent since last so many dates. The hearing cannot be stalled on account of non cooperation of one counsel.

4. As per prosecution story, the applicant is stated to have enticed away the minor daughter of the informant in the night of 16/17.05.2018 at about 2:00 am. As per the allegations in the FIR, the date of birth of the victim is stated to be 13.11.2004 and the applicant is stated to have left her alone outside the village on 12.12.2018 i.e. after a period of about six months. The victim was found pregnant at that time and is stated to have given birth to a female child on 31.12.2018.

5. Learned counsel for the applicant has stated that he was madly love with the victim and out of fear of the villagers had eloped with the victim and had undergone marriage in a temple although the said marriage is not registered. Learned counsel for the applicant has further stated that although the statement of the victim recorded under Section 164 Cr.P.C. is against the applicant, but the same has been garnered out of fear of the family members of the girl. The applicant and the victim belong to the same village and the same community. He further argued that the applicant proposes to rear his child as he is the father and he is very much willing to keep his married wife and the newborn baby with him. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. The applicant is languishing in jail since 01.10.2019. In case, the applicant is released on bail, he will not misuse the liberty of bail. There are no criminal antecedents of the applicant.

6. Per contra, Sri Girjesh Kumar Dwivedi, learned A.G.A. has vehemently opposed the bail application but has not disputed the fact that out of the said union of the couple, a baby girl was born on 31.12.2018 and she is more than three and half years of age as present, who is being taken care of by the parents of the victim, although he has not disputed the fact that the applicant has no criminal history.

7. The matter shatters the conscious of one and all. What is the fault of the new born baby who has come to world under such circumstances?

8. Admittedly, as per the radiological examination report, the age of the victim is between 18-20 years, which is on record as filed in supplementary affidavit dated 13.01.2022. Thus, the victim can be stated to be major at the time of offence.

9. In this conservative and non-permissive society, it is true that marriage in the same village is prohibited and is not

customary, and it may be an after effect of media and cinema. Instances of marriage in the same village are on the rise. This does adversely affect the social fabric. Both the accused and the victim are of very young age and have barely attained the age of majority. A baby girl has been born out of their wedlock. Though, the marriage may not be described as per the law of the land, but the Court has to apply a pragmatic approach in such conditions and indeed both the families are required to act practically. A lot of water has flown down the Ganges. Now, it's time to move ahead.

10. The youth in their tender age become victim to the legal parameters though rightly framed by the legislature, but here this Court is being drawn to make an exception in the extraordinary circumstances of the case. The life of a newborn child is at stake. She cannot to be left to face the stigma during her life.

11. The mathematical permutations and combinations have to be done away with. A hypertechnical and mechanical approach shall do no good to the parties and why should an innocent baby out of no fault of her bear the brutalities of the society in the present circumstances. Human psychosis and that too of the adolescents has to be taken into account.

12. This Court in the case of ***Atul Mishra vs. State of U.P. And 3 others1***, has also done away with the stringent provisions of the P.O.C.S.O. Act under the extra-ordinary circumstances of the case.

13. Keeping in view the nature of the offence, evidence on record regarding complicity of the accused, larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of ***Dataram Singh Vs. State of U.P. and another2***, and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

14. Let the applicant- **Ramshankar**, who is involved in aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) The applicant is being released on bail on the assurance of the learned counsel for the applicant that he is very much willing to take care of his wife (victim) and the infant. The applicant shall deposit (fixed deposit) a sum of Rs.2,00,000/- in the name of new born child of the victim till her attaining the age of majority within a period of six months from the date of release from jail.

(ii) 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.

(iii) 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 IPC.

(iv) 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 IPC.

(v) 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.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2022)06ILR A1035
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Misc. 2nd Bail Application No. 33746 of 2020

Praveen Pal ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ravi Kumar Singh, Sri Mohit Singh, Sri V.P. Srivastava (Senior Adv.)

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

The examination of material either by the Forensic Analyst or Chemical Analyst is an integral part of investigation which may provide a link regarding the cause of death or give a lead in the matter. The same is very relevant for the proper investigation and even for the courts judging the case in the trial. The chargesheets are submitted without the reports of the Forensic Lab or Chemical Analyst, the investigation cannot be said to be completed without the report (s) of the experts to whom materials 5 are sent for their opinion. As the prosecution relies on the said part of evidence also, it cannot be said that the investigation has concluded in spite of the reports not being received. A tendency has developed of filing of the said reports of the experts through a supplementary charge sheet at a much much later stage. In the meantime the accused suffers the rigorous of jail and explores the remedy available to him for bail and even as per the facts of the present case all the witnesses have been examined in the trial but the said report is still awaited in spite of a letter and it's reminder by the concerned trial court to a responsible officer of the laboratory for sending a report by examining the contents out of turn. This system cannot be given a knot. It has to be deprecated. This Court apart from its inherent power has power of superintendence also. It cannot shut its eye to grave irregularities, when they are brought to its notice or even comes to its knowledge.

Application dismissed. (E-12)

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Ravi Kumar Singh, learned counsel for the applicant and Sri Sanjay Kumar Singh, learned counsel for the State and perused the records.

2. Personal affidavit of Sri Ashok Kumar, Deputy Director, Forensic Science

Laboratory, U.P., Agra has been filed today which is taken on record. He is present in Court in compliance of the order dated 6.4.2022 of this Court.

3. Personal affidavit of Sri Badugu Deva Paulson, Secretary (Home), Government of U.P., Lucknow has also been filed today which is taken on record.

4. Personal affidavit of Sri Mukul Goel, Director General of Police, U.P., Lucknow has also been filed today which is taken on record.

5. Learned counsel for the applicant states that the present bail application has rendered infructuous as the trial has concluded and the applicant has been convicted, as such the same may be dismissed as not pressed.

6. Although a prayer has been made to dismiss the bail application as not pressed but since compliance affidavits have been filed by the concerned officials as stated above in compliance of the order dated 6.4.2022 of this Court, it would be necessary to refer to them as the said matter is in the larger interest of justice before closing the issue.

7. On 6.4.2022, following order was passed by this Court:-

"Heard Sri Ravi Kumar Singh, learned counsel for the applicant and Sri Sanjay Kumar Singh, learned counsel for the State.

This is the second bail application on behalf of the applicant. The first bail application of the applicant was rejected by this Court vide order dated 6.2.2020 passed in Criminal Misc. Bail Application No.4779 of 2020. While rejecting the said bail application, this Court had expedited the trial and directed to conclude the same as expeditiously as possible, preferably within six months from the date of production of certified copy of the same. The said order was filed before the trial court on 3.3.2020.

Learned counsel for the applicant argued that the applicant is in jail since 23.04.2018 and the trial has not concluded. This Court vide order dated 27.10.2021 directed the District Judge, Meerut to send the report regarding the stage of trial and compliance of the order dated 06.02.2020 passed by this Court. The order passed on 27.10.2021 is quoted here-in-below:-

"Heard Sri Ravi Kumar Singh, learned counsel for the applicant and Sri Akhilesh Kumar Tripathi, learned counsel for the State.

This is the second bail application on behalf of the applicant. The first bail application of the applicant was rejected by this Court vide order dated 6.2.2020 passed in Criminal Misc. Bail Application No.4779 of 2020.

Learned counsel for the applicant argued that the order rejecting the first bail of the applicant was filed before the trial court on 3.3.2020 and even then the trial is pending and has not yet concluded. He has placed the certified copy of the order sheet which is annexed as annexure no.23 to the affidavit filed in support of bail application. The applicant is in jail since 23.04.2018.

Looking to the arguments of the learned counsel for the applicant, let a report from the District Judge, Meerut be called within three weeks from today

regarding the stage of trial and compliance of the order dated 06.02.2020 passed by this Court.

The office to communicate this order to the concerned District Judge within a week from today.

Let the matter be listed in the week commencing 22.11.2021 along with report received from the District Judge, Meerut."

The report of the In-Charge Additional Sessions Judge/Special Judge, Special Court No.2 (Prevention of Corruption Act), Meerut dated 17.11.2021 is on record.

A perusal of the said report shows that the statement of P.W.1 Phool Chand Singh was recorded on 4.9.2019, statement of P.W.2 Umesh Chand was recorded on 15.11.2019, statement of P.W.3 and 4 Monu and Devendra Saini was recorded on 18.2.2020. Subsequently the certified copy of the order dated 6.2.2020 was filed before the trial court on 5.3.2020, after it, statement of P.W.5 S.I. Ajay Kumar was recorded on 18.3.2020, statement of P.W.6 Dr. Vinod Kumar Singh was recorded on 16.10.2020 and 8.1.2021, statement of P.W.7 Constable Clerk Rambir Singh was recorded on 4.11.2020, statement of P.W.8 Dr. Shashank Mishra was recorded on 21.12.2020 and statement of P.W.9 S.I. Sunir Kumar was recorded on 10.8.2021. The report of the Forensic Lab with regards to the examination of the alleged weapon of assault has not reached the Court and as such the same was summoned. The trial court sent a letter dated 7.9.2021 and subsequently a reminder dated 11.11.2021 to the Forensic Science Laboratory, Agra for summoning the said report and even stating to the Joint Director that if the said item has not reached it's number, it should be examined on priority and a report be sent immediately. The report of the concerned trial Judge states that except for the report of the Forensic Lab, trial is almost complete.

This situation is alarming.

The investigation concluded and charge sheet was submitted which appears to have been submitted without the report of the Forensic Lab. The charges were framed and the evidence of all the witnesses have been examined as is evident from the report dated 17.11.2021 of the Trial Judge sent by the In-Charge District Judge with his letter dated 17.11.2021. The delayed examination of material in the Forensic Lab appears to be a routine now. In spite of the order of this Court and also various orders of other Courts, the system has not improved and it appears that the same have no effect and there is no anxiety by anyone to improve the system. The present case is glaring example of it. The applicant is in jail since 23.04.2018. The only impediment in conclusion of trial as of now is non-receipt of the report of the Forensic Lab. The letter and it's reminder by the trial court to the Joint Director, Forensic Laboratory, Agra also appear to have been kept pending in a routine manner without any action on it. Even the minimum courtesy of reciprocating the said letter and its reminder was not resorted to by the concerned officer. An order/direction/request from a court is expected to be honoured.

This Court in Crl. Misc. Bail Application No.14403 of 2021 "Tahir Khan Vs. State of U.P." vide order dated

11.11.2021 wherein viscera was preserved and the report was not made available had shown it's displeasure in delayed examination of the same by the Forensic Lab and had directed the Director General of Police, U.P., Lucknow and the Secretary, Homes, Government of U.P., Lucknow to take up the issue at their end for it's expeditious examination to help the Investigating Agencies so that the same would not be an impediment before the courts in deciding matters. It appears that in spite of the said order no system has been evolved and the matter is not being looked seriously by the concerned authorities. It is reiterated that the examination of material either by the Forensic Analyst or Chemical Analyst is an integral part of investigation which may provide a link regarding the cause of death or give a lead in the matter. The same is very relevant for the proper investigation and even for the courts judging the case in the trial. The charge-sheets are submitted without the reports of the Forensic Lab or Chemical Analyst, the investigation cannot be said to be completed without the report (s) of the experts to whom materials are sent for their opinion. As the prosecution relies on the said part of evidence also, it cannot be said that the investigation has concluded in spite of the reports not being received. A tendency has developed of filing of the said reports of the experts through a supplementary charge sheet at a much much later stage. In the meantime the accused suffers the rigorous of jail and explores the remedy available to him for bail and even as per the facts of the present case all the witnesses have been examined in the trial but the said report is still awaited in spite of a letter and it's reminder by the concerned trial court to a responsible officer of the laboratory for sending a report by examining the contents out of turn. This system cannot be given a knot. It has to be deprecated.

This Court apart from its inherent power has power of superintendence also. It cannot shut its eye to grave irregularities, when they are brought to its notice or even comes to its knowledge.

Looking to the facts of the matter as stated above, let personal affidavits be filed by the Director General of Police, U.P., Lucknow and the Secretary, Home, Government of U.P., Lucknow informing the Court as to what steps are being taken by them for expeditious examination of materials sent to the experts for analysis. The said affidavit be filed within three weeks from today.

The Director, Forensic Science Laboratory, Agra is directed to appear before this Court on the next date and explain as to why the letter dated 7.9.2021 and its reminder dated 11.11.2021 sent by the trial court has not been acted upon.

The Registrar General, High Court shall communicate this order to the concerned officers forthwith. Learned A.G.A. for the State shall also communicate it them for immediate compliance."

8. In response to the same, the affidavit of Deputy Director, Forensic Science Laboratory, U.P., Agra states that the examination report dated 03.03.2021 was sent to the Senior Superintendent of Police, Meerut by speed post on 3.3.2021 itself. Thereafter a reminder was sent for the same by the Circle Officer, Daurala, Meerut on 24.9.2021 through special messenger asking for the report to whom it was communicated that the said report

dated 3.3.2021 has already been sent by post. Still in response to the said reminder, a second copy of the said report was sent on 24.12.2021 by Special Messenger Constable 1599 Shiv Pratap of Police Station Kankarkhera, District Meerut. The Station House Officer of Police Station Kankarkhera, District Meerut informed the Senior Superintendent of Police, Meerut that the report in question had been submitted in the Court of Additional Sessions Judge/Special Judge, District Meerut on 24.12.2021 and the evidence has completed and the matter has been fixed for 20.4.2022 for delivery of judgement. The judgement has been delivered on 20.04.2022 convicting the accused appellant Praveen Pal.

9. .2022 stating about the steps being taken for expediting the examination of samples of the Forensic Science Laboratory so that the investigating agencies would be expediting the cases and also in order to remove the impediment caused by delay in deciding the cases before the courts. The steps which are being taken have been stated in para nos.6 to 14 of the said affidavit, the same are reproduced hereunder:-

"6. That with regard to the issue pertaining to the examination of samples by the Forensic Science Laboratories, so that the investigating agencies would be held in expediting cases and in expediting the cases and in order to remove the impediment caused by delay in deciding the cases before the courts, the steps taken are stated hereunder:-

7. That it is most humbly submitted that at present, the examination of samples is being conducted at the Forensic Science Laboratories situated at Lucknow, Agra, Varanasi, Moradabad, Ghaziabad, Prayagraj, Jhansi and Gorakhpur.

8. That a decision had earlier been taken by the State Government to establish Forensic Science Laboratory for all the 18 Ranges. At present, the Forensic Science Laboratories at Lucknow, Agra, Varanasi, Moradabad, Ghaziabad, Prayagraj, Jhansi and Gorakhpur have been established and are functional ***annexure no.1 to this affidavit.***

9. That the construction of the buildings for the Forensic Science Laboratories is in progress at Kannauj, Aligarh, Gonda and Bareilly. The process for establishment of Forensic Science Laboratory at Basti, Mirzapur, Azamgarh, Banda, Ayodhya and Saharanpur is ongoin. For kind and convenient referral and perusal by this Hon'ble Court, a chart reflecting the status for establishment of Forensic Science Laboratories Pan State is being enclosed herewith and marked as ***annexure no.2 to this affidavit.***

10. That, out of 64 posts of Scientific Officers (direct recruitment), 22 Scientific Officers have been issued appointment letters. The recruitment to the remaining posts is under process. Out of 117 Scientific Assistants who have been selected by the Uttar Pradesh Subordinate Services Selection Commission, appointment letters to 72 of them have been issued on 13.04.2022, appointment letters to remaining successful candidates will be issued after their medical examination and character verification reports are received.

11. That by office memo dated 15.11.2021, the State Government has granted approval for the Forensic Science

Laboratory Technical Officer Service Rules (First mendment) and remaining vacant posts shall be duly filled expeditiously thereby reducing the duration of the pendency of examination of samples, due to the availability of more trained personnel and necessary man power. A copy of office memo 15.11.2021 dated issued by the Home Police (Anubhag - 9), Government of Uttar Pradesh, Lucknow is being enclosed herewith and marked s ***annexure no.3 to this affidavit.***

12. That by letters dated 05.11.2018, 12.11.2018 and 17.11.2021 issued by the Director, Forensic Science Laboratory, Lucknow addressed to the incharge of all regional Forensic Science Laboratories Pan State and have been directed to accord top priority to the examination of samples in the matters related to murder and dowry death. Copies of the letters dated 05.11.2018, 12.11.2018 and 17.11.2021 issued by the Director, Forensic Science Laboratory, Lucknow addressed to all the Forensic Science Laboratories Pan State are being enclosed herewith and marked s ***annexure no.4 to this affidavit.***

13. That it is most humbly submitted that every effort is being made to establish Forensic Science Laboratory Pan State and to appoint the requisite number of personnel, including scientific officers to ensure that the time taken in the examination of samples is reduced and so that the justified concern expressed by the Hon'ble Court in the aforesaid context is satisfactory and duly addressed.

14. That it is humbly submitted that the deponent is aware that the reports of the examination of material by the Forensic Analyst or Chemical Analyst, and the reports submitted after examination of a sample by the Forensic Science Laboratory, are an integral part of the investigation and the judicial process, and therefore, he assures this Hon'ble Court that deligent efforts will be made to ensure expeditious examination of samples and the obtaining of the reports thereof."

10. The Director General of Police, U.P., Lucknow has also vide his identically worded affidavit dated 29.04.2022 stated about the steps being taken for expeditious disposal of samples by the Forensic Science Laboratory for facilitating the investigating agencies and expediting the cases before the courts. The same have been stated from para nos.6 to 14 of the same which are reproduced hereunder:-

"6. That with regard to the issue pertaining to the examination of samples by the Forensic Science Laboratories, so that the investigating agencies would be held in expediting cases and in order to remove the impediment caused by delay in deciding the cases before the learned courts, the steps taken are stated hereunder:-

7. That it is most humbly submitted that at present, the examination of samples is being conducted at the Forensic Science Laboratories situated at Lucknow, Agra, Varanasi, Moradabad, Ghaziabad, Prayagraj, Jhansi and Gorakhpur.

8. That a decision had earlier been taken by the State Government to establish Forensic Science Laboratory for all the 18 Ranges. At present, the Forensic Science Laboratories at Lucknow, Agra,

*Varanasi, Moradabad, Ghaziabad, Prayagraj, Jhansi and Gorakhpur have been established and are functional a**nnexure no.1 to this affidavit.***

*9. That the construction of the buildings for the Forensic Science Laboratories is in progress at Kannauj, Aligarh, Gonda and Bareilly. The process for establishment of Forensic Science Laboratory at Basti, Mirzapur, Azamgarh, Banda, Ayodhya and Saharanpur is ongoin. For kind and convenient referral and perusal by this Hon'ble Court, a chart reflecting the status for establishment of Forensic Science Laboratories Pan State is being enclosed herewith and marked as **annexure no.2 to this affidavit.***

10. That, out of 64 posts of Scientific Officers (direct recruitment), 22 Scientific Officers have been issued appointment letters. The recruitment to the remaining posts is under process. Out of 117 Scientific Assistants who have been selected by the Uttar Pradesh Subordinate Services Selection Commission, appointment letters to 72 of them have been issued on 13.04.2022, appointment letters to remaining successful candidates will be issued after their medical examination and character verification reports are received.

*11. That by office memo dated 15.11.2021, the State Government has granted approval for the Forensic Science Laboratory Technical Officer Service Rules (First amendment) and remaining vacant posts shall be duly filled expeditiously thereby reducing the duration of the pendency of examination of samples, due to the availability of more trained personnel and necessary man power. A copy of office memo 15.11.2021 dated issued by the Home Police (Anubhag - 9), Government of Uttar Pradesh, Lucknow is being enclosed herewith and marked s **annexure no.3 to this affidavit.***

*12. That by letters dated 05.11.2018, 12.11.2018 and 17.11.2021 issued by the Director, Forensic Science Laboratory, Lucknow addressed to the incharge of all regional Forensic Science Laboratories Pan State and have been directed to accord top priority to the examination of samples in the matters related to murder and dowry death. Copies of the letters dated 05.11.2018, 12.11.2018 and 17.11.2021 issued by the Director, Forensic Science Laboratory, Lucknow addressed to all the Forensic Science Laboratories Pan State are being enclosed herewith and marked s **annexure no.4 to this affidavit.***

13. That it is most humbly submitted that every effort is being made to establish Forensic Science Laboratory Pan State and to appoint the requisite number of personnel, including scientific officers to ensure that the time taken in the examination of samples is reduced and so that the justified concern expressed by the Hon'ble Court in the aforesaid context is satisfactory and duly addressed.

14. That it is humbly submitted that the deponent is aware that the reports of the examination of material by the Forensic Analyst or Chemical Analyst, and the reports submitted after examination of a sample by the Forensic Science Laboratory, are an integral part of the investigation and the judicial process, and therefore, he assures this Hon'ble Court that deligent efforts will be made to ensure expeditious examination of samples and the obtaining of the reports thereof."

11. In view of the affidavits of Secretary (Home), Government of U.P.,

Lucknow and Director General of Police, U.P., Lucknow, it is evident that steps are being taken for early examination of samples by the Forensic Science Laboratory. This Court has no reason and occasion to doubt the same. The efforts as enumerated in both the affidavits are expected to be seriously and effectively undertaken so that the samples at the Forensic Science Laboratory are examined in an expeditious manner. This Court hopes and trusts that the efforts of the Government in setting up additional laboratories and making them functional will continue in its true spirit and will yield positive results enabling expeditious examinations of samples which would lead to expeditious investigations and trials. Even the steps for gearing up the infrastructure of existing ones will also be taken care with all efficacy and interest.

12. The Registrar General of this Court and the learned counsel for the State shall communicate this order to the Secretary (Home), Government of U.P., Lucknow and Director General of Police, U.P., Lucknow for necessary information forthwith.

13. The present bail application is thus consigned to records.

(2022)06ILR A1042
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. 2nd Bail Application No. 45253 of 2021

Dheeraj Kumar Shukla ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Chandra Shekhar Mishra

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 37 --- The power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of subsection (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression `reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with.

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

accused on bail. Although it is established that a court considering a bail application cannot undertake a detailed examination of evidence and an elaborate discussion on the merits of the case, the court is required to indicate the prima facie reasons justifying the grant of bail. Merely recording "having perused the record" and "on the facts and circumstances of the case" does not subserve the purpose of a reasoned judicial order. Though detail evaluation of facts on merit is not permissible, but the Court granting bail cannot obviate its duty to apply its judicial mind and to record reasons, brief as they may be, for the purpose of deciding whether or not to grant bail.

C. Bail orders of the Coordinate Benches, which have been passed without giving reason on merit and without taking note of limitations provided under Section 37 of the N.D.P.S. Act in cases of a recovery of contraband of commercial quantity have no persuasive value and the same is not binding upon this Court. A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well established principle of law. If any illegality is brought to the knowledge of the Court, the same should not be permitted to perpetuate. It is also well settled that no judge is obliged to pass orders against his conscience merely to maintain consistency.

D. Long detention may be relevant for grant of bail in matters arising out of conviction under Penal Code etc., but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-Section (1) of Section 37 of the N.D.P.S. Act. Mere long detention in jail does not entitle an accused to be enlarged on bail pending trial.

E. Fresh arguments in a second bail application for an accused cannot be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected.

Application dismissed. (E-12)

List of Cases cited:-

1. Varinder Kumar Vs St. of H.P., (2020) 3 SCC 321,

2. Kallu Khan Vs St. of Raj., 2021 SCC OnLine SC 1223

3. Dayalu Kashyap Vs St. of Chattisgarh, 2022 SCC OnLine SC 334

4. Chandigarh Administration & anr. Vs Jagjit Singh & anr., AIR 1995 SC 705

5. Rakesh Kumar Pandey Vs Munni Singh @ Mata Bux Singh & anr. Special Leave Petition No. 4059 of 2000

6. Satyendra Singh Vs St. of U.P., 1996 A.Cr.R. 867

7. U.O.I. Vs Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831

8. U.O.I. Vs Ram Samujh, (1999) 9 SCC 429

9. U.O.I. Vs Shiv Shankar Kesari, (2007) 7 SCC 798

10. St. of Kerala Etc. Vs Rajesh Etc. AIR 2020 Supreme Court 721

11. U.O.I. Vs Prateek Shukla (Crl.A. No. 284/2021), AIR 2021 SC 1509

12. The St. (NCT of Delhi) Narcotics Control Bureau Vs Lokesh Chadha, (2021) 5 SCC 724

13. Narcotics Control Bureau Vs Laxman Prasad Soni, Etc. (Criminal Appeal Nos. 438-440 of 2021 decided by the Apex Court on 19.04.2021).

14. U.O.I. Vs Vimla Singh (Criminal Appeal No. 862 of 2021)(SC)(Decided on 19.08.2021)

15. U.O.I. through Narcotics Control Bureau, Lucknow Vs Md. Nawaz Khan, (2021) 10 SCC 100

16. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., (2004) 7 SCC 528

17. Sonu Vs Sonu Yadav & anr., 2021 SCC OnLine SC 286

18. Ms Y Vs St. of Raj. & anr., 2022 SCC OnLine SC 458

19. Mahipal Vs Rajesh Kumar @ Polia & anr., (2020) 2 SCC 118

20. Manoj Kumar Khokhar Vs St. of Raj. & anr., (2022) 3 SCC 501

21. Vijay Kumar Vs Narendra & ors., (2002) 9 SCC 364

22. Ramesh Kumar Singh Vs Jhabbar Singh & ors., 2004 SCC (Cri) 1067

23. Girand Singh Vs St. of U.P., (2010) 69 ACC 39

24. Rajesh Ranjan Yadav @ Pappu Yadav Vs CBI through 21 its Director reported in (2007) 1 SCC 70

25. Satya Pal Vs St. of U.P., (1998) 37 ACC 287

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

1- This is second bail application moved on behalf of the applicant. The first bail application of the applicant has been rejected by detailed order dated 06.07.2021 passed in Criminal Misc. Bail Application No. 42092 of 2020.

2- By means of this second bail application, the applicant-Dheeraj Kumar Shukla, who is involved in Case Crime No. 0325 of 2020, under Sections 8/20 of Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as "N.D.P.S. Act"), police station Jhunsi, district Prayagraj, is seeking enlargement on bail during the pendency of trial.

3- Heard Mr. Chandra Shekhar Mishra, learned counsel for the applicant, Mr. Virendra Kumar Maurya, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, learned Brief holder appearing on behalf of State of U.P. and perused the record.

4- In short compass, the facts of the case as per prosecution case are that on the information of informer, two vehicles white coloured Swift Dzire car and grey coloured Honda City car were intercepted on 23.06.2020 by the police team using necessary force and persons sitting in the vehicles were pulled out. On questioning, they disclosed about transportation of illegal Ganja in the said vehicles. On interrogation at the spot, the apprehended accused persons, who were sitting in Honda City car, disclosed their names as Praveen Maurya alias Punit Maurya (owner), Rishabh Kumar (Driver) and Dhiraj Maurya, whereas person, who was driving Swift Dzire car disclosed his name as Dheeraj Kumar Shukla (applicant). The accused were enlightened about their legal rights to be searched before a Gazetted Officer, to which they declined and gave their consent saying that informant may take their search. Accordingly, they were searched, but no contraband was recovered from their personal search, except mobile phones and some cash amount etc. as mentioned in the recovery memo. On taking search of aforesaid vehicles, total 92.410 Kgs. of Ganja were recovered from the dicky of Honda City car bearing No. MH 04 AF 0076 and 65.160 Kgs. of Ganja were recovered from the dicky of Swift Dzire car bearing No. UP 70 EW 0246. As such, total 157.570 Kgs of illegal Ganja have been recovered in this case. Accused persons could not show the authorization for keeping and transporting the same. Separate samples of about 100-100 grams each of Ganja were taken out from each

packets, thereafter samples and remaining Ganja as well as other recovered materials were separately sealed in white cloths. Specimens of seal were prepared. Accused persons disclosed that they have been engaged in the trafficking of Ganja since last several years. They also disclosed that they purchased the Ganja from one Hari, resident of Kodpad, Odisha and will sell the same on higher price in Prayagraj. Both the aforesaid vehicles were also seized. Contents of recovery memo were explained to the accused persons and after taking their signatures, copy of recovery memo was handed over to them. On the basis of aforesaid recovery, a case was registered against the accused persons at Case Crime No. 0325 of 2020, under section 8/20 of N.D.P.S. Act, police station Jhunsi, district Prayagraj.

5- It is submitted by learned counsel for the applicant that instant second bail application has been moved mainly on the following two new grounds:-

(i)- After rejection of first bail application of the applicant on 06.07.2020, co-accused Sonoo Shukla and Praveen Maurya @ Puneet Maurya have been granted bail by the Coordinate Bench of this Court vide orders dated 14.07.2021 and 14.09.2021 in Criminal Misc. Bail Application Nos. 20323 of 2021 and 44698 of 2020 respectively, therefore, the applicant is also entitled to be released on bail on the ground of parity.

(ii)- Applicant is in jail but trial is not proceeding effectively.

6- Per-contra, learned Additional Government Advocate vehemently opposed the prayer for bail of the applicant by contending that:-

(i)- commercial quantity of Ganja is 20 Kg, whereas in this case total 157.570 Kgs. of illegal Ganja have been recovered (92.410 Kgs. of Ganja was recovered from the dicky of Honda City car bearing No. MH 04 AF 0076 and 65.160 Kgs. of Ganja from the dicky of Swift Dzire car bearing No. UP 70 EW 0246), which are much more than commercial quantity, therefore, provisions of Section 37 of the N.D.P.S. Act are attracted in the present case.

(ii)- co-accused Sonoo Shukla and Praveen Maurya @ Puneet Maurya have been granted bail by the Coordinate Bench vide orders dated 14.07.2021 and 14.09.2021 respectively without considering the mandatory provisions of Section 37 of the N.D.P.S. Act and material on record available in the case diary as well as without giving any reason, therefore, benefit of parity of such bail orders cannot be given to the present applicant.

(iii)- the bail has been obtained by misrepresentation of facts and law. It is submitted that in this case, total 157.570 Kgs "Ganja' was recovered from the dicky of the vehicles in question, therefore, provisions of Section 50 of N.D.P.S. Act is not attracted at all in view of the recent judgments of the Apex Court in the cases of **Varinder Kumar Vs. State of Himachal Pradesh, (2020) 3 SCC 321, Kallu Khan Vs. State of Rajasthan, 2021 SCC OnLine SC 1223 and Dayalu Kashyap Vs. State of Chattisgarh, 2022 SCC OnLine SC 334.**

(iv)- Mr. Maurya, learned A.G.A. has also placed reliance upon following judgments of the Apex Court as well as of this Court:-

(a). In **Chandigarh Administration and another Vs. Jagjit**

Singh and another, AIR 1995 SC 705, the Apex Court in paragraph-8 has held as follows:

"..... 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 and 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 illegal/unwarranted action must be corrected, 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.

"..... Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to 5 public interest. It will be a negation of law and the rule of law."

(b). I**n Special Leave Petition No. 4059 of 2000: Rakesh Kumar Pandey Vs. Munni Singh @ Mata Bux Singh and another,** decided on 12.3.2001, the Hon'ble Apex Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence and while cancelling the bail granted by the High Court it observed that:-

"The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier."

(c). In the case of **Satyendra Singh Vs. State of U.P., 1996 A.Cr.R. 867,** the following observations have been made by this Court :

Para 16: "The orders granting, refusing or cancelling bail are orders of interlocutory nature. It is true that discretion in passing interim orders should be exercised judicially but rule of parity is not applicable in all the cases, where one or more accused have been granted bail or similar role has been assigned inasmuch as bail is granted on the totality of facts and circumstances of a case. Parity can not be a sole ground and is one of the grounds for consideration of the question of bail."

7- Having heard the learned counsel for the parties, I find that the issue that arises for consideration before this Court is *"as to whether the applicant is entitled to be released on bail only on the ground of parity of bail orders dated 14.07.2021 and 14.09.2021 of co-accused Sonoo Shukla and Praveen Maurya @ Puneet Maurya, which have been passed by the Coordinate Bench without considering the mandatory provisions of Section 37 of the N.D.P.S. Act and without giving reasons."*

8- Relevant part of the aforesaid bail order dated 14.07.2021 of co-accused Sonoo Shukla passed by the Coordinate Bench is being reproduced herein below:-

"Heard learned counsel for the applicant, learned A.G.A for the State and perused the record.

It has been argued by learned counsel for the applicant that applicant is innocent and he has been falsely implicated in the present case. It is alleged that 157.570 of Ganja was alleged to be recovered from the vehicle Swift Desire Car No. UP-70-EW-0246, which is registered in the name of accused-applicant. It is further contended that the alleged recovery was not made from the accused-applicant and he was implicated in this case on the ground that he is registered owner of the aforesaid Swift Desire Car. It is further contended that the recovery was made from Dheeraj Kumar Shukla, who is the brother of present accused-applicant from aforesaid Swift Desire Car. It is contended that on arrest of co-accused - Dheeraj Kumar Shukla, he stated that this car belongs to him. His father has purchased in the name of present accused-applicant for use of co-accused Dheeraj. It is further contended that Swift Desire Car No. UP-70-EW-0246 has been released in favour of the accused-applicant by the Court of learned Additional District & Sessions Judge Court No. 10, Allahabad on 15.10.2020. It is further contended that the alleged vehicle was used for transporting of alleged contraband without his knowledge of his brother or without his consent.

Learned A.G.A. has opposed the prayer for bail, but he could not dispute the aforesaid facts and submitted that the alleged recovery was not made from the accused-applicant. He has not disputed the above facts that the alleged vehicle was not released in favour of the accused applicant.

Considering the entire facts and circumstances of the case, submissions of learned counsel for the parties, nature of evidence and all attending facts and circumstances of the case, without expressing any opinion on merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed."

9- Relevant part of bail order dated 14.09.2021 of co-accused Praveen Maurya @ Puneet Maurya passed by the Coordinate Bench is being also reproduced herein below:-

"Heard learned counsel for the applicant, learned AGA, appearing for the State and perused the material brought on record.

It has been contended by the learned counsel for the applicant that 92.410 kilograms contraband article, i.e. Ganja, is said to have been recovered from the vehicle in which the applicant and one co-accused were sitting along with the driver. He further submits that there is no compliance of mandatory provisions of Section 50 N.D.P.S. Act, hence the recovery is bad in the eyes of law. It has also been submitted that the applicant is languishing in jail since 24.06.2020. The applicant has no other reported criminal antecedent.

Learned A.G.A. has vehemently opposed the prayer.

Courts have taken notice of the overcrowding of jails during the current pandemic situation (Ref.: Suo Motu Writ Petition (C) No. 1/2020, Contagion of COVID 19 Virus in prisons before the Supreme Court of India). These circumstances shall also be factored in while considering bail applications on behalf of accused persons.

Having heard the submissions of learned counsel of both sides, nature of

accusation and the severity of punishment in case of conviction and the nature of supporting evidence, prima facie satisfaction of the Court in support of the charge, reformative theory of punishment, and larger mandate of the Article 21 of the Constitution of India, the dictum of Apex Court in the case of Dataram Singh v. State of U.P. and another, reported in (2018) 2 SCC 22 and without expressing any opinion on the merit of the case, I find it to be a case of bail."

10- Before delving into the matter, it is apposite to quote the Section 37 of N.D.P.S. Act, which are as follows:-

*"**37. Offences to be cognizable and non-bailable.** - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-*

a- every offence punishable under this Act shall be cognizable;

b- no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless

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

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

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

11- On several occasions, the Apex Court has considered the issue relating to provisions of Section 37 of the N.D.P.S. Act and after wholesome treatment laid down guidelines in this regard observing inter alia that recording of finding in terms of Section 37 of N.D.P.S. Act is a sine qua non for granting bail under N.D.P.S. Act. Reference of some of the relevant decisions are as follow:-

(i). The expression 'reasonable grounds' has not been defined in the N.D.P.S. Act, but the Apex Court in the case of **Union of India Vs. Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831,** has settled the expression "reasonable grounds". Relevant paragraphs no. 12, 13 and 14 are quoted herein below:

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

alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression `reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

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

(ii). In case of **Union of India Vs. Ram Samujh, (1999) 9 SCC 429**, Apex Court has made following observations in paragraph 7 of the said judgment, which are reproduced herein below:-

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didien v. Chief Secretary. Union Territory of Goa. [1990] 1 SCC 95 as under:

"24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985

specifying mandatory minimum imprisonment and fine."

(iii). In **Union of India Vs. Shiv Shankar Kesari, (2007) 7 SCC 798,** Apex Court elaborated and explained the conditions for granting of bail as provided under Section 37 of the Act. Relevant paragraph Nos. 6 and 7 are extracted here in below :-

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b) (ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."

(iv). In **State of Kerala Etc. Vs. Rajesh Etc. AIR 2020 Supreme Court 721,** Apex Court again considered the scope of Section 37 of N.D.P.S. Act and relying upon earlier decision in Ram Samujh (Supra) held as under:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

(v). The Apex Court in **Union of India vs Prateek Shukla (Crl.A. No. 284/2021), AIR 2021 SC 1509** has held that merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious

application of mind. The provisions of Section 37 of the N.D.P.S. Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. The relevant paragraph nos. 11 of the said judgment are reproduced herein under :

"11. Ex facie, there has been no application of mind by the High Court to the rival submissions and, particularly, to the seriousness of the allegations involving an offence punishable under the provisions of the NDPS Act. Merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind by the Single Judge of the High Court to the basic question as to whether bail should be granted. The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. There has been a serious infraction by the High Court of its duty to apply the law....."

NOTE:- Here it is also relevant to mention that in the case of Prateek Shukla (supra), Review Petition (Crl.) No.323 of 2021 was filed but the same was rejected by the Apex Court vide order dated 17.08.2021.

(vi). The Apex Court in the matter of **The State (NCT of Delhi) Narcotics Control Bureau Vs. Lokesh Chadha, (2021) 5 SCC 724** has held that :

".....Section 37 of the NDPS Act stipulates that no person accused of an offence punishable for the offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail, where the Public Prosecutor oppose the application, unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

(vii). **Narcotics Control Bureau Vs. Laxman Prasad Soni, Etc. (Criminal Appeal Nos. 438-440 of 2021 decided by the Apex Court on 19.04.2021).**

In the said case, there was recovery of 229 Kgs. of Ganja from the possession of accused persons. Out of which 25 Kgs. of Ganja was recovered from one vehicle occupied by the accused. There was another vehicle namely truck in which rest of the contraband material was found. The accused persons, who were arrested along with 25 Kgs. Ganja have been granted bail by the co-ordinate Bench of this Court vide order dated 23.09.2019 in Criminal Misc. Bail Application Nos. 38036 of 2019, 38066 of 2019 and 38048 of 2019 without considering provisions of Section 37 of the N.D.P.S. Act.

The aforesaid order dated 23.09.2019 has been set-aside by the Apex Court on account of the reason that the applications for bail were allowed by the High Court without considering the import and effect of Section 37 of the N.D.P.S. Act.

(viii). The Apex Court in **Union of India v. Vimla Singh**, decided on 19.08.2021 in Criminal Appeal No. 862 of 2021, has set-aside the bail order passed by High Court to four accused on the ground that High Court has not taken into account the effect and rigour of Section 37 of the N.D.P.S. Act.

(ix). The Apex Court in the case of **Union of India through Narcotics**

Control Bureau, Lucknow vs. Md. Nawaz Khan, (2021) 10 SCC 100 has held that:-

"23.....the test which the High Court and this Court are required to apply while granting bail is also for offences involving commercial quantity shall be released on bail, where there are reasonable grounds for believing that he is not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menance of drug-trafficking in the country, stringent parameters for grant of bail under the NDPS Act have been prescribed."

12- The Apex Court in several cases deprecated the practice of passing bail orders without giving reasons. In order to deal the issue involved in the case in hand, it would be useful to refer following judgments of the Apex Court.

(i). The Apex Court in **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and another, (2004) 7 SCC 528** has held that:-

"....although it is established that a court considering a bail application cannot undertake a detailed examination of evidence and an elaborate discussion on the merits of the case, the court is required to indicate the prima facie reasons justifying the grant of bail."

(ii). The Apex Court in the case of **Sonu vs Sonu Yadav and another, 2021 SCC OnLine SC 286** has observed that an order without reasons is fundamentally contrary to the norms which guide the judicial process. The administration of criminal justice by the High Court cannot be reduced to a mantra containing a recitation of general observations. That there has been a judicious application of mind by the judge who is deciding an application under Section 439 of the CrPC must emerge from the quality of the reasoning which is embodied in the order granting bail.

The relevant paragraph nos. 11 and 12 of the said judgments are reproduced herein under:-

"11. In the earlier part of this judgment, we have extracted the lone sentence in the order of the High Court which is intended to display some semblance of reasoning for justifying the grant of bail. The sentence which we have extracted earlier contains an omnibus amalgam of (i) "the entire facts and circumstances of the case"; (ii) "submissions of learned Counsel for the parties"; (iii) "the nature of offence"; (iv) "evidence"; and (v) "complicity of accused". This is followed by an observation that the "applicant has made out a case for bail", "without expressing any opinion on the merits of the case". This does not constitute the kind of reasoning which is expected of a judicial order. The High Court cannot be oblivious, in a case such as the present, of the seriousness of the alleged offence, where a woman has met an unnatural end within a year of marriage. The seriousness of the alleged offence has to be evaluated in the backdrop of the allegation that she was being harassed for dowry; and that a telephone call was received from the accused in close-proximity to the time of death, making a demand. There are specific allegations of harassment against the accused on the ground of dowry. An order

without reasons is fundamentally contrary to the norms which guide the judicial process. The administration of criminal justice by the High Court cannot be reduced to a mantra containing a recitation of general observations. That there has been a judicious application of mind by the judge who is deciding an application under Section 439 of the CrPC must emerge from the quality of the reasoning which is embodied in the order granting bail. While the reasons may be brief, it is the quality of the reasons which matters the most. That is because the reasons in a judicial order unravel the thought process of a trained judicial mind. We are constrained to make these observations because the reasons indicated in the judgment of the High Court in this case are becoming increasingly familiar in matters which come to this Court. It is time that such a practice is discontinued and that the reasons in support of orders granting bail comport with a judicial process which brings credibility to the administration of criminal justice.

12. For the above reasons, we are of the view that the order of the High Court granting bail without due application of mind to the relevant facts and circumstances as well to the provisions of the law requires the interference of this Court."

(iii). The Apex Court in the matter of **Ms Y versus State of Rajasthan and another, 2022 SCC OnLine SC 458** considering the earlier decisions as well as judgment of the Apex Court in the matter of **Mahipal v. Rajesh Kumar @ Polia and another, (2020) 2 SCC 118** has again insisted for giving reasoned order while granting or refusing bail. The relevant paragraph nos. 22 and 23 of the said judgments are reproduced herein under:-

"22. The impugned order passed by the High Court is cryptic, and does not suggest any application of mind. There is a recent trend of passing such orders granting or refusing to grant bail, where the Courts make a general observation that "the facts and the circumstances" have been considered. No specific reasons are indicated which precipitated the passing of the order by the Court.

23. Such a situation continues despite various judgments of this Court wherein this Court has disapproved of such a practice. In the case of Mahipal (supra) this Court observed as follows:

"25. Merely recording "having perused the record" and "on the facts and circumstances of the case" does not subserve the purpose of a reasoned judicial order. *It is a fundamental premise of open justice, to which our judicial system is committed, that factors which have weighed in the mind of the Judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of Judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice.* ***Judges are duty-bound to explain the basis on which they have arrived at a conclusion.***

(emphasis supplied)"

(iv). In quite recent, the Apex Court in the case of **Manoj Kumar Khokhar versus State of Rajasthan and another, (2022) 3 SCC 501** considering several previous judgments on the issue has held that thought detail evaluation of facts on merit is not permissible, but the Court granting bail cannot obviate its duty to apply its judicial mind and to record reasons, brief as they may be, for the purpose of deciding whether or not to grant bail.

13- In view of the above discussion, it is crystal clear that before granting bail for the offence under N.D.P.S. Act, twin conditions as provided under Section 37(1)(b)(i) and (ii) have to be satisfied, which is in addition to Section 439 of Cr.P.C. and mandatory in nature.

14- Having examined the bail orders of co-accused in its entirety, I find substance in the submission of learned A.G.A. that co-accused Sonoo Shukla and Praveen Maurya @ Puneet Maurya have been granted bail by the Coordinate Bench of this Court without taking into account the effect and rigour of Section 37 of the N.D.P.S. Act and ignoring the settled law laid down by the Apex Court regarding application of Section 37 of the N.D.P.S. Act, whereas recovered quantity is undisputedly is commercial quantity. In the conspectus of the facts of the case, Section 50 of the N.D.P.S. Act is also not applicable as the recovery of "Ganja' was from the dicky of vehicles. I also find that no reason on merit of the case has been recorded for granting bail to them. The Apex Court in the cases which are mentioned in preceding paragraph nos. 11 and 12 has deprecated the practice of granting or refusing bail without indicating reason on merit.

15- In the light of dictum of aforesaid judgments of the Apex Court as well as the reasons mentioned in preceding paragraph nos. 13 and 14, this Court is of the view that such bail orders of the Coordinate Benches, which have been passed without giving reason on merit and without taking note of limitations provided under Section 37 of the N.D.P.S. Act in cases of a recovery of contraband of commercial quantity have no persuasive value and the same is not binding upon this Court. A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well established principle of law. If any illegality is brought to the knowledge of the Court, the same should not be permitted to perpetuate. It is also well settled that no judge is obliged to pass orders against his conscience merely to maintain consistency. Hence, the benefit of parity of bail orders dated 14.07.2021 and 14.09.2021 of co-accused Sonoo Shukla and Praveen Maurya @ Puneet Maurya cannot be extended to present applicant. Accordingly, the submission of learned counsel for the applicant for granting bail to the applicant on the ground of parity is hereby rejected. The issue of parity is decided against the applicant.

16- So far as next argument of learned counsel for the applicant that the applicant is in incarceration for a long time since 24.06.2020, therefore, he is liable to be released on bail is concerned, it is argued by learned A.G.A. that in the case of **Union of India v. Rattan Mallik** (supra), the accused was in jail for last three years, but the Apex

Court has made an observation that the stated circumstances may be relevant for grant of bail in matters arising out of conviction under Penal Code etc., but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-Section (1) of Section 37 of the N.D.P.S. Act. Learned A.G.A. further submits that the argument of learned counsel for the applicant has no leg to stand on the ground that there is good authority to hold that mere long detention in jail does not entitle an accused to be enlarged on bail pending trial. It has been held to this effect in **Vijay Kumar vs. Narendra and others, (2002) 9 SCC 364, Ramesh Kumar Singh vs. Jhabbar Singh and others, 2004 SCC (Cri) 1067 and Girand Singh vs. State of U.P., (2010) 69 ACC 39**. Learned A.G.A. has also referred to the judgment of the Apex Court rendered in the case of **Rajesh Ranjan Yadav @ Pappu Yadav vs. CBI through its Director reported in (2007) 1 SCC 70** wherein the Apex Court has held as under:

".....None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail".

17- Here it would be relevant to mention that before the Division Bench of this Court in the case of **Satya Pal Vs. State of U.P., (1998) 37 ACC 287**, the following question had been referred by learned Single Judge for decision :-

"Whether a fresh argument in a second bail application for an accused should be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected."

The Division Bench after wholesome treatment has answered as under :-

"Accordingly our answer to the question referred is that fresh arguments in a second bail application for an accused cannot be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected."

18- In the light of analysis of the case as mentioned above and considering the recovery of huge quantity of Ganja as mentioned above, coupled with the fact that the applicant was apprehended at the spot and was having conscious and constructive possession over the recovered Ganja, I do not find any reasonable ground in terms of Section 37 of the N.D.P.S. Act to hold that the applicant is not guilty of an offence and he is not likely to commit any offence while on bail.

19- In view of the facts and circumstances of the case and on account of the reasons mentioned above, I do not find any good ground for enlarging the applicant on bail. The second bail application of the applicant is accordingly **rejected.**

20- It is made clear that the finding recorded and observation made herein above is for a limited purpose and is confined to the question of releasing the accused applicant on bail only. The trial Court shall be absolutely free to arrive at its

independent conclusions on the basis of evidence led unaffected by anything said in this order.

21- However, trial Court is directed to conclude the trial of the applicant expeditiously in accordance with provisions of Section 309 Cr.P.C without granting unnecessary adjournment to either of the party.

22- Copy of this order be sent to the concerned Court below for compliance.

(2022)06ILR A1056
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Crl. Misc. Writ Petition No. 8431 of 2021

Siddharth Varadarajan & Anr. **...Petitioners**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Sri Mehul Khare, Ms. Pragya Pandey

Counsel for the Respondents:
G.A.

A. Criminal Law – Indian Penal Code, 1860 - Sections 153-B & 505(2) - Quashing of F.I.R.--- Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Only where the written or spoken words have the tendency of creating public disorder or disturbance of law and order or affecting public tranquillity, the law needs to step in to prevent such an activity**.**

B. The instigation must necessarily and specifically be suggestive of the consequences and sufficient certainty to incite the consequences must be capable of being spelt out to be incitement. The word 'Promote' does not imply mere describing and narrating a fact, or giving opinion, criticising the point of view or actions of another person. It requires that the speaker should actively incite the audience to cause public disorder. This active incitement can be gauged by the content of the speech, the context and surrounding circumstances and the intent of the speaker. However, in case the speaker does not actively incite the descent into public disorder and is merely pointing out why a certain person or group is behaving in a particular manner, what are their demands and their point of view or when the speaker interviews such person or group, it would be a passive delivery of facts and opinions which may not amount to promotion. In such circumstances it cannot be said that the news was published to create nuisance or riot and incite the people.

C. F.I.R. can be quashed on the parameters laid down in the case of R.P. Kapoor Vs St. of Punjab; AIR 1960 SC 866 and St. of Haryana Vs Bhajan Lal; 1992 Supp (1) SCC 335.

Writ Petition allowed. (E-12)

List of Cases cited:-

1. Amish Devgan Vs U.O.I. & ors.; (2021) 1 SCC 1

2. Patricia Mukhim Vs St. of Meghalaya & ors.; 2021 SCC Online SC 258

3. Vinod Dua Vs U.O.I. & ors.; 2021 SCC OnLine SC 414

4. Niharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors.; 2021 SCC OnLine SC 315

5. R.P. Kapoor Vs St. of Pun.; AIR 1960 SC 866

6. St. of Har. Vs Bhajan Lal; 1992 Supp (1) SCC 335

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Rajnish Kumar, J.)

1. Heard Ms. Pragya Pandey, learned counsel for the petitioners and learned

A.G.A. for the State. None appeared for the informant despite sufficient service.

2. The instant petition has been filed for quashing the First Information Report (here-in-after referred as FIR) dated 31.01.2021 in Case Crime No.27 of 2021, under Section 153-B and 505 (2) of Indian Penal Code (here-in-after referred as IPC), registered at Police Station- Civil Lines, District- Rampur alongwith consequential reliefs.

3. Petitioner no.1 is the founding editor of online news publication 'The Wire' and the petitioner no. 2 is the reporter of the said online news publication. The farmers were protesting against three farmer laws enacted in 2020. As a mark of protest they marched in Delhi on 26.01.2021 and in an incident near 'ITO' New Delhi, a young man named Navreet Singh Dibdiba hailing from district Rampur, U.P. suffered serious injuries and succumbed to death. The State version is that death was caused due to an accident involving his tractor whereas some of the eye witnesses and the victims primarily claim that it was due to bullet injury. 'The Wire' covered this incident in its report dated 30.01.2021 titled "Autopsy Doctor Told Me He'd Seen the Bullet Injury but Can Do Nothing as His Hands are Tied" authored by the petitioner no.2 and shared it on Twitter handle at 10.08 A.M. A clarificatory statement was issued by the three doctors who carried out the postmortem denying that they had spoken to the media or any other person or they made any such statement. The said news was also published by the petitioner no.1 on 30.01.2021 at 04:46 P.M. after it was issued by Rampur Police at 4.39 P.M. The FIR was lodged on 31.01.2021 at 00.59 bearing FIR No. 27 of 2021 under Sections 153-B and 505 (2) IPC against the petitioner no.1 on the basis of a complaint by one Sanju Turaiha / respondent no.3 alleging that the petitioner no.1 by way of the aforementioned tweet, sought to provocate the masses, spread riot, tarnish the image of medical officers by proving wrong to the panel of Medical Officers and disturb law and order and though the doctors who performed the postmortem denied that they have told the victim's family that the cause of the death was bullet injuries but the petitioner no.1 did not delete the tweet. The petitioners approached the Hon'ble Supreme Court challenging the three FIRs. Including the FIR No. 27 of 2021 in Writ Petition (Criminal) No.71 of 2021. The Hon'ble Supreme Court by means of the order dated 08.09.2021 permitted the petition to be withdrawn by the petitioner no. 2 and granted protection from any coercive action for a period of two months. Consequently, the present writ petition has been filed.

4. Learned counsel for the petitioners submitted that the petitioners have wrongly and falsely been implicated in the case. The allegations made in the FIR does not disclose the commissioning of any offence under Section 153-B and 505 (2) IPC. The petitioners had only published the statement of the parents of the deceased and the contradictions of the doctors was also published / uploaded at the earliest after it's release. Therefore even if the same was not deleted it does not constitute any offence. There was no threat of riots and in fact there was no violence or riot on account of the alleged publication. She had further submitted that the fair criticism is permissible under law. She had also submitted that the grand father of the deceased has moved the Delhi High Court praying for a Court monitored probe into

the death of his grandson, where the High Court has issued the notices and the Delhi High Court is monitoring the investigation. Therefore the FIR is nothing but an abuse of process of law and curtailment of right to freedom of speech. Therefore the impugned FIR is not sustainable in the eyes of law and liable to be quashed.

5. Learned A.G.A. vehemently opposed the submissions of learned counsel for the petitioners. He submitted that the FIR has rightly been lodged in accordance with law as despite the contradictions of the doctors in regard to the statement published by the petitioners, the news item was not deleted. The allegations levelled in the FIR disclose the commissioning of offence under Section 153-B and 505 (2) IPC. Therefore the FIR can not be quashed and the writ petition is liable to be dismissed.

6. We have considered the submissions of learned counsel for the parties and perused the record.

7. The farmers were protesting against the three farm laws enacted in the year 2020. As a part of their protest the farmers marched into New Delhi on 26.01.2021. During the protest in an incident near 'ITO' New Delhi, a young man named Navreet Singh Dibdiba hailing from district Rampur, U.P. died due to certain injuries suffered in the incident. 'The Wire' online news publication, the founding editor of which is the petitioner no.1, covered this incident in its news report dated 30.01.2021 titled as "Autopsy Doctor Told Me He'd Seen the Bullet Injury but Can Do Nothing as His Hands are Tied" authored by petitioner no. 2. The news item is extracted below:-

'Autopsy Doctor Told Me He'd Seen the Bullet Injury But Can Do Nothing as His Hands are Tied'

Grandfather of Navreet Singh, killed in tractor parade on January 26, levels dramatic charge, doctors deny making any statement.

Note: This story ends with a video of the wounds on Navreet Singh's face which some readers may find disturbing.

***New Delhi**: The family of Navreet Singh - the young man killed during the tractor parade in the capital on January 26 - has refused to accept the Delhi police's claim that he died because his tractor overturned, and insists he was shot - as farmers who say they were witness to the incident near ITO had originally claimed.*

The cause of Navreet Singh's death is at the centre of three sedition cases that the police in Uttar Pradesh, Madhya Pradesh and Haryana have filed against journalists including India Today's Rajdeep Sardesai, and the Congress politician Shashi Tharoor for blaming his death on a gunshot.

The Delhi police were quick to release video footage in which a tractor can be seen crashing into a police barricade and overturning. However, farmers at the scene claimed Navreet had been shot at before he lost control of the vehicle.

The post mortem report, prepared by a medical officer at the District Hospital, Rampur, after a 2 am autopsy on January 27, concluded that the "cause of death is shock and haemorrhage as a result of ante-mortem head injury", which Delhi Police officials have cited as consistent with their explanation.

The family, however, contests this report.

''We were cheated, now courts will decide'

"We were told by the doctor that they have clearly seen the bullet injury, and then we cremated his body peacefully. But we were cheated, as the [post mortem] report that came out did not say that. The doctor

even told me that even though he had seen the bullet injury, he can do nothing as his hands are tied," Hardeep Singh Dibdiba, Navreet's grandfather alleged, while speaking to The Wire on Friday, three days after his death.

On their part, the doctors have denied saying any such thing.

Dibdiba, 68, has been part of the farmers' protest since the beginning, he says, adding that he has authored five books on Sikhism. However, after his grandson's death, he is back in Dibdiba village of Rampur in Uttar Pradesh.

Noting the mention that the post-mortem report makes of two "lacerated" wounds, one on Navreet's chin and the other behind his ear, he said, "They [doctors] haven't directly mentioned the word bullet in the post-mortem, but given the circumstances and the kind of government that is governing the state, they wrote as much as they could about it. Now the courts themselves will clear the matter once we have a lawyer," he said.

Navreet's father, Vikramreet Singh, 46, said, "Everybody who saw his dead body saw that it was a bullet injury. One of the doctors who did the post-mortem said that it is a bullet injury, but that he can't write it." He added that his son had recently returned from Australia and went to Delhi to participate in the tractor parade by farmers. "We will finish his last rites by February, 4 and then go ahead with our plan of action," he said.

UP police deny interference or pressure

Denying the family's bullet injury claim, the seniormost police officer of the area, ADG Bareilly Avinash Chandra, said, "We had made a panel of senior doctors for the autopsy. We have no reason to suppress or distort such a document because the matter is of Delhi Police."

One organisation the family could approach, say lawyers, is the National Human Rights Commission, which could examine the video made during the autopsy and cross examine the doctor who wrote up the report.

What happened that day?

When this reporter saw Navreet Singh's body lying on the road at ITO on January 26, several farmers identified themselves as eyewitnesses to the incident and claimed that the young man had died as a result of being hit by a bullet.

Though no police personnel were visible within at least 300 meters from the dead body, the farmers told reporters that the police had "dispersed from the scene."

Even after the Delhi Police released footage which showed Navreet's tractor turning turtle, the farmers at the scene stuck to their claims. "A bullet hit him and that is why he lost control of the tractor and met with an accident," said one man who said he was a witness.

Family says deep gash above ear is ''exit wound' of bullet

The post mortem report makes no mention of any bullet injury but does note the presence of an inverted injury on the left side of Navreet's lower chin, and an everted injury above his right ear. The report, which The Wire has accessed, lists six injuries including those over the eyebrow, chin, skull, ear ossicles, chest and thigh.

The post mortem report mentions a "lacerated wound of size 2cmx1cm over left side of the chin, 1cm below left angle of the mouth," adding that "margins are inverted and bone deep." Another injury, the report said, was a "lacerated wound of size 6cmx3cm over [the] right ear, margins are irregular and everted (inside out) right ear ossicles and brain matter is coming out

from [the] wound." The report also mentions a "lacerated wound of size 2cmx1cm bone deep medial end of right eyebrow, margins are inverted," and "traumatic swelling" over the skull.

The family claims that the injury on his right ear is the exit wound from the bullet. However, Manoj Shukla, deputy CMO and doctor at the district hospital in Rampur where the post-mortem report was prepared, said this was not so. Speaking to The Wire over the phone on Friday, he said that it is possible that something else might have hit his right ear. "Or you may have got the wrong document," he added.

According to a senior doctor at the All India Institute of Medical Sciences, speaking to The Wire on condition of anonymity, laceration wounds can be associated with bullet injuries. A laceration is a wound that occurs when skin, tissue, and/or muscle is torn or cut open. Lacerations may be deep or shallow, long or short, and wide or narrow. Most lacerations are the result of the skin hitting an object, or an object hitting the skin with force.

He said, "It seems that the post mortem report has carefully been made to remove any doubts about a bullet injury." He added that the nature of the injury on his lower chin and ear could be possible entry and exit points of a bullet injury, especially given that the two injuries form a straight line. He added, "If a bullet had passed this man's head, the mandible bone would have been fractured but the report doesn't mention it. In fact, the autopsy report does not mention any X-rays done."

Navreet Singh's father says that the doctors had assured them that a bullet injury was visible in the X-rays but refused to show it to them. Dr. Shukla also confirmed that X-Rays were taken during the autopsy. However the post-mortem does not refer to any of them.

The family also shared a video of Navreet's face, pointing to the deep holes visible in his left chin and above his right ear, making the point that this was a bullet injury. While it is impossible for journalists or lay persons to reach any firm conclusion, the family is hoping an independent probe will establish the truth.

Reacting to Dibdiba's allegations, the Rampur police tweeted a statement on Saturday evening signed by the three doctors involved in Navreet Singh's post-mortem denying that they had spoken "to the media or any other person" or provided any such information as is being attributed to them in the media."

In the news the State's version as well as the allegations of victim's family were published. It also carries contents of the postmortem report. A clarification of the three doctors was issued by the Rampur Police at 04:39 PM on the same date. It was also published, immediately thereafter, at 04:46 PM on 30.01.2021. The statement reads as follows:-

नोट (खण्डन)

दिनांक. 27.01.2021 को रात्रि 02.00 बजे श्री नवरीत सिंह आयु लगभग 24 वर्ष पुत्र श्री विक्रमजीत सिंह उर्फ साहब सिंह, निवासी. ग्राम डिबडिया, थाना बिलासपुर जनपद रामपुर का पोस्टमार्टम थाना अध्यक्षए बिलासपुर के मैमों पर तीन चिकित्सीय पैनल के द्वारा किया गया था, जिसकी नियमानुसार वीडियोग्राफी भी करायी गयी थी। उपरोक्त पोस्टमार्टम के पैनल में शामिल तीनों चिकित्साधिकारियों में से किसी भी चिकित्साधिकारी द्वारा मीडिया में किसी भी प्रकार का वकतव्य /बयान जारी नही किया

गया है। और यह भी कहना है कि पोस्टमार्टम करने वाले चिकित्साधिकारी द्वारा पोस्टमार्टम रिपोर्ट की एक प्रति पुलिस अधीक्षक व एक प्रति सम्बन्धित थानाध्यक्ष/पुलिस अधिकारी को सील्ड पैक लिफाफे में उपलब्ध करायी जाती है। इसके अतिरिक्त पोस्टमार्टम रिपोर्ट के सम्बन्ध में मा० न्यायालय में आवश्यकता पड़ने पर मा० न्यायालय द्वारा बुलाये जाने पर ही पोस्टमार्टम करने वाले चिकित्साधिकारी द्वारा मा० न्यायालय में वकतव्य/बयान दिया जाता है

अतः श्री नवरीत सिंह की पोस्टमार्टम रिपोर्ट के सम्बन्ध में चिकित्साधिकारियों के नाम से मीडिया में प्रकाशित किये जा रहे समाचारध्वकतव्य का पूर्णतयः खण्डन किया जाता है कि इस प्रकार की कोई भी वकतव्य/बयान हमारे द्वारा किसी भी मीडियाकर्मी/किसी अन्य व्यक्ति को नहीं दिये गये है।

ह० अपठनीय ह०अपठनीय ह०अपठनीय

(डा० मो० जुबैर) ;डा० दशरथ सिंह) ;डा० मनोज कुमार शुक्ला)

चिकित्साधिकारी ई०एम०ओ० उपमुख्य चिकित्सा अधिकारी

8. The impugned FIR No. 27 of 2021, under Section 153-B and 505 (2) IPC was registered on 31.01.2021 at 00.59 on a complaint made by the respondent no. 3. The FIR was lodged with the allegations that the petitioner by way of the aforementioned tweet, sought to provocate the masses, spread riot, tarnish the image of medical officers by proving wrong to the panel of Medical Officers and disturb law and order and though the doctors who performed the postmortem denied that they have told the victim's family that the cause of the death was bullet injuries but the petitioner no.1 did not delete the tweet. The petitioner no. 2, who is author of the news report shared by the petitioner no.1 on tweeter, was later on added in the FIR, which was originally registered against the petitioner no.1. The FIR is extracted below:-

नकल तहरीर..... सेवा में, श्रीमान प्रभारी निरीक्षक, थाना सिविल लाइन्स, रामपुर। महोदय, सादर निवेदन इस प्रकार है कि प्रार्थी को सोशल मीडिया ट्वीटर के माध्यम से संज्ञान में आया है कि सिद्धार्थ नाम व्यक्ति द्वारा सिद्धार्थ/एसवरदराजन एकान्ट से दिनांक 30.01.2021 को समय प्रातः 10:08 बजे पोस्ट डाला गया है, जिसमें कहा गया है कि कृषि बिल के विरोध में दिल्ली में चल रहे धरना प्रदर्शन के दौरान नवरीत सिंह डिबडिया की मृत्यु कारित हुई थी जिसके पोस्टमार्टम में शामिल एक पैनल डाक्टर द्वारा नवरीत सिंह के दादा हरदीप सिंह को बयान दिया गया है कि नवरीत सिंह की मृत्यु गोली लगने से घायल होने के कारण हुई थी। चिकित्सक के हाथ अनुचित प्रभाव में बंधे हुए थे इसलिए वह कुछ नहीं कर सका। इस ट्वीट में जिस तथाकथित रिपोर्ट का हवाला दिया गया इस इस प्रकार से प्रस्तुत किया गया जिससे वह पोस्टमार्टम करने वाले चिकित्सक का कथन लगे, जिसे पढ़कर लोग दिग्भ्रमित हो जाये। इसके परिणामस्वरूप रामपुर के जन सामान्य में आक्रोश व्याप्त हो गया है एवं तनाव बढ़ गया है। यह पोस्ट निश्चित रूप से षडयन्त्र के अन्तर्गत जनसामान्य को क्षति कारित कर अनुचित लाभ कमाने के उद्देश्य से हिंसा भड़काने हेतु किया गया प्रतीत होता है। जब कि नवरीत सिंह पुत्र विक्रमजीत सिंह उर्फ साहब सिंह निवासी ग्राम डिबडिया थाना बिलासपुर जनपद रामपुर का पोस्टमार्टम जिला शासकीय चिकित्सालय रामपुर के शासकीय चिकित्सा अधिकारी के 03 सदस्यीय पैनल द्वारा किया गया था और उनके द्वारा पोस्टमार्टम रिपोर्ट सील्ड बन्द लिफाफे में

नियमानुसार पुलिस अधीक्षक एवं संबंधित प्रभारी निरीक्षक को प्रेषित की गयी है। चिकित्साधिकारी द्वारा इस सम्बन्ध में किसी भी व्यक्ति को कोई बयान नही दिया गया है पोस्टमार्टम की वीडियोग्राफी भी करायी गयी है। तीनों शासकीय चिकित्साधिकारियों द्वारा उक्त वायरल पोस्ट का खण्डन किया गया है। इसके बावजूद भी उक्त ट्वीट को अभी तक हटाया नहीं गया है। बिना सही तथ्यों की जानकारी किये, जानबूझकर सोशल मीडिया. ट्विटर के माध्यम भड़काऊ पोस्ट डालना, शासकीय चिकित्साधिकारियों का गलत बयान दर्शाकर मृतक नवरीत सिंह की मृत्यु गोली लगने का कारण कारित होना बताकर जन सामान्य को भड़काने, उपद्रव फैलाने, शासकीय चिकित्साधिकारियों एवं पैनल को गलत साबित कर उनकी छवि धूमिल करने के साथ ही शान्ति एवं कानून व्यवस्था को बिगाड़ने का भरसक प्रयास किया गया है। उक्त कृत्य धारा 505 आई०पी०सी० एवं 66 ए० आईटीएक्ट 2008 के अन्तर्गत गम्भीर अपराध है। अतः श्रीमान जी से प्रार्थना है कि प्रथम सूचना रिपोर्ट दर्ज कर संबंधित के विरूद्ध कानूनी कार्यवाही करने की कृपा करें। दिनांक 30.01.2021 `क.अंग्रेजी Sanju प्रार्थी संजू तुरैहा पुत्र जीवाराम निवासी पनबड़िया थाना सिविल लाइन्स रामपुर। मो० 9149060025 नोटः. मै सीसी1466 विपिन कुमार प्रमाणित करता हूँ कि प्रार्थना पत्र की नकल कम्प्यूटर पर शब्द ब शब्द बोल बोलकर का०1465 शर्वेन्द्र से टाईप करायी गयी।"

9. The aforesaid FIR was lodged under section 153-B and 505 (2) IPC, which are extracted below for ready reference:-

*"**153-B. Imputations, assertions prejudicial to national integration.**--(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,-- (a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or*

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied, or deprived of their rights as citizens of India, or

(c) makes or publishes and assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment which may extend to *three years, or with fine, or with both.*

(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

505 (2) Statements creating or promoting enmity, hatred or ill-will between classes.-- Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other

ground whatsoever, feelings of enmity, hatred or illwill between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both."

10. For constituting an offence against a person under Section 153-B IPC there should be words either spoken or written or signs or visible representations by a person on account of which any class of persons can not by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the constitution of India or uphold the sovereignty and integrity of India or on account of various factors mentioned therein be denied or deprived of their rights as citizens of India or such assertion, counsel, plea or appeal causes or likely to cause disharmony or feelings of enmity or hatred or ill will between such members and other persons.

11. Similarly for constituting an offence under Section 505 (2) IPC, it refers to a person making, publishing or circulating any statement or report containing rumour or alarming news. Thereafter, it refers to the intent of the person which should be to create or promote and then refers to the harm-based element, that is, likely to create or promote on the ground of religion, race, place of birth, residence, language, cast, etc., feeling of enmity, hatred or ill-will between different religions, racial language, religious groups or castes or communities, etc. Unless the aforesaid ingredients are fulfilled the offences under sections 153-B and 505 (2) can not be made out.

12. The Hon'ble Supreme Court, in the case of **Amish Devgan Vs. Union of India and Others; (2021) 1 SCC 1**, has held that a publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a malafide intention. However, opinions may not reflect malafide intention. It has further been held that dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. It has also considered that as to what will be the impact of statement or impact and authority of a reasonable person. The relevant paragraphs- 70, 71 & 76 to 78 are extracted below:-

"70. Manzar Sayeed Khan, taking note of the observations in Bilal Ahmad Kaloo, records that common features of Section 153A. And 505 (2) being promotion of feeling of enmity, hatred or ill-will "between different' religious or racial or linguistic or regional groups or castes or communities, involvement of at least two groups or communities is necessary. Further, merely inciting the feeling of one community or group without any reference to any other community or group would not attract either provision. Definition of "hate speech' as expounded by Andrew F. Sellars prescribes that hate speech should target a group or an individual as they relate to a group.

71. The Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the nation. Dignity of individual and unity and integrity of the nation are linked, one in the form of rights of individuals and other in the form of individual's obligation to others to ensure unity and integrity of the nation. The unity and integrity of the nation cannot be

overlooked and slighted, as the acts that "promote' or are "likely' to "promote' divisiveness, alienation and schematism do directly and indirectly impinge on the diversity and pluralism, and when they are with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law. The purpose is not to curtail right to expression and speech, albeit not gloss over specific egregious threats to public disorder and in particular the unity and integrity of the nation. Such threats not only insidiously weaken virtue and superiority of diversity, but cut-back and lead to demands depending on the context and occasion, for suppression of freedom to express and speak on the ground of reasonableness. Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common. masses and law-abiding citizens. This invariably leads to State response and, therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public disorder tend to trample upon liberty and freedom of others.

76. Persons of influence, keeping in view their reach, impact and authority they yield on general public or the specific class to which they belong, owe a duty and have to be more responsible. They are expected to know and perceive the meaning conveyed by the words spoken or written, including the possible meaning that is likely to be conveyed. With experience and knowledge, they are expected to have a higher level of communication skills. It is reasonable to hold that they would be careful in using the words that convey their intent. The reasonable-man's test would always take into consideration the maker. In other words, the expression "reasonable man' would take into account the impact a particular person would have and accordingly apply the standard, just like we substitute the reasonable man's test to that of the reasonable professional when we apply the test of professional negligence. 98 This is not to say that persons of influence like journalists do not enjoy the same freedom of speech and expression as other citizens, as this would be grossly incorrect understanding of what has been stated above. This is not to dilute satisfaction of the three elements, albeit to accept importance of "who' when we examine "harm or impact element' and in a given case even "intent' and/or "content element'.

77. Further, the law of "hate speech' recognises that all speakers are entitled to "good faith' and "(no)-legitimate purpose' protection. "Good faith' means that the conduct should display fidelity as well as a conscientious approach in honouring the values that tend to minimise insult, humiliation or intimidation. The latter being objective, whereas the former is subjective. The important requirement of "good faith' is that the person must exercise prudence, caution and diligence. It requires due care to avoid or minimise consequences. "Good faith' or "no-legitimate purpose' exceptions would apply with greater rigour to protect any genuineacademic, artistic, religious or scientific purpose, or for that matter any purpose that is in public interest, or publication of a fair and accurate report of any event or matter of public interest.Such works would get protection when they were not undertaken with a specific intent to cause harm. These are important and significant safeguards. They highlight importance of intention in "hate speech' adjudication. "Hate speech' has no

redeeming or legitimate purpose other than hatred towards a particular group. A publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention. However, opinions may not reflect mala fide intention.

78. The present case, it is stated, does not relate to "hate speech' causally connected with the harm of endangering security of the State, but with "hate speech' in the context of clauses (a) and (b) to sub-section (1) of Section 153A, Section 295A and sub-section (2) to Section 505 of the Penal Code. In this context, it is necessary to draw a distinction between "free speech' which includes the right to comment, favour or criticise government policies; and "hate speech' creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social Racial and Religious Tolerance, 2001 (Victoria, Australia) and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity (as explained above) and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference etc. Freedom to express and speak is the most important condition for political democracy. Law and policies are not democratic unless they have been made and subjected to democratic process including questioning and criticism. Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The "market place of ideas' and "pursuit of truth' principle are fully applicable. Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain. This justification is also premised on the conviction that freedom of speech serves an indispensable function in democratic governance without which the citizens cannot successfully carry out the task to convey and receive ideas. Political speech relating to government policies requires greater protection for preservation and promotion of democracy. Falsity of the accusation would not be sufficient to constitute criminal offence of "hate speech'."

13. The Hon'ble Supreme Court, in the case of **Patricia Mukhim Vs. State of Meghalaya and Others; 2021 SCC Online SC 258**, has held that only where the written or spoken words have the tendency of creating public disorder or disturbance of law and order or affecting public tranquillity, the law needs to step in to prevent such an activity. The Hon'ble Supreme Court regarding right to freedom of speech has held as under in paragraph 14:-

"14. India is a plural and multicultural society. The promise of liberty, enunciated in the Preamble, manifests itself in various provisions which outline each citizen's rights; they include the right to free speech, to travel freely and settle (subject to such reasonable restrictions that may be validly enacted) throughout the length and breadth of India. At times, when in the legitimate exercise of such a right, individuals travel,

settle down or carry on a vocation in a place where they find conditions conducive, there may be resentments, especially if such citizens prosper, leading to hostility or possibly violence. In such instances, if the victims voice their discontent, and speak out, especially if the state authorities turn a blind eye, or drag their feet, such voicing of discontent is really a cry for anguish, for justice denied - or delayed. This is exactly what appears to have happened in this case."

14. The Hon'ble Supreme Court, in the Case of **Vinod Dua vs Union Of India and Others; 2021 SCC OnLine SC 414**, had held that a citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder and that is only when the words or expressions have pernicious tendency or intention of creating public disorder or disturbance of law and order that Sections 124-A and 505 of the IPC must step in.

15. The word 'Incitement' has been considered by the Hon'ble Supreme Court in the Case of **Amish Devgan Vs. Union of India and Others (Supra)**. The instigation must necessarily and specifically be suggestive of the consequences and sufficient certainty to incite the consequences must be capable of being spelt out to be incitement. The word 'Promote' does not imply mere describing and narrating a fact, or giving opinion, criticising the point of view or actions of another person. It requires that the speaker should actively incite the audience to cause public disorder. This active incitement can be gauged by the content of the speech, the context and surrounding circumstances and the intent of the speaker. However, in case the speaker does not actively incite the descent into public disorder and is merely pointing out why a certain person or group is behaving in a particular manner, what are their demands and their point of view or when the speaker interviews such person or group, it would be a passive delivery of facts and opinions which may not amount to promotion. In such circumstances it can not be said that the news was published to create nuisance or riot and incite the peaple.

16. Adverting to the facts of this case, the FIR was lodged alleging therein that the petitioners by publication of the alleged news and the aforesaid tweet sought to provocate the masses, spread riot, tarnish the image of medical officers by proving wrong to the panel of Medical Officers and disturb law and order and though the doctors who performed the postmortem denied that they have told the victim's family that the cause of the death was bullet injuries but the petitioner no.1 did not delete the tweet. Perusal of the publication made by the petitioners indicate that it mentions the fact of incident, thereafter the statement of the family members regarding incident and alleged information given by the doctors to him, denial of the U.P. Police and the fact as to what happened that day. This publication was made on 30.01.2021 at 10.08 A.M. and on the very same day a clarification of the three doctors was issued by Rampur Police at 04:39 PM, immediately thereafter at 04:46 PM, the same was also published by the petitioners. The aforesaid news items does not disclose that any opinion was expressed by the petitioners with consequences thereof, therefore this Court does not find any opinion or assertion on

the part of the petitioners which may have the effect of provocating or inciting the people. Nothing was also brought before this court to indicate that there was any disturbance or riot which may have any bearing on public disorder on account of the publication of news/ tweet of the petitioners.

17. The Hon'ble Supreme Court in the case of **Niharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and Others; 2021 SCC OnLine SC 315** has recorded its conclusions in regard to quashing of the F.I.R. / criminal proceedings, according to which the F.I.R. can be quashed on the parameters laid down in the case of **R.P. Kapoor Vs. State of Punjab; AIR 1960 SC 866 and State of Haryana Vs. Bhajan Lal; 1992 Supp (1) SCC 335.** The cases in which the F.I.R. / complaint can be quashed have been identified in paragraph 102 of **Bhajan Lal (Supra)** which is extracted below:-

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

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investi- gation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

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

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

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

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

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

18. In view of above this court is of the view that since the allegations made in the FIR does not disclose the commissioning of offences under Sections 153-B and 505 (2) IPC, therefore, it is not sustainable in the eyes of law and is liable to be quashed. The FIR is accordingly quashed. The writ petition is **allowed**. No order as to costs.

(2022)06ILR A1068
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.06.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Crl. Misc. Writ Petition No. 7081 of 2021
with Crl. Misc. Writ Petition No. 7082 of 2021

Shri Abhishek Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nitin Chopra

Counsel for the Respondents:
G.A., Sri Azad Khan, Sri Ashish Deep Verma

A. Criminal Law - Code of Criminal Procedure, 1973 – Sections 188 & 189 - When the First Information Report definitely discloses the commission of cognizable offences the writ petition does not warrant any interference. Under Section 188 and 189 Cr.P.C. the offences alleged to have been committed beyond the territory of India by an Indian citizen could be investigated into and also tried in India.

Held: Writ Petitions dismissed. (E-12)

List of Cases cited:-

1. St. of Har. & ors. Vs Bhajan Lal & ors. 1992 Supp (1) SCC 335;

2. St. of Kerala & ors. O.C. Kuttan & ors. (1999) 2 SCC 651;

3. St. of Telangana Vs Habib Abdullah Jeelani & ors. (2017) 2 SCC 779;

4. P. Chidambaram Vs Director of Enforcement (2019) 9 SCC 24

5. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. 2021 SCC Online SC 315

6. Thota Venkateshwarlu Vs St. of Andhra Pradesh through Principal Secretary & anr. 2011 (9) SCC 527

7. Om Hemrajani Vs St. of U.P. & ors. : 15 AIR 2005 SC 392

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

1. These writ petitions have been filed with a prayer that the First Information Report dated 14.4.2021 under sections 498-A, 323, 506, 406, 342, 313, 351 I.P.C. and sections 3/4 of Dowry Prohibition Act be quashed. A further prayer has been made that the petitioners in pursuance of the aforesaid First Information Report be not arrested.

2. For the decision of controversy, the facts mentioned in Criminal Misc. Writ Petition No. 7081 of 2021 are being taken into consideration.

3. A perusal of the First Information Report shows that the respondent no.4 had married the petitioner on 6.5.2011 at Greater Noida, Uttar Pradesh. This marriage was also got registered as per law. It has been alleged in the First Information Report that since the inception of the marriage, the petitioner used to forcefully take-away the salaries of respondent no.4 and in fact he had forced the respondent no.4 to transfer almost Rs.2,00,000/- to clear off his educational loans. He had further forced the respondent no.4 to give Rs.80,000/- to pay off some other loan. It has been alleged that the petitioner regularly used to transfer various amounts from the accounts of respondent no.4 to his accounts to pursue his higher studies in BITS Pilani. Respondent no.4 has stated

that the petitioner had forced her to leave her job in India and to go to the USA on an H4 visa and had made her to work in the USA online despite the fact that the visa did not permit her to do so. It has been alleged in the First Information Report that despite the fact that respondent no.4 desired to pursue her higher studies in Pepperdine University, the petitioner had restrained her from studying. During their stay as husband and wife in the USA, in June, 2016, the respondent no.4 had got pregnant but because of the fact that the petitioner had pushed her, she had fallen-down and resultantly a miscarriage had taken place. Subsequently, in 2017, the respondent no.4 again got pregnant but during the pregnancy, it has been alleged, the petitioner had never cared for her and, therefore, from May 2017 to August 2017, the respondent no.4 stayed in India. It has been alleged that despite the fact that the husband did not care for the respondent no.4, she went back to USA to save her marriage for the sake of her child which she was bearing. It has also been stated that despite requests from the in-laws that they may return her Stridhan, the same was not returned to her. Subsequently, when the respondent no.4 had gone back to USA and the child, was born, the petitioner, it has been alleged, did not take care of the respondent no.4 and did not even take any paternity leave to take care of the child. On top of that it has been alleged that the parents of the petitioner also came to USA and the respondent no.4 was required to conduct the household chores. In June 2018, the opposite party no.4 flew down to India once again with her son and in the following July, the petitioner sent her a notice for divorce. Thereafter, to save the marriage she again flew back in August 2018 to enquire why all the cruelty was being perpetrated. It has been alleged that the petitioner had throughout been ignoring the respondent no.4. In the USA the petitioner had cancelled all the credit cards which were there with the respondent no.4. The respondent no. 4 and her son were made to live in a state of penury without any medical support. Despite the fact the parents of the respondent no. 4 had sent money, she was not allowed to pursue her studies. At times, she was closed in the bath room and was beaten. When the respondent no.4 had desired the admission of the young child in a day-care centre, the petitioner had denied the same. It has been alleged in the First Information Report that when the respondent no.4 on 15.3.2019 had fallen ill, she had to herself go to the hospital and in the hospital when there was no money with her, the emergency contact people in USA suggested her that she should go back to India. It has been alleged that after that she came back to India where she filed a complaint under the Domestic Violence Act. It has been alleged that behind the back of respondent no.4, the petitioner had also filed a case for divorce. When the respondent no.4 was in India, on 26.2.2021, two persons had come to the house of respondent no.4 and had threatened her and her parents to withdraw the cases otherwise they would kill both, the parents and the son of respondent no.4.

4. Challenging the instant First Information Report, the learned counsel for the petitioner Sri Prabhat Jauhar assisted by Sri Prakhar Saran Srivastava had argued that despite the fact that respondent no.4 had got admission in the USA, she never studied. He has submitted that on 14.1.2016, the petitioner had also purchased a house for the respondent no.4 in NOIDA from his own pocket. Learned counsel for the petitioner argued that when respondent no.4 had urged for the

admission of the child in a day-care centre and when there was some dispute regarding that, the respondent no.4 had approached the US Police which had found that there was no merit in the complaint. This had happened on 15.3.2019 and the respondent no.4 had come back to India on 19.3.2019. Aggrieved by the actions of the respondent no.4, the petitioner had sent a legal notice through his attorney to respondent no.4 to return the minor child and also he had informed the respondent no.4 about the contemplated divorce proceedings in the USA. Learned counsel for the petitioner has also stated that after the divorce petition was filed by the petitioner in USA on 4.3.2021, the respondent no.4, as a counter-blast to the filing of the divorce case in the US Court, filed the instant First Information Report on 14.4.2021. He submits that the order for the custody of the son was passed on 18.12.2020 and that was also a reason for the F.I.R. In the meantime, it is alleged that the petitioner had filed a Habeas Corpus Petition for the custody of the minor child before the Allahabad High Court which was still pending. Learned counsel for the petitioner has also stated that the respondent no.4 had filed a Special Leave Petition against the order of issuance of notice in the Habeas Corpus Petition and the Supreme Court had also tried reconciliation but that had failed and, therefore, the Habeas Corpus Petition in the High Court was to be heard. Learned counsel for the petitioner has submitted that if the First Information Report is perused, then it becomes abundantly clear that all the incidents which had been complained of had occurred in the USA and, therefore, the respondent no.4 had no cause of action in India. Learned counsel for the petitioner has also submitted that the ingredients of Section 498A I.P.C. were also not present in the First Information Report which was lodged by the respondent no.4. Learned counsel for the petitioner has stated that the cruelty of the husband or the relatives of the husband should have been to the extent that it would have driven the respondent no.4 to a state when she would have committed suicide. If that had not happened then the cruelty should have caused a grave injury or a danger to the life, limb or health (whether mental or physical) to the respondent No.4. In the absence of the necessary ingredients as were to be found under section 498-A I.P.C., the First Information Report was required to be quashed. Learned counsel for the petitioner has further submitted that the respondent no.4 had hardly stayed with her in-laws and, therefore, it could not be said that they had subjected her to any cruelty or torture. In this regard, learned counsel for the petitioner has relied upon the decisions of the Supreme Court in Ruchi Majoo vs. Sanjeev Majoo : (2011) 6 SCC 479; Vipin Jaiswal (A-1) vs. State of Andhra Pradesh : (2013) 3 SCC 684; Virala Bharath Kumar & Anr. vs. State of Telangana & Anr. : (2017) 9 SCC 413 and Kamlesh Ghanshyam Lohia & Ors. vs. State of Maharashtra, Through the Commissioner of Police & Ors. : (2019) 4 RCR (Cri.) 169 and has submitted that if the necessary ingredients for constituting an offence under section 498-A I.P.C. and other accompanying sections were not present, the First Information Report ought to be quashed.

5. Learned counsel for the petitioner further stated that the lodging of the F.I.R. was an abuse of process of law and if it was established that there was no cruelty then the F.I.R. should be quashed.

6. Learned counsel for the petitioner has relied upon a reply of the respondent

no. 4 of October 2019 which was sent to the notice which the petitioner had sent on 26.3.2019 and has stated that in the reply the respondent no. 4 had stated that if the petitioner filed a written apology and took the responsibility of his wife and son and provided a maintenance of $2000 per month for the basic sustenance and maintenance for his wife and son in India then she was ready for a settlement. He also relied upon that portion of the reply wherein it had been stated that if the petitioner came down to India and took his wife and son to USA then the respondent no. 4 was ready to condone his cruelty and submitted that when she was herself ready for rapprochement then no question of cruelty etc. arose. Learned counsel for the petitioner has also stated that for all the allegations which the respondent no. 4 had made in the first information report, namely, the fact that the petitioner was preventing the respondent no. 4 for pursuing her studies; maltreatment at USA; the abortion which had taken place in the year 2016; the maltreatment at his hands after the child was born and the maltreatment after the petitioner's parents had gone to USA no report to the Police in USA was made and, therefore, the allegations made in the first information report were baseless and an abuse of the process of law. He further stated that only to wreak vengeance and with malafide intentions the first information report was lodged. In this regard, he relied upon a judgement of the Supreme Court reported in 2019 (15) SCC 357 (Rashmi Chopra vs. State of U.P.) and has submitted that if the FIR was a counter-blast to the divorce petition which the petitioner had filed and if the ingredients of the various sections under which the FIR was filed were not fulfilled then the FIR ought to be quashed.

7. Learned counsel further relied upon a judgement of the Supreme Court reported in 2009 (7) SCC 712 (Harmanpreet Singh Ahluwalia and others vs. State of Punjab and others) and has submitted that if after the investigation was concluded and yet a charge sheet was filed against the accused then the same ought be quashed. He also submits that on the basis of what had been said in the judgement reported in 2009 (7) SCC 712 (supra) in paragraph 32 that if from any particular fact of the case it was found that the FIR had been made with an ulterior motive to harass the accused then the continuance of criminal proceedings against the accused would amount to abuse of the process of the court.

8. Learned counsel for the petitioner further argued that since most of the offences had allegedly occurred in the USA the petitioner could not be investigated against and could not be tried in India as all the evidence were available only in the USA.

9. Learned counsel for the petitioner in the end submitted that there was a Look Out Notice and there was also a non-bailable warrant issued against the petitioner and if the High Court did not protect the interest of the petitioner then the petitioners interest would be greatly jeopardized.

10. In reply, Sri Ashish Deep Verma assisted by Sri Azad Khan learned counsel appearing for respondent no.4 has submitted that if on the perusal of the First Information Report, a cognizable offence was disclosed, then in a writ petition, the genuineness or the credibility of the information would not be relevant. Learned counsel for the respondent no.4 has relied upon the decisions of the Supreme Court in

State of Haryana & Ors. vs. Bhajan Lal & Ors. : 1992 Supp (1) SCC 335; State of Kerela & Ors. O.C. Kuttan & Ors. : (1999) 2 SCC 651; State of Telangana vs. Habib Abdullah Jeelani & Ors. : (2017) 2 SCC 779; P. Chidambaram vs. Director of Enforcement : (2019) 9 SCC 24 and Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra & Ors. : 2021 SCC Online SC 315 and has submitted that the High Court should not interfere in the investigation which was to be done by the State as that would result in miscarriage of justice. From the judgement of the Supreme Court in Neeharika Infrastructure Pvt. Ltd. (supra) learned counsel for the respondent no.4 has stated that the following principles of law emerged, which are as follows :-

"From the aforesaid decisions of this Court, right from the decision of the Privy Council in the case of Khawaja Nazir Ahmad (supra), the following principles of law

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into cognizable offences;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) However, in cases where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, in the "rarest of rare cases'. (The rarest of rare cases standard in its application for quashing under Section 482 Cr.P.C. is not to be confused with the norm which has been formulated in the context of the death penalty, as explained previously by this Court);

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities. The inherent power of the court is, however, recognised to secure the ends of justice or prevent the above of the process by Section 482 Cr.P.C.

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. During or after investigation, if the investigating officer finds that there is no substance in the

application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint; and

xv) When a prayer for quashing the FIR is made by the alleged accused, the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merits whether the allegations make out a cognizable offence or not and the court has to permit the investigating agency/police to investigate the allegations in the FIR."

12. Learned counsel for the respondent no. 4 further states that even on facts the petitioner could not be exonerated of the charges of cruelty as he had though purchased the property in question in the name of his wife, he had yet to pay 40% of the cost of it and because he had stopped giving the various instalments the builder was after the life of the respondent no. 4 to pay remaining installments. Learned counsel for the respondent no. 4 also submitted that the offences which had been alleged against the petitioner were continuous in nature. The offences of cruelty had started off right from the date the couple had got married. The FIR was a result of all that had happened in the past so many years and, therefore, the petitioner could not get away by saying that there was no particular incident of cruelty.

13. Learned counsel for the respondent no. 4 further submitted that cruelty is a term which has a different meaning for every individual. For arriving at a conclusion as to whether there was cruelty against a particular individual all surrounding circumstances had to be looked into. In the instant case, he submits that the respondent no. 4 came from a very well-to-do family and was a well educated lady and, therefore, she expected a treatment which was of a nature which would go with her upbringing. He submits that when proper treatment was not meted out to her then it was definitely cruelty. Learned counsel for the respondent no. 4 has also submitted that not only the petitioner had filed the divorce petition in the USA but he had also filed a divorce suit in August 2019 in India (This fact has not been controverted by the learned counsel for the petitioner).

14. Learned counsel submitted that the reply which the respondent no. 4 had sent in October 2019 and the Email which she had sent showed how disgruntled she was with her situation and that she was in fact being cruelly deprived of her maintenance.

15. Learned counsel for the respondent no. 4 further submitted that under Section 498-A of the IPC, the cruelty had not only to be physical torture or atrocity. There could be a mental and emotional injury while physical injury was not present, which was a latent form of cruelty but was equally serious in the terms

of the provisions of statutes and this cruelty would also embrace the attributes of cruelty in terms of Section 498-A of the IPC.

16. Learned counsel for the respondent no.4 also relied upon the provisions of Section 188 and 189 of the Cr.P.C. which are being reproduced here as under:-

"188. Offence committed outside India. When an offence is committed outside India-

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

189. Receipt of evidence relating to offences committed outside India. When any offence alleged to have been committed in a territory outside India is being inquired into or tried under the provisions of section 188, the Central Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before a judicial officer in or for that territory or before a diplomatic or consular representative of India in or for that territory shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

17. He submits that the petitioner could be tried in India even for the offences which he had committed in the USA. He submits that for investigation, in fact, no sanction of the Central Government was also required. For this purpose, he relied upon 2011 (9) SCC 527 (Thota Venkateshwarlu vs. State of Andhra Pradesh through Principal Secretary and another). So far as the evidence was concerned, learned counsel for the respondent no. 4 submitted that under Section 189 Cr.P.C. all the evidence could be obtained by the investigating agency even from the USA.

18. Learned counsel for the respondent no. 4 replying to the arguments of the petitioner that a protection was required from the High Court because the look out notice had been issued against the petitioner and that a non-bailable warrant had been issued, submitted that the petitioner had throughout avoided investigation vis-a-vis the FIR which was lodged on 14.4.2021 and, therefore, no indulgence be granted to the petitioner. He further submits that if the offences were cognizable in nature the FIR could not be quashed and, therefore, the prayer for a protection could not be granted to the petitioner.

19. Learned counsel for the respondent no. 4 thus submitted that the case could very well be looked into by the police as also by the Courts at Gautam Budh Nagar under the provisions of Section 188 Cr.P.C. He also relied upon the decision of the Supreme Court in Om Hemrajani vs. State of U.P. & Ors. : AIR 2005 SC 392 and submitted that the offence which were committed outside India could be very much tried in India.

20. Learned AGA Sri Arunendra Kumar Singh also submitted that the FIR could not be tinkered with lightly. He relied upon the judgements of the Supreme Court which had been relied upon by the learned counsel for the respondent no. 4.

21. Learned counsel for the State also submitted that the offences alleged in the FIR were of a continuing nature and they could not be taken lightly. Still further, learned AGA submitted that most of the judgements which had been cited by the learned counsel for the petitioner were for the quashing of the charge sheet.

22. Having heard learned counsel for the parties, the Court finds from the perusal of the First Information Report that there are allegations which reveal the commission of a cognizable offence. Respondent No. 4 has alleged various kinds of cruelties which had led her to various illnesses. The respondent no. 4 had also alleged that there was a miscarriage which had resulted because of the fact that the petitioner had pushed her. Still further the Court finds that the respondent no. 4 was being deprived of her financial resources and that had driven her to come back to India and in India also, the Court finds, there was a threat made vis-a-vis the respondent no. 4 and her parents on 26.2.2021 when two persons had reached her house at 5.30 PM and had threatened her with dire consequences. The arguments of the learned counsel for the petitioner that the FIR was a counter-blast to the notice for divorce and that the FIR itself was a malicious persecution of the petitioner do not hold any water.

23. Under such circumstances, when the First Information Report definitely discloses the commission of cognizable offences the writ petition does not warrant any interference.

24. The Court also finds that under Section 188 and 189 Cr.P.C. the offences alleged to have been committed beyond the territory of India by an Indian citizen could be investigated into and also tried in India.

25. Both the writ petitions are, accordingly, dismissed.

26. Dismissal of the Criminal Misc. Writ Petition No. 7081 of 2021 and Criminal Misc. Writ Petition No. 7082 of 2021 would not in any manner come in the way of the petitioner in availing the remedies which might be available under the Cr.P.C.

(2022)06ILR A1075
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Company Petition No. 16 of 2019

Jagriti Upbhogta Kalyan Parishad, M.P. & Ors. ...Petitioners

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri A.K. Ganguly, Sri Amrendra Nath Singh, Sri B.B. Paul, Sri K.P. Singh, Sri K.R. Singh, Sri Kunwar Bhadur Dixit, Sri N.C. Gupta, Sri R.C. Srivastava, Rachna Srivastava, Sri Rajeev Mishra, Rani Chhabra, Sri Sujeet Kumar, Sri U.N. Khare, Sri Vikash Pathak, Sri Vivek Saran

Counsel for the Respondents:
Sri V.A. Mehta, A.S.G.I., Sri Amit Mishr, Sri Anil Katiyar, Sri B.N. Singh, C.S.C., Sri G.S. Hajela, Sri Gyan Prakash, Sri Javed Husain Khan, Sri

Jitendra Pandey, Sri K.C. Rajput, Sri K.C. Sinha, Sri Mahesh Srivastava, Mis Laxmi Arvind, Mrs. V.D. Khanna, Sri N.I. Jafri, Sri Prabhakar Tripathi, S.C., Sri V.K. Saxena, Sri W.H. Khan, Sri Gulrej Khan

A. Civil Law - Companies Act, 1956 - Section 434© of the r/w Rule 530 of Companies (Transfer of Pending Proceedings)Rules, 2016-- Second proviso to Section 434(1)(c) provides that any party to winding up proceedings pending before any Court immediately before the commencement of IBC, may file an application for transfer of such proceedings and the Court may transfer all such proceedings to the NCLT. However, the said proviso does not mandate that the proceedings would automatically stands transferred rather it leaves the decision with the Court where the winding up proceedings are pending, to transfer the same or not to transfer the same. The applications of the applicants/respondent no.12 do not even disclose specifically as to why power to transfer the winding up petition should be exercised by this Court and the winding up petition should be transferred, particularly when after journey of about 25 years the matter is now about to reach to its logical end.

B. Transfer of petition pending in High Court to NCLT can be made when no irreversible steps towards winding up of the Company have otherwise taken place.

Held: Transfer Application rejected. (E-12)

List of Cases cited:-

1. Reserve Bank of India a Statutory Body Vs Sahara India Financial Corporation Ltd. 2019 3 ADJ 540(LB)

2. Action Ispat & Power Pvt. Ltd. Vs Shyam Metalics and Energey Ltd. (2021) 2 SCC 641 (para 14 to 26)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri W.H. Khan, learned senior advocate assisted by Sri Gulrez Khan, learned counsel for the applicant/ respondent No.12 and Sri Vivek Saran holding brief of Sri Vikas Pathak, learned counsel for the petitioner on Civil Misc. Application No.48 of 2019, dated 09.09.2019, Civil Misc. Application No. 49 of 2019 dated 30.11.2019 and Civil Misc. Application No.52 of 2020 dated 30.07.2020, filed by the respondent No.12 and objections thereto filed by the petitioner being objection Nos. 54 of 2020, 55 of 2020 and 56 of 2020, dated 20.10.2020, 20.10.2020 and 03.11.2020 respectively.

2. By the aforesaid three applications, the applicant/respondent no.12 has prayed as under :

Civil Misc. Application No. 48, dated 09.09.2019	Civil Misc. Application No.49 dated 30.11.2019	Civil Misc. Application No. 52 dated 30.07.2020
"1. That the Winding up Petition may be dismissed. 2. That the Company be permitted to restart its business with the assets it possessed and prosecute the objects for which it was incorporated. 3. That the claims made against the Company S.B. Petroleum Ltd. Is	"1. That the winding up petition may be dismissed. 2. That the claimants (if any) against the Company S.B. Petroleum Ltd	"1. further appointment of a Special Commissioner may be dispensed off with. 2. the winding up petition may be dismissed. 3. the claimants if any, against the Company S.B. Petroleum

denied by the Company and is disputed and the claim requires evidence oral and documentary for which remedy lies in the common court/appropriate court of law. "	may be directed to file their claims before the NCLT."	Ltd may be directed to file their claims before the NCLT."

3. The main contention of learned counsel for the applicant/respondent no.12 is that since the Company's Act, 1956 has been repealed by the new Act i.e. The Companies's Act, 2013 (hereinafter referred to as "the Act 2013") and the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "the IBC") has been enacted, therefore, by virtue of Section 434(1)(c) of the Act, 2013 read with Rule 5 of the Companies (Transfer of pending proceedings) Rules, 2016 (hereinafter referred to as "the Transfer Rules, 2016"), the present Company petition is not maintainable before this Court and it has to be transferred to the National Company Law Tribunal (for short "NCLT") constituted under Section 408 read with Section 410 of the Act 2013.

4. This petition was heard on several occasions and detailed orders including the orders dated 29.09.2020, 02.12.02020 and 20.01.2021 were passed incorporating the submissions of learned counsels for the parties.

5. By order dated 02.12.2020, following questions were framed for consideration :-

(i) Whether in view of Section 434(1)(c) of the Companies Act 2013 read with Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, the present Company petition which by order dated 28.5.2019 passed by the Division Bench converted the PIL No.12324 of 2003 into the present Company Petition, can be proceeded with by the High Court or it has to be transferred to the NCLT" ?

(ii) Whether after the enactment of the Companies Act 2013, the present petition could have been registered as Company Petition by converting PIL No.12324 of 2003 by order dated 28.05.2019 whereas after enactment of the Act 2013 and constitution of the Tribunal NCLT under Section 408 read with Section 410 of the Act 2013, no Company Petition would lie to the High Court ?

6. **Learned counsel for the applicant/respondent no.12** has submitted as under :-

(A) In view of Section 408, 410 and 434(1)(c) of the Companies Act, read with the 5th proviso, the High Court has no jurisdiction to entertain or proceed with a Company Petition inasmuch as the jurisdiction in Company Petition for winding up on the ground of inability to pay tax is maintainable only before the NCLT. Reliance is place on the judgment of Hon'ble Supreme Court dated 22.01.2019 in **Civil Appeal No.818 of 2018 (Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.) (paras 12 and 17).** (B) As per Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, enacted by Notification dated 07.12.2016 as amended by 2nd amendment Notification dated 29.06.2017, all petitions relating to winding up under Clause (e) of Section 433 of the Companies Act, 1946 on the ground of inability to pay debts, pending before the High Court as on 15.12.2016 stood transferred to the NCLT.

Therefore, this Court should also transfer the present petition to NCLT.

(C) It is admitted that the order dated 28.05.2019 in PIL No.12324 of 2003 was passed by the Division Bench with the consent of the parties. The relevant portion of paragraph-47 of the aforesaid order dated 28.05.2019, reads as under:

"(II) Since it is an old matter, Registry of this Court now shall register a Winding Up Company Petition and place this matter before Company Judge so that Court may proceed in the matter by considering claims of the parties The property, movable or immovable, in the custody of District Administration or the Registrar General etc., shall be taken in custody by Company Judge or if so directed, shall be handed over to Official Liquidator for maintenance of property and dealing with the same in the manner as directed by Company Judge in the winding up petition.

(III) Till further order is passed by Company Judge, Registrar General is directed to keep the entire money, as detailed in para 38 of this order, in a fixed deposit and thereafter it shall be dealt with in the manner as directed by Company Judge.

(IV) Claim of M/s Pushpa Petroleum is said to be founded on a compromise between the said Firm and M/s SBPL dated 04.04.2005. The Company Judge shall look into its genuineness and pass appropriate order."

(D) The aforesaid order was passed on no objection/ consent of the applicant/ respondent No.12 but that consent or no objection does not confer any power upon the High Court to proceed with the present matter as a company petition, inasmuch as the High Court has no jurisdiction to proceed with the company petition under the Companies Act, 2013. Now company petition can be filed by the petitioner only before the NCLT in accordance with the provisions of the Companies Act, 2013.

(E) In any case, this court cannot proceed with the present company petition and instead the matter should be remitted to the NCLT under Section 271 of the Companies Act, 2013.

7. **Learned counsel for the petitioner** has submitted as under :-

(a) A Writ (C) No.758 of 1996 (Jagriti Upbhogta Kalyan Parishad and others Vs. Union Of India and Others was filed by the present petitioners before the Hon'ble Supreme Court under Article 32 of the Constitution of India and by Order dated 13.01.2003, Hon'ble Supreme Court has disposed of the writ petition with certain directions and consequent thereto a public interest litigation (PIL) No.12324 of 2003 (Jagriti Upbhogta Kalyan Parishad Thru Its Joint Secretary Vs. Union Of India and Others) was registered in this Court and after various steps were taken under directions of this Court pursuant to the aforesaid order of Hon'ble Supreme Court, the aforesaid PIL was disposed of by order dated 28.05.2019 with the following directions :-

"(I) CBI Court shall proceed to decide the cases pending before it ensuring hearing on day to day basis. It should endeavor to complete trial in all these cases expeditiously since sufficient time has already elapsed. Now it is expedient that proceedings should be completed within two years, but if for any good or valid reason, it fails to do so, it may submit a progress report to the Court seeking further time.

(II) Since it is an old matter, Registry of this Court now shall register a Winding

Up Company Petition and place this matter before Company Judge so that Court may proceed in the matter by considering claims of the parties The property, movable or immovable, in the custody of District Administration or the Registrar General etc., shall be taken in custody by Company Judge or if so directed, shall be handed over to Official Liquidator for maintenance of property and dealing with the same in the manner as directed by Company Judge in the winding up petition.

(III) Till further order is passed by Company Judge, Registrar General is directed to keep the entire money, as detailed in para 38 of this order, in a fixed deposit and thereafter it shall be dealt with in the manner as directed by Company Judge.

(IV) Claim of M/s Pushpa Petroleum is said to be founded on a compromise between the said Firm and M/s SBPL dated 04.04.2005. The Company Judge shall look into its genuineness and pass appropriate order."

(b) Pursuant to the aforesaid directions, the aforesaid PIL was converted/registered as the present Company petition No.16 of 2019, with the consent of the applicants herein/respondent no.12.

(c) Vide para (a) of the order, Hon'ble Supreme Court transferred entire papers of the aforesaid Writ Petition requesting Hon'ble the Chief Justice of this Court to constitute the Special Bench to deal with the matter and the Special Bench will appoint a retired Judge of the High Court as a Special Commissioner.

(d) The Special Commissioner, in terms of the aforequoted order of Hon'ble Supreme Court and pursuant to the orders passed by the High Court from time to time, took effective steps and did the needful to adjudicate the claims. The aforesaid writ petition was registered as PIL No.12324 of 2003 but by order dated 28.05.2019, the High Court directed the PIL to be converted into a Company petition which is the present Company Petition No.16 of 2019.

(e) Present case is not a winding up proceedings under the Companies Act, 1956 but it is a petition registered under the order dated 28.05.2019 passed by the High Court in PIL No.12324 of 2003.

(f) The jurisdiction of the High Court to proceed with the present Company Petition, under the peculiar facts and circumstances of the case and the aforequoted order of Hon'ble Supreme Court; is not ousted even as per provisions of Section 434(1)(c) of the Act, 2013 read with Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, particularly when this company petition was not pending as on the cut off date i.e. 15.12.2016. Therefore, present company petition should be concluded by the High Court.

(g) PIL No.12324 of 2003 was converted into the present Company petition by order dated 28.05.2019, passed by the High Court which was passed on "no objection" filed by all the contesting parties including the petitioners and the respondent no.12. Therefore, after getting the P.I.L. converted with consent into a company petition, the respondent no.12/applicants can not raise objections that the present company petition can not be adjudicated by the High Court.

(h) Since PIL No.12324 of 2003 was converted into the present Company Petition by order dated 28.05.2019, passed by the Division Bench of this court, therefore, the present petition is not a petition for the purposes of Section 434(1)(c) or Section 271 of the Companies

Act, 2013. It is a petition under the orders passed in the aforesaid PIL, therefore, the provisions of Section 271 or Section 434(1)(c) of the Companies Act, 2013, shall not be attracted. Reliance is placed on the principles laid down in **Reserve Bank of India A Statutory Boday vs. M/s. Sahara India Financial Corporation Ltd., 2019 (3) ADJ 540 (LB).**

(i) A company petition cannot be automatically transferred by the High Court to the Tribunal under Section 434 (1)(c) of the Companies Act, 2013 rather third proviso to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 as amended by the Second Amendment Rules vide GSR 732(E) dated 29.06.2017 leaves the discretion with the court where the winding up proceedings are pending to transfer it or not to transfer it to the Tribunal. Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 as amended on 29.06.2017, reads as under:

"5. ***Transfer of pending proceedings of Winding up on the ground of inability to pay debts.****- (1) All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:*

Provided *that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:*

Provided *further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:*

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."

(j) In support of his submissions, Sri Saran has relied upon paragraphs-57 and 58 of the judgment of this court in the case of **Reserve Bank of India A Statutory Boday vs. M/s. Sahara India Financial Corporation Ltd. (supra)**.

Facts

8. The petitioners filed a writ petition before Hon'ble Supreme Court under Article 32 of the Constitution of India bringing to its notice that how various consumers, distributors and dealers of the respondent no.12 i.e. M/s. S.B. Petroleum Ltd., spread in nine states, namely, Madhya Pradesh, Maharashtra, Karnataka, Uttar Pradesh, Haryana, Rajasthana, Bihar, Delhi and Punjab were taken for a ride and cheated by collection of crores of rupees and syphoned it by acquiring personal

properties. The matter was heard by **Hon'ble Supreme Court** for several years and ultimately the **writ petition was disposed of by order dated 13.01.2003 as under :-**

"This writ petition under Article 32 of the Constitution of India was filed in public interest, approximately six years earlier, bringing to the notice of this Court how various consumers, distributors and dealers of respondent No. 12 -M/s. S.B. Petroleum Ltd. spread in nine States, namely Madhya Pradesh, Maharashtra, Karnataka, Uttar Pradesh, Haryana, Rajasthan, Bihar, Delhi, Punjab were taken for a ride and cheated by collection of crores of rupees. According to the petitioners crores of rupees were syphoned and personal properties acquired. Various orders were passed by this Court from time to time against respondent. 12-Company and its Managing Director and his family members and also other Directors. Directions were also issued to various authorities noticing a total inaction on the part of the authorities. Some of the orders passed to which reference can be made in this regard are the orders dated 20th October and 17th November, 1997, 6th February and 20th March, 1998 and 3rd December, 2001. Various bank accounts and properties have been attached. The matter was also investigated by CBI and the Economic Offences Wing (CID) U.P. We have been informed by Shri Altaf Ahmad, learned Additional Solicitor General that 22 chargesheets were filed on 24th December, 1999 before Additional Chief Judicial Magistrate III, Lucknow. Learned Additional Solicitor General submits that primarily on account of the non-cooperation of the accused charges have not been framed. We, however, refrain from expressing any opinion except observing that all concerned are directed to cooperate in the expeditious disposal of the cases that have been initiated as a result of directions issued in this matter.

Having regard to the facts and circumstances of the case, we do not think it possible for this Court to either examine from time to time the progress of the criminal cases so as to ensure its expeditious disposal and to also go into the factual details of a large number of consumers and their rights, and also the rights, if any, of dealers/distributors. We may note that though large sums have been refunded, according to respondent no.12, to the consumers but it seems that still there may be large number of consumers to get the refunds. We feel it would be appropriate, if the matter is transferred to the High Court in terms of the prayer made in I.A.No.27/2002 filed by learned Amicus Curiae. Accordingly, we issue the following directions:

a) All the case papers of this matter be transferred to High Court of Allahabad with a request to Hon'ble Chief Justice of Allahabad High Court to constitute a special bench either at Allahabad or at Lucknow to deal with the matter. The special bench will appoint a retired Judge of the High Court as a Special Commissioner and decide about his remuneration/ expenses etc. The Special Commissioner will take charge of all the assets including the bank accounts of respondent no.12.

b) The bank accounts disclosed in the affidavit of Dr.KPD Shastri shall remain frozen till further orders.

c) All the concerned banks are directed to furnish details of operations of the accounts since 1993 to the Special Commissioner.

d) The Special Commissioner so appointed would take charge of the following bank accounts:-

1. Bank of Baroda, Aliganj Branch, Lucknow, Account No.Current A/c 391.
2. State Bank of India, Main Branch, Hajrat Ganj, Lucknow.
3. Syndicate Bank, Hajrat Ganj, Lucknow.
4. Oriental Bank of Commerce, Hajrat Ganj,Lucknow.
5. ABN Amro Bank, New Delhi.
6. State Bank of Indore, Hajrat Ganj, Current A/c No.207.
7. Bank of Baroda, Nishant Ganj, Lucknow A/c No.1673
8. Bank of Baroda A/c No.1730
9. Bank of Baroda, Gore Gaon, Bombay A/c No.3284
10. Bank of Baroda, Gandhi Dham, Gujrat A/c No.1366
11. Bank of Baroda, Gandhi Dham, Gujarat No.1465
12. Bank of Baroda, Asharami Ahmedabad, Gujarat A/c No.30157
13. Bank of Baroda, Aliganj, Lucknow, Krishna International A/c No.316
14. Bank of Baroda, Aliganj, Lucknow, SB International Oil & Energy No.610
15. Bank of Baroda, Aliganj, Lucknow, SB Petroleum, Port Terminal A/c No.617
16. Bank of Baroda, Aliganj, Lucknow, Saushail Enterprises A/c No.618
17. Bank of Baroda, Aliganj, Lucknow, SBLPG Bottling, No.640
18. Bank of Baroda, Aliganj, Lucknow A/c No.493
19. Bank of Baroda, Aliganj, Lucknow. A/c No.6343
20. Bank of Baroda, Nishatganj, Lucknow, Shell Petroleum A/c No.1606
21. Bank of Baroda, Nishatganj, Lucknow, SB Petroleum Port Terminal A/c No.1692
22. Bank of Baroda, Nishatganj, Lucknow, SB International Oil & Energy A/c No.1623
23. Bank of Baroda, Nishatganj, Lucknow, Saushil Enterprises A/c No.1640
24. State Bank of India, Main Branch, Hajrat Ganj, Lucknow, Saurpika Investment & Properties A/c No.CC51
25. Federal Bank, 29, Vidhan Sabha Marg, Lucknow, Saushil Enterprises A/c No.1226
26. Federal Bank, 29, Vidhan Sabha Marg, Lucknow, Krishna Exim Pvt.Ltd. A/c No.1229
27. Fedral Bank, 29, Vidhan Sabha Marg, Lucknow, SB International Oil & Energy A/c No.1225
28. Bank of Baroda Gandhi Dham, SB Inter Oil & Energy Ltd. A/c No.1515

e) The Special Commissioner will also take charge of the following properties:-

1. Land at Mohanlal Ganj, Meerut, Mainpuri, Mathura (sale deed in favour of M/s SB Petroleum free from all encumbrances: 12.73 lacs)
2. Bottling plant at Mohanlal Ganj, Lucknow (fully owned by respondent no.12 fre from all encumberances: 168.85 lacs)
3. SKO storage at Mohanlal Ganj, Lucknow (fully owned by respondent no.12, free from all encumbrances: 116.86 lacs)
4. Kerosene and LPG port storage facility project at Pipavav Port, Gujarat (lease hold right in favour of respondent no.12: 122.73 lacs)
5. Vehicle (staff cars & scooters: 12.00 lacs)
6. Furniture & Fixtures (27.03 lacs)

7. Electrical Equipments (0.92 lacs)
8. Electrical installations (0.60 lacs)
9. Computers (2.52 lacs)
10. Stock of lubricating oil (30.25 lacs)
11. LP Gas (3.25 lacs)
12. Cylinders and regulators (4.90 lacs)
13. Sundry debtors (1.67 lacs)
14. Other current assets (0.37 lacs)
15. Loans and advances (87.08 lacs)
16. Eight bighas of Agricultural land situated at Mohan Lal Ganj, Lucknow.
17. Office Complex at 20A/3, Gokhle Marg, Lucknow which she acquired in the year 1983
18. B-65, Sec.C, Mahanagar, Residential house which she acquired in the year 1986
19. A flat at Wazir Hasan Road, Lucknow.
20. Two acres of land situated in Gata No.988-A, Mauza-Zara Mai, Tehsil and Distt. Mainpuri, UP
21. Two acres of land situated in Gata No.112, Vill.Bhagwanpur, Pargana-Sarawa, Tehsil and Distt. Meerut, UP
22. Two acres of land situated in Khasra No.53, Min-Jumla, Rakba-0,737, Mouza-Mahuwan, Tehsil and Distt. Mathura, UP at Agra-Mathura Road.
23. Twenty Acres of land, Vill.Rampura-II, Pipavav port, Post-Uchaiya, Tehsil-Rajula, Distt. Amreli.

24. RECLAIM OF LOAN/ADVANCE TO:

M/s Kashinath Kailashnath

Jewellers Lucknow UP Rs.25.00 lacs

Refund of Security Deposit for land at Pipavav Port for LPG & SKO Storage Rs.7.00 lacs

Sale of land at Mathura, Meerut & Mainpuri Rs.15.00 lacs

25. Investments made at Mohanlal Ganj, Lucknow, UP, such as:-

LPG Bottling Plant Rs.169.00 lac approx.

SKO Storage Plant Rs.130.00 lacs approx.

f) The Special Commissioner would also take charge of the following FDRs:-

3rd August 1993 20 Lacs

18th December, 1993 15 lacs

5th May, 1994 10 lacs

1st June, 1994 7.5 lacs

5th October, 1994 7.5 lacs
15 lacs
10 lacs

7th September, 1994 33,70049/-

September, 1994 25 lacs

October 1994 7.5 lacs

January, 1995 7,63,291

12th July, 1994 -Two FDRs -7.5 lacs each

11th September, 1994 15 lacs

5th October, 1994 7.5 lacs

g) ***The Special Commissioner would insert two advertisements*** in the Times of India, Indian Express, Dainik Jagran or

such other important newspapers having large circulation in the concerned States ***announcing his appointment and inviting all concerned who have deposited their money with the dealers/distributors of S.B.Petroleum Ltd.*** and also the concerned dealers/distributors ***to file their claims before the Special Commissioner*** within a time stipulated in the said publication.

h) The Special Commissioner shall formulate a scheme whereby the consumers are repaid their deposits without insisting their personal presence before the Commissioner. The Special Commissioner would, of course, ensure that the amount reaches the right person.

i) ***In so far as the dealers/distributors are concerned, they may file their claims before the Special Commissioner.*** *Respondent no.12- Company claims to have serious disputes with the dealers/distributors. According to the company - respondent No. 12 they are not entitled to claim any refund.* ***It would be open to the Company and also to all dealers/distributors to take such pleas as are available to them in law before the Special Commissioner. The Special Commissioner will go into the respective pleas of the Company and dealers/distributors and adjudicate upon their claims whereafter orders for refund, if any, or other appropriate orders will be passed by him.***

j) The Company and its Managing Director Mr.VK Tiwari and all other concerned are directed to furnish all books of accounts/all deeds of the properties of the Company and alsoof Mr.VK Tiwari and all his family members and the Directors of the Company as are attached under the orders of this Court to the Special Commissioner within 15 days of the appointment of the Special Commissioner.

In respect of ***properties 20A/3, Gokhale Marg, Lucknow and B-65, Sector 'C' Mahanagar, Lucknow*** *it has been claimed that these properties were acquired in 1981 and 1987 respectively by Smt.Abha Tiwari w/o VK Tiwari even before the formation of the Company and thus the plea is that these properties cannot be utilised for the alleged claims of any person against the Company. On the other hand, the claimants may dispute this factual statement and may also contend that for various reasons it would be permissible to lay hand to these properties as well. We have only noticed in brief the pleas which may be raised before the Special Commissioner. We however, express no opinion on any of the pleas .* ***The Special Commissioner would examine the respective submissions in respect of these two properties and decide the*** *matter in accordance with law as also the matters in respect of which mention has been made by his chartered accountant.*

k) The CBI and Economic Offences Wing, CID (UP) are directed to report the progress of the case before the special bench at the High Court.

l) It would be open to the Special Commissioner to to approach the special bench of the High Court for any clarification/directions/orders.

m) Some amounts are lying in fixed deposites pursuant to the orders passed by this Court from time to time. Those FDRs be transmitted to the High Court. The Special Commissioner, as and when necessary, may seek directions from the High Court in respect of the amounts in those FDRs.

Before concluding we place on record this Court's deep appreciation for the services rendered by the amicus curiae Mr. AK Ganguly, Senior Advocate and Ms. Rachna Srivastava, Advocate.

The writ petition and all applications are disposed of in the above terms."

9. Vide direction No.(a) of the aforequoted order, Hon'ble Supreme Court transferred case papers of the aforesaid Writ Petition (c) No.758 of 1996 to this Court with a request to Hon'ble Chief Justice of Allahabad High Court to constitute a Special Bench either at Allahabad or at Lucknow Bench to deal with the matter. The Special Bench will appoint a retired judge of the High Court as a Commissioner and decide about his remuneration/expenses etc. **The Special Commissioner will take charge of all the assets including the Bank accounts of the respondent no.12**. Pursuant to the aforesaid directions the Public Interest Litigation (PIL) No.12324 of 2003 (Jagriti Upbhogta Kalyan Parishad Thru Its Joint Secretary Vs. Union Of India And Others) was registered in this Court. A Special Commissioner was also appointed who carried out tremendous job before the assets may be sold and the proceeds may be distributed amongst the claimants/petitioners, **the aforesaid PIL was disposed of by a detailed order dated 28.05.2019.** The directions given by the Division Bench in the aforesaid PIL No.12324 of 2003 while disposing of the aforesaid PIL no.12324 of 2003 by order dated 28.05.2019, are as under :-

"(I) CBI Court shall proceed to decide the cases pending before it ensuring hearing on day to day basis. It should endeavor to complete trial in all these cases expeditiously since sufficient time has already elapsed. Now it is expedient that proceedings should be completed within two years, but if for any good or valid reason, it fails to do so, it may submit a progress report to the Court seeking further time.

(II) Since it is an old matter, Registry of this Court now shall register a Winding Up Company Petition and place this matter before Company Judge so that Court may proceed in the matter by considering claims of the parties The property, movable or immovable, in the custody of District Administration or the Registrar General etc., shall be taken in custody by Company Judge or if so directed, shall be handed over to Official Liquidator for maintenance of property and dealing with the same in the manner as directed by Company Judge in the winding up petition.

(III) Till further order is passed by Company Judge, Registrar General is directed to keep the entire money, as detailed in para 38 of this order, in a fixed deposit and thereafter it shall be dealt with in the manner as directed by Company Judge.

(IV) Claim of M/s Pushpa Petroleum is said to be founded on a compromise between the said Firm and M/s SBPL dated 04.04.2005. The Company Judge shall look into its genuineness and pass appropriate order.

10. Pursuant to the direction of the Division Bench of this Court in para 47(II)/(III)/(IV) of the order dated 28.05.2019 in the aforesaid PIL No.12324 of 2003 the present petition has been registered and listed before me as Company Judge nominated by Hon'ble the Chief Justice by order dated 17.06.2020 on administrative side. This is how the present company petition has came up before this court for consideration.

11. However, the present case could not be proceeded to reach the logical ends on account of further obstructions created by the applicants/respondent no.12 by making successive application being Civil Misc. Application No.48 dated 09.09.2019, **Civil**

Misc. Application No. 49 dated 30.11.2019 and Civil Misc. Application No.52 dated 30.07.2020 which are being hereby decided.

Discussion and Findings

12. I have carefully considered the submissions of learned counsels for the parties and perused the records of the case.

13. It is undisputed that the entire proceedings against the applicants/respondent no.12 and their properties took place pursuant to the directions of Hon'ble Supreme Court vide order dated 13.01.2003 in Writ Petition (c) No.752 of 1996, filed by the petitioner herein under Article 32 of the Constitution of India. The direction given by the Hon'ble Supreme Court in the order dated 13.01.2003, has already been reproduced above. It is also admitted to the applicants/respondent no.12 that the Special Commissioner, in terms of the aforequoted order of Hon'ble Supreme Court and pursuant to the orders passed by the High Court from time to time in the aforesaid PIL no.12324 of 2003, took effective steps and did the needful to adjudicate the claim.

14. Now, mainly the process of selling the assets and distribution of proceeds amongst the claimants in adjudication of their claims, is left. It appears that under the facts and circumstances of the case the Division Bench thought it fit to provide by order dated 28.05.2019 that the PIL may now be converted and registered as a winding up company petition so that the matter may reach to its logical ends. Thus, the present case is not winding up proceedings under the Companies Act, 1956 but it is a petition registered under the orders of the Division Bench dated 28.05.2019 in PIL No.12324 of 2003, which itself was the result of order of Hon'ble Supreme Court dated 13.01.2003, passed under Article 32 of the Constitution of India in Writ Petition (c) No.758 of 1996.

15. It has been admitted by learned counsel for the applicant/respondent no.12 that the aforesaid PIL No.12324 of 2003 was converted into the present company petition by order dated 28.05.2019 on "no objection" filed by all the contesting parties including the petitioners and the applicants/respondent no.12. Thus, the aforesaid PIL was converted into the present petition with the consent of the applicants/ respondent no.12. Consequently, the respondents can not raise objection that the present company petition can not be adjudicated by the High Court. Without prejudice to the above, it is further relevant to mention that neither the applications presently under consideration filed by the applicants/respondent no.12 have disclosed any reason for transfer of the present petition to NCLT nor learned counsel for the applicants/respondent no.12 has raised any contention disclosing reasons for transfer, except that the present petition deserves to be transferred to the NCLT under the Transfer Rules, 2016. There is no doubt that the second proviso to Section 434(1)(c) provides that any party to winding up proceedings pending before any Court immediately before the commencement of IBC, may file an application for transfer of such proceedings and the Court may transfer all such proceedings to the NCLT. However, the said proviso does not mandate that the proceedings would automatically stands transferred rather it leaves the decision with the Court where the winding up

proceedings are pending, to transfer the same or not to transfer the same. The applications of the applicants/respondent no.12 do not even disclose specifically as to why power to transfer the winding up petition should be exercised by this Court and the winding up petition should be transferred, particularly when after journey of about 25 years the matter is now about to reach to its logical end. Similar is the view taken by Lucknow Bench of this Court in the case of **Reserve Bank of India a Statutory Body Vs. Sahara India Financial Corporation Ltd. 2019 3 ADJ 540(LB)(para 43,51,53,56,57 & 58)**. The judgment of this Court in the case of **Saumya Co-operative Housing Society Vs. State of U.P., 2019 (143) RD** relied by learned counsel for the applicants/respondent no.12 laying down the principle that jurisdiction can not be conferred on a Court by consent, is distinguishable on facts of the present case. Reasons in this regard have already been stated in foregoing paragraphs. It would be relevant to mention at the cost of repetition that the present petition has come into existence on account of the orders of Hon'ble Supreme Court dated 13.01.2003 in Writ Petition (c) No.758 of 1996 followed by order of the Division Bench of this Court dated 28.05.2019 in PIL No.12324 of 2003.

16. It would not be out of place to mention that pursuant to the direction of Hon'ble Supreme Court particularly those given in paragraphs g, h, i and l of the order dated 13.01.2003, the Special Commissioner took up the entire matter and after issuance of notices publicised in largely circulated news papers, adjudicated the claims. An interim report dated 11.01.2006 was submitted by the Special Commissioner, namely, Sri Justice R.A. Sharma (Retd.) and thereafter a supplementary final report dated 05.09.2006 was also submitted. The interim report dated 11.01.2006 is a very detailed report which discloses various steps taken by the Special Commissioner pursuant to the orders of Hon'ble Supreme Court and also the Division Bench of this Court in the aforesaid PIL No.12324 of 2003.

17. In the supplementary final report the Special Commissioner concluded as under :-

"By his orders dated 28.03.2006, the Special Commissioner has decided 153 claims. The judgments of the decided claims are contained in two volumes. All these judgments have been filed before this Hon'ble Court.

In the final report, it was mentioned that five cases; two from U.P. and three from Maharashtra, have been adjourned from time to time at the request of the parties and are fixed in April and June, 2006. Now, these five cases have also been decided. There were also five highly belated claims, which were left undecided. These claims have also been decided.

The Special Commissioner has awarded Rs. 9,42,65,989/- + Rs. 1,68,82,865/- = Rs. 11,11,48,854/- to the claimants whose claims have been allowed.

As all the pending claims have been decided by the Special Commissioner, his judicial work is over. Sale of the properties, mentioned in the Special Commissioner's order dated 28.03.2006, which is part of volume I of the judgments, and payment of the amount to the claimants whose claims have been decreed are the only work left. The sale of the properties is likely to take

time, as the orders of the Special Commissioner have been challenged.

This report is, accordingly, submitted to bring on record the position with regard to the disposal of the claims filed before the Special Commissioner."

18. Thereafter, on account of death of Sri Justice R.A. Sharma, by order of the Division Bench this Court Sri Justice R.R.K. Trivedi (Retd.) was appointed as a Special Commissioner on 06.08.2013 to carry out the orders of Hon'ble Court. A lot of amount has been collected which are kept in three bank accounts and details of which have been given by Sri Justice R.R.K. Trivedi (Retd.) in his application dated June 10, 2020. The amounts is available in the bank in the form of FDRs. are about 1.25 crores.

9. The facts as briefly noted above clearly indicates that such steps have already been taken which are irreversible. Therefore, in terms of the provisions of Section 434 (c) of the Companies Act, 2013 read with Rule 5 of the Transfers Rules, 2016, the transfer applications in question filed by the applicants/respondent no.12 deserve to be rejected.

20. In the case of **Action Ispat and Power Private Limited Vs. Shyam Metalics and Energey Limited (2021) 2 SCC 641 (para 14 to 26)** Hon'ble Supreme Court considered the provisions of Section 434(c) of the Companies Act, 2013 and the Transfer Rules 2016 and held that transfer of petition pending in High Court to NCLT can be made when no irreversible steps towards winding up of the Company have otherwise taken place. Therefore, even in view of the law laid down by Hon'ble Supreme Court the present company petition need not to be transferred to the NCLT.

21. For all the reasons aforestated, the Civil Misc. Application No.48 of 2019 dated 09.09.2019, Civil Misc. Application No. 49 of 2019 dated 30.11.2019 and Civil Misc. Application No.52 of 2020 dated 30.07.2020, filed by the applicants/ respondent No.12 are hereby rejected.

22. The matter is released and be listed on 25.03.2022 before the appropriate court.

(2022)06ILR A1088
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 2341 of 2001

Prabhakar Pandey ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Shashank Shekhar Singh, Sri Anil Bhushan, Sri Siddharth Kumar Mishra

Counsel for the Opposite Parties:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973 - Magistrate rejected the final report and cognizance order was passed- Revisional court quash cognizance order- on the plea of alibi raised by accused raised on the basis of affidavits-Plea of alibi must not be looked at the stage of investigation and inquiry-examined during the Trial at the stage of defence-impugned order not sustainable-

Revision allowed. (E-9)

List of Cases cited:

1. Gangadhar Janardan Mhatre Vs St. of Mah. & ors. 2004 (7) SCC 768,

2. Pakhando & ors. Vs St. of U.P. reported in 2001 SCC Online All 967

3. Mohammad Yusuf Vs St. of U.P. 2007 (9) ADJ 294

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Anil Bhushan, learned senior counsel assisted by Sri Siddharth kumar Mishra, learned counsel for the revisionist and Sri Suresh Bahadur Singh, learned A.G.A. for the State-opposite party No.1. Even in the revised list none appeared on behalf of the opposite party nos.2 to 4 nor any counter affidavit has been filed on their behalf, this court proceed to hear the matter finally.

2. This revision is directed against the order dated 26.07.2001 passed by learned District and Sessions Judge, Kannauj by which he has accepted the final report submitted by the Investigating Officer and set aside the order dated 25.04.2001 passed by the Judicial Magistrate, Chhibramau by which he has summoned the opposite party no.2 under Section 379 I.P.C.

3. The brief facts of the present case is that the revisionist has constructed a house in the property in dispute and also there are 32 trees of Mango and one tree of Neem. On 06.09.2000 respondent No.2 along with some unsocial elements has broken the lock of the house of the revisionist and took possession on the same and also take away the goods of Rs. 8000/-. The revisionist tried to lodge F.I.R. by approaching the concerned Police Station and by sending Fax message to the Superintendent of Police, but no F.I.R. has not been lodged. Thereafter, revisionist filed an application under Section 156 (3) Cr.P.C. before the Judicial Magistrate on 02.12.2000 and on the application of the revisionist on the same day the Judicial Magistrate, First Class has passed an order directing the Police Station of concerned Police to lodge an F.I.R. and inform the Court. Pursuant to the order passed by the Judicial Magistrate an F.I.R. has been lodged by the police on 07.12.2000, under Sections 147, 504, 506, 427, 448, 379 I.P.C. and the same was registered as Case Crime No. 454 of 2000 and after investigation the Investigating Officer in a mechanical manner submitted final report in favour of the opposite party no.2 without considering the evidence on record.

The revisionist has again approached to the Police Authority for again re-investigation and also filed protest petition before the Judicial Magistrate and on the protest petition of the revisionist the learned Magistrate vide order dated 25.04.2001 have issued summons to the opposite party no.2 under Section 379 I.P.C.

4. Feeling aggrieved by the order dated 25.04.2001 the opposite party no.2 filed a criminal revision before the learned District and Sessions Judge, Kannauj and the revisional court vide impugned order dated 26.07.2021 set aside the summoning order dated 25.04.2001 and also accepted the final report without considering the evidence on record.

5. After hearing the learned counsel for the revisionist and learned A.G.A. for the State and on perusal of the record it reveals that the F.I.R. was registered by the revisionist against opposite party no. 2 under Sections 147, 504, 506, 427, 448,

379 I.P.C. and after investigating final report was submitted by the Investigating Officer in a mechanical manner. Thereafter, the learned Magistrate after considering the protest petition and perusing the record summoned the accused under Section 379 Cr.P.C. vide order dated 25.04.2001, expressing his judicial power.

6. In **Gangadhar Janardan Mhatre vs. State of Maharashtra and others 2004 (7) SCC 768**, the Court reiterating above view said as under:

"The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 109(1)(b) and direct the issue of process to the accused."

(emphasis added)"

7. In **Pakhando and others Vs. State of U.P. reported in 2001 SCC Online All 967** a Division Bench of this Court after considering Section 190 Cr.P.C. has held that if upon investigation Police comes to conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify forwarding of accused for trial and submits final report for dropping proceedings, Magistrate shall have following four courses and may adopt any one of them:

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under Section 190(I)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) He may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) He may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(I)(b) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

8. In **Mohammad Yusuf Vs. State of U.P. 2007 (9) ADJ 294**, Police submitted final report which was not accepted by Magistrate, not on the basis of material collected by Police, but, relying on Protest Petition and accompanying affidavit Magistrate issued process. Court disapproved the aforesaid procedure adopted by Magistrate and said:

"Where the magistrate decides to take cognizance under section 190 (1) (b) ignoring the conclusions reached at by the investigating officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigating officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying

affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Section 200 and 202 Cr.P.C. The Magistrate could not take cognizance under section 190 (1) (b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taking into account extraneous material i.e. protest petition and affidavits while taking cognizance under section 190 (1) (b) Cr.P.C. the impugned order is vitiated." (emphasis added).

9. In the instant case, after submission of final report under Section 173 Cr.P.C. against opposite party no. 2, the learned Magistrate after considering the protest petition rejected the final report and arrived at conclusion that case is made out against opposite party under Sections 379 I.P.C. and cognizance order was also passed on 25.04.2001 and summoned the accused/opposite party. Contention of the counsel for the revisionist is perfectly correct that the Magistrate has power straightway disagreeing with the conclusion arrived at by the Investigating Officer. Being aggrieved with the order dated 25.04.2001, opposite party No.2 filed revision in the court of District and Sessions Judge, Kannau. Sessions Court considered the plea of alibi of the accused only on the basis of affidavit submitted by opposite party and quash the order of cognizance passed by Magistrate against the opposite party under Sections 379 I.P.C. vide order dated 26.07.2001 and accepted the final report submitted by investigating officer. Revisional Sessions Court has allowed the revision of opposite party no.2 on the basis of plea of alibi filed on affidavit of witness. But it is a settled principal of law that plea of alibi must not be looked at the stage of investigation and inquiry. Plea of alibi of accused shall be examined only during the trial at the stage of defence. Order of learned Revisional Sessions Court is totally based on plea of alibi of accused-oppposite parties on the basis of affidavit submitted by witness before the Sessions Court. So the order of the lower revisional court is not sustainable in the eyes of law. **On exercising the revisional power, learned Sessions Court cannot quash the cognizance and summoning order passed by the Magistrate, in exercising its revisional power, jurisdiction of Sessions Court is very limited and the Sessions Court can only examine the illegality, irregularity and impropriety of the order passed by the Magistrate. If the Sessions Court find any illegality, irregularity or jurisdictional error then Sessions Court cannot quash the proceedings but the revisional court have only power to issue direction by pointing out the error regarding the order passed by the Magistrate. Therefore, order of learned Sessions Court, is wholly erroneous and against the set principles of law.**

10. In view of the aforesaid discussion this Court is of the view the present revision of revisionist is liable to be allowed and the order dated 26.07.2001 passed by learned District and Session Judge, Kannauj is hereby quashed.

11. The District and Session Judge, Kannauj is directed to pass a fresh order in accordance with law in view of the observation of this Court after hearing the aggrieved parties.

12. Accordingly, the revision is **allowed.**

13. The office is directed to transmit back the lower court record, if any, with a copy of the judgment and order of this Court before the court below for its compliance.

(2022)06ILR A1092
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision Defective No. 273 of 2016

Laxman Prasad ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Anurag Pathak, Sti Rajesh Kumar Pandey

Counsel for the Opposite Parties:
Govt. Advocate, Sri Shri Prakash Dwivedi

Limitation Act - Section 5-Revision filed after delay of 756 days -no sufficient cause-complete careless and reckless-virtually unexplained-**Application and revision dismissed.** (E-9)

List of Cases cited:

1. Collector, Land Acquisition Vs Katiji, 1987(2) SCC 107

2. P.K. Ramachandran Vs St. of Kerala, AIR 1998 SC 2276

3. Shakuntala Devi Jain Vs Kuntal Kumari, AIR 1969 SC 575

4. Brij Indar Singh Vs Kanshi Ram ILR (1918) 45 Cal 94

5. St. of Nagaland Vs Lipok AO & ors., AIR 2005 SC 2191

6. Vedabai @ Vaijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT 2001(5) SC 608

7. Pundlik Jalam Patil (dead) by LRS. Vs Executive Engineer, Jalgaon Medium Project & anr. (2008) 17 SCC 448

8. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157

(Delivered by Hon'ble Shamim Ahmed, J.)

(Criminal Misc. Delay Condonation Application No. 135146 of 2016)

1. This revision has been filed challenging the judgment and order dated 21.10.2015 passed by Principal Judge, Family Court, Mirzapur in Misc. Case No. 39 of 2014, by which application of revisionist filed under Section 126(2) Cr.P.C. was rejected, which was preferred by the revisionist against the judgment and order dated 01.01.2014 passed by Principal Judge, Family Court, Mirzapur in Misc. Case No. 102 of 2013, Smt. Meera Devi Vs. Laxman Prasad, whereby the court below has allowed the application undr Section 125 Cr.P.C. moved on behalf of wife (opposite party No. 2 herein) and directed the revisionist to pay maintenance allowance to his wife at the rate of Rs. 5,000/- per month from the date of application and remaining balance amount be paid in four equal installments in every three months within a period of one year.

2. Heard learned counsel for the revisionist and learned counsel for the opposite party no.2 and learned A.G.A. for the State.

3. This revision is barred by limitation and has been filed with a delay of 756 days.

4. Learned counsel for the revisionist submits that the revisionist is husband and his wife-opposite party no.2 filed an application under Section 125 of Cr.P.C., which was allowed by the Principal Judge, Family Court, Mirzapur vide its order dated 01.01.2014 and awarded maintenance at the rate of Rs. 5000/- per month from the date of application i.e. 28.07.2006. Against the said order the revisionist filed an application under Section 126(2) Cr.P.C. which was rejected by the learned Principal Judge, Family Court, Mirzapur on 21.10.2015. He further submits that the revisionist reached Allahabad on 24.03.2016 and thereafter, again went back to Mirzapur for taking some relevant papers and finally came to Allahabad on 11.04.2016 and after preparing this revision, filed the same along with application under Section 5 of the Limitation Act.

5. The explanation given in affidavit accompanying delay condonation application filed under Section 5 of Limitation Act, 1963 is neither acceptable nor trustworthy.

6. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In **Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

7. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

8. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the

reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

9. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

10. I need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

11. In ***Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575*** a three Judges Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

12. The Privy Council in **Brij Indar Singh Vs. Kanshi Ram ILR (1918) 45 Cal 94** observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in **State of Nagaland Vs. Lipok AO and others, AIR 2005 SC 2191.**

13. In **Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others, JT 2001(5) SC 608** the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

14. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448**, in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not

15. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012**

"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

16. In my view, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, I find that here is a case which shows a complete careless and reckless long delay on the part of revisionist which has remain virtually unexplained at all. Therefore, I do not find any reason to exercise my judicial discretion exercising judiciously so as to justify condonation of delay in the present case.

17. In the result, the application deserves to be dismissed.

18. Accordingly, the application for condonation application is hereby rejected.

Since delay condonation application No. 135146 of 2016 has been rejected by this Court vide order of date, therefore, the present revision is also dismissed as barred by limitation.

(2022)06ILR A1095
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 944 of 2017

Shane Abbas ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Krishna Dutt Tiwari

Counsel for the Opposite Parties:
Govt. Advocate, Sri Firoz Haider, Sri Nazrul Islam Jafri

Criminal Law - Juvenile Justice Act, 2015- Revisionist challenging the order declaring the Opposite party as juvenile-disputing the date of birth in the High School Certificate as according to the certificate issued by the Muncipal Corporation Moradabad the date of birth is different -throughout from class K.G. to XI, the date of birth is same as in high school certificate-valid proof for age determination -if matriculation certificate is available and there is no other material evidence to create doubt-matriculation certificate will determine the age.

Revision dismissed. (E-9)

List of Cases cited:

1. Rishipal Singh Solanki Vs St. of U.P. & ors. 2021 0 Supreme (SC) 698

2. Ashwani Kumar Saxena Vs St. of M.P. in Criminal Appeal No. 1403 of 2021 (decided on 13.09.2012),

3. Jabar Singh Vs Dinesh & anr. - (2010) 3 SCC 757

4. Ram Vijay Singh Vs St. of U.P.– 2021 CriLJ 2805

5. Shah Nawaz Vs St. of U.P. & ors. reported in AIR 2011SC3107

6. Parag Bhati (Juvenile through Legal Guardian Mother-Smt. Rajini Bhati Vs St. of U.P. & anr. – (2016) 12 SCC 744

7. Abuzar Hossain @ Gulam Hossain Vs St. of West Bengal reported in 2012 (10) SCC 489

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This revision is directed against the judgment and order dated 09.03.2017 passed by Special Judge (POCSO Act) Additional Sessions Judge Court No. 12 Moradabad in Appeal No. 207/2016 (Shane Abbas Vs. Kumar Fiza Zaidi) dismissing the appeal of the present revisionist and confirmed the order dated 20.10.2016 passed by Juvenile Justice Board Moradabad in Case No. 77/2016 arising out of Case Crime No. 237/2016, under Sections 302, 120B I.P.C. Police Station Civil Lines, District Moradabad, by which the opposite party No.2-Kumari Fiza Naseem Zaidi has been

2. The brief facts of the present case is that on 25.02.2016 opposite party No.2-Kumari Fiza Naseem Zaidi and others have committed brutal murder of the brother of the revisionist, who was practising advocate and returning from kachery (District Court). The opposite party No.2 raised the plea of her juvenility before the Juvenile Justice Board Moradabad and after considering the material evidence the Juvenile Justice Board, Moradabad vide order dated 20.10.2016 allowed the application of the opposite party no.2 and she was declared juvenile. Thereafter, the present revisionist filed an appeal against the order dated 20.10.2016 before the Special Judge (POCSO Act) Additional Sessions Judge Court No. 12 Moradabad bearing Criminal Appeal No. 207/2016 (Shane Abbas Vs. Kumari Fiza Zaidi) raising objection that the date of birth of the opposite party No.2-Kumari Fiza Naseem Zaidi as per the certificate issued by the Municipal Corporation Moradabad is 16.11.1998 and according to the High School Certificate her date of birth is 16.11.1999 and as per Medical report (X-ray report) her age is 19 years, even then learned courts below have not considered the same and passed the impugned order. Several other grounds were taken while

assailing the impugned order passed by the court below.

3. I have heard the learned counsel for the parties and perused the record.

4. Before this Court proceeds further to assess the evidence and to consider and decide the case on merits, it shall be appropriate to examine the nature and scope of enquiry as contemplated under the law.

5. Hon'ble Apex Court in the case of **Rishipal Singh Solanki Vs. State of Uttar Pradesh and others 2021 0 Supreme (SC) 698** in paras 18,19, 20, 21, 22, 23, 24, 25, 26, 27 has held as under:

"18. The JJ Act, 2015 is a sequel to the Juvenile Justice (Care and Protectiion of Children) Act 2000 (hereinafter referred to as the "JJ Act, 2000') which has since been repealed. Under the JJ Act, 2000, an amendment was made by Act 33 of 2006 with effect from 22.8.2006 under which Section 7A of was inserted which reads as under:

"7A. Procedure to be followed when claim of juvenility is raised before any court.-- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect." of Section 49 of the said Act reads as under:

"49. Presumption and determination of age.-

(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority 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."

19. Rule 12 of the Juvenile Justice (Care and Protection of Children)

Rules, 2007 (hereinafter referred to as the "JJ Rules, 2007') prescribed the procedures for determination of age. Rule 12 reads as under -

"12. Procedure to be followed in determination of Age.

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or 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."

20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining : (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. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year. If a juvenile in conflict with law was found to be below 18 years, an order had to be passed declaring the status of the juvenility by the Court. The said procedure was also applicable to dispose off cases where the status of the juvenility had not been determined in accordance with the Act and the Rules made thereunder.

21. On repeal of JJ Act, 2000 and on the enforcement of JJ Act, 2015, the procedure to be followed when a claim of juvenility is raised before any court, other than a Board is stipulated under Section 9 (2) & (3). The same reads as under -

"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:

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."

There is no corresponding Rule to determine juvenility akin to Rule 12 of the JJ Rules, 2007.

22. On the other hand, under section 94 of the JJ Act, 2015, a

presumption is raised that when a person is brought before the JJ Board or the Child Welfare Committee (''Committee' for short) (other than for the purpose of giving evidence) and the said person is a child, the JJ Board or the Committee 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. But where the said Board or the Committee has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the JJ Board or the Committee, 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. The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of the Act, be deemed to be the true age of that person. For immediate reference section 94 of JJ Act, 2015 is extracted as under:

"94. 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 -

a) 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;

b) the birth certificate given by a corporation or a municipal authority or a panchayat;

c) 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.

23. Under section 7A of JJ Act, 2000 which was inserted by an amendment with effect from 22.08.2006, provision was made to claim juvenility by contending that the accused person was a juvenile on the date of commission of the offence and in such a case, on the evidence taken on record, a finding regarding the age of such person had to be recorded by the court, other than a JJ Board. The claim for juvenility could be raised before any Court and at any stage, even after the final disposal of a case and such claim had to be determined in terms of the said Act and the rules made thereunder. If the Court found a person to be a juvenile on the date of commission of offence under sub-section (1) of section 7A of the JJ Act, 2000, it had to forward the juvenile to the JJ Board for passing appropriate orders and the sentence, if any, passed by a Court would not have any effect. However, under the JJ Act, 2015, a provision corresponding to section 7A of the JJ Act, 2000, is in the form of sub-Section 2 of Section 9 of the said Act, which has been extracted above.

24. Further, unlike section 49 of JJ Act, 2000, section 94 of JJ Act, 2015 provides for presumption and determination of age if the Juvenile Justice Board or the Committee has reasonable grounds to doubt whether the person brought before it is a child or not. It shall undertake the process of determination of age by seeking evidence such as:

(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; and

(iii) 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.

25. The difference in the procedure under the two enactments could be discerned as under:

(i) As per JJ Act, 2015 in the absence of requisite documents as mentioned in Sub-section (2) of Section 94(a) and (b), there is provision for determination of the age by an ossification test or any other medical age related test to be conducted on the orders of the Committee or the JJ Board as per Section 94 of the said Act; whereas, under Rule 12 of the JJ Rules, 2007, in the absence of relevant documents, a medical opinion had to be sought from a duly constituted Medical Board which would declare the age of the juvenile or child.

(ii) With regard to the documents to be provided as evidence, what was provided under Rule 12 of the JJ Rules, 2007 has been provided under sub-section 2 of section 94 of the JJ Act, 2015 as a substantive provision.

(iii) Under Section 49 of the JJ Act, 2000, where it appeared to a

competent authority that a person brought before it was a juvenile or a child, then such authority could, after making an inquiry and taking such evidence as was necessary, record a finding as to the juvenility of such person and state the age of such person as nearly as may be. Sub-section (2) of Section 49 stated that no order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order had been made is not a juvenile and the age recorded by the competent authority to be the age of person so brought before it, for the purpose of the Act, be deemed to be the true age of that person.

26. But, under Section 94 of the JJ Act, 2015, which also deals with presumption and determination of age, the Committee or the JJ Board has to record such observation stating the age of the child as nearly as may be and proceed with the inquiry without waiting for further confirmation of the age. It is only when the Committee or the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, it can undertake the process of age determination, by seeking evidence.

27. Sub-section (3) of Section 94 states that the age recorded by the Committee or the JJ Board to be the age of the persons so brought before it shall, for the purpose of the Act, be deemed to be the true age of that person. Thus, there is a finality attached to the determination of the age recorded and it is only in a case where reasonable grounds exist for doubt as to whether the person brought before the Committee or the Board is a child or not, that a process of age determination by seeking evidence has to be undertaken.

6. The Supreme Court of India in **Ashwani Kumar Saxena Vs. State of M.P. in Criminal Appeal No. 1403 of 2021 (decided on 13.09.2012)**, examined the scope of an enquiry expected from a Court, the Juvenile Justice Board and the Committee in the light of earlier judgements and was pleased to observe in para-27 as under:-

"Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an "inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence."

7. The Hon'ble Supreme Court held that the enquiry on the point of juvenility has nothing to do with the enquiry as contemplated under other legislations and gave an opinion in paras-32, 34 and 36 of the aforesaid judgment of **Ashwani Kumar Saxena (supra)** as below:

32. Consequently, the procedure to be followed under the J.J. Act in

conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in section 7A read with Rule 12.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w 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 need 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 need 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 above mentioned 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.

36. Age determination inquiry contemplated under the JJ Act and 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, J.J. Board or a Committee functioning under the J.J. 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 J.J. Board or the Committee need to go for medical report for age determination.

8. In **Jabar Singh Vs. Dinesh and another - (2010) 3 SCC 757**, Hon'ble Apex Court Court considered a situation wherein the entry of date of birth in the admission form of the school records or transfer certificates did not satisfy the condition laid down under Section 35 of the Evidence Act, i.e., the said entry was not in any public or official register and was not 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 therefore the said evidence was not relevant for the purpose of determining the age of the accused in the said case. In the aforesaid case, this Court set aside the order of the High Court in revision and confirmed the order of the trial Court holding that the accused therein was a juvenile at the time of the commission of the alleged offence.

9. Hon'ble Apex Court in the case of **Ram Vijay Singh Vs. State of Uttar Pradesh- 2021 CriLJ 2805,** has observed as under :

"the ossification test is not the sole criterion of age determination and a blind and mechanical view regarding the age of the person cannot be adopted solely on the basis of medical opinion by radiological examination. Though, radiological examination is a useful guiding factor for determining the age of a person, the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other circumstances. The relevant paragraphs of the said judgment are extracted as under: "14. We find that the procedure prescribed in Rule 12 is not materially different than the provisions of Section 94 of the Act to determine the age of the person There are minor variations as the Rule 12(3)(a)(i) and (ii) have been clubbed together with slight change in the language. Section 94 of the Act does not contain the provisions regarding benefit of margin of age to be given to the child or juvenile as was provided in Rule 12(30(b) of the Rules. The importance of ossification test has not undergone change with the enactment of Section 94 of the Act. The reliability of the ossification test remains vulnerable as was Under Rule 12 of the Rules."

10. Hon'ble Apex Court in the Case of **Shah Nawaz Vs. State of U.P. and others reported in AIR 2011SC3107** in paras 7, 8, 9, 10, 11 and 12 has held as under:

"7) In Raju and another Vs. State of Haryana (2010) 3 SCC 235, this Court had admitted "mark sheet" as one of the proof in determining the age of the accused person. In that case, the appellants therein Raju and Mangli along with Anil alias Balli and Sucha Singh were sent up for trial for allegedly having committed an offence punishable under Section 302 read with Section 34 of the IPC. Accused Sucha Singh was found to be a juvenile and his case was separated for separate trial under the Act. Others were convicted under Section 302 read with Section 34 of the IPC and were sentenced to imprisonment for life and to pay a fine of Rs. 5,000/-. Apart from contending on the merits of the prosecution case, insofar as appellant No. 1, Raju, is concerned, the counsel appearing for him submitted that on the date of the incident that is on (31.03.1994), he was a juvenile and as per his mark sheet, wherein his date of birth was recorded as 1977, he was less than 17 years of age on the date of the incident. Learned counsel submitted that having regard to the recent decision of this Court in **Hari Ram Vs. State of Rajasthan and another, (2009) 13 SCC 211**, appellant No. 1 must be held to have been a minor on the date of the incident and the provisions of the Act would apply in his case. Learned counsel further contended that the appellant No. 1 would have to be dealt with under the provisions of the said Act in keeping with the decision in the aforesaid case. On merits, while accepting the claim of the learned counsel for accused-appellant, this Court altered the conviction and sentence and convicted under Section 304 Part I read with Section 34 IPC instead of Section 302 read with Section 34 IPC. As far as appellant No. 1, namely, Raju was concerned, while accepting the entry relating to date of birth in the mark sheet referred his case to the Board in terms of Section 20 of the Act to be dealt under the provisions of the said Act in keeping with

the provision of Section 15 thereof. It is clear from the said decision that this Court has accepted mark sheet as one of the proof for determining the age of an accused person.

8) Similarly, this Court has treated the date of birth in School Leaving Certificate as valid proof in determining the age of an accused person. In **Bhoop Ram Vs. State of U.P. (1989) 3 SCC 1,** this Court considered whether the appellant therein is entitled lesser imprisonment than imprisonment for life and should have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 (1 of 1952). The following conclusion in para 7 is relevant which reads as under:-

"7.....The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column "date of birth". There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars.... "

It is clear from the above decision that this Court relied on the entry made in the column "date of birth" in the School Leaving Certificate.

9) In **Rajinder Chandra Vs. State of Chhattisgarh and another (2002) 2 SCC 287,** this Court once again considered the entry relating to date of birth in the mark sheet and concluded as under:

"5. It is true that the age of the accused is just on the border of sixteen years and on the date of the offence and his arrest he was less than 16 years by a few months only. In ***Arnit Das v. State of Bihar*** *this Court has, on a review of judicial opinion, held that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. The law, so laid down by this Court, squarely applies to the facts of the present case.*

10) In ***Arnit Das v. State of Bihar (2000) 5 SCC 488,*** *the Court held that while dealing with a question of determination of the age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he is a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be juvenile in borderline cases.*

11) In ***Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584*** *with regard to the entries made in School Leaving Certificate, this Court has observed as under:- "17. The school-leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 1-8-1967 and his name was struck off from the roll of the institution on 6-5-1972. The said school-leaving certificate was not issued in the ordinary course of business of the school. There is nothing on record to show that the said date of birth was recorded in a register maintained by the*

school in terms of the requirements of law as contained in Section 35 of the Evidence Act. No statement has further been made by the said Headmaster that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school-leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Headmaster that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school, there was no reason as to why the same had not been produced."

12) In ***Pradeep Kumar Vs. State of U.P. 1995 Supp (4) SCC 419****, this Court considered the commission of offence by persons below 16 years of age. The question before a three- Judge Bench was whether each of the appellants in those appeals was a child within the meaning of Section 2(4) of the U.P. Children Act, 1951 and as such on conviction under Section 302 read with Section 34 IPC should have been sent to an approved school for detention till the age of 18 years. At the time of granting special leave, appellant, by name, Jagdish produced High School Certificate, according to which he was about 15 years of age at the time of occurrence. Appellant - Krishan Kant produced horoscope which showed that he was 13 years of age at the time of occurrence. So far as appellant - Pradeep was concerned, a medical report was called for by this Court which disclosed that his date of birth as 07.01.1959 was acceptable on the basis of various tests conducted by the medical authorities. In the above factual scenario/details, this Court concluded as under:-*

"3. It is thus proved to the satisfaction of this Court that on the date of occurrence, the appellants had not completed 16 years of age and as such they should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment on conviction under Section 302/34 of the Act"

After saying so and after finding that the appellants were aged more than 30 years, this Court directed not to send them to an approved school under the U.P. Children Act for detention, while sustaining the conviction of the appellants under all the charges framed against them, quashed the sentences awarded to them and ordered their release forthwith."

11. In case of **Parag Bhati (Juvenile through Legal Guardian-Mother-Smt. Rajini Bhati v. State of Uttar Pradesh and another - (2016) 12 SCC 74**4, Ho'ble Apex Court observed as under:

"34. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the Courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the

institution entrusted with the administration of justice.

35. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law cannot be allowed to come to his rescue. (Emphasis added) From the above decision, it is clear that the purpose of Juvenile Justice Act, 2000 is not to give shelter to the accused of grave and heinous offences.

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, an enquiry for determination of the age of the accused is permissible which has been done in the present case."

12. Hon'ble Apex Court in the case of **Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal reported in 2012 (10) SCC 489,** a three judge Bench considered questions arising under the JJAct and the rules framed thereunder. After a detailed consideration of earlier judgments of the Apex Court on this issue, the larger bench of the apex Court, laid down as under:

39. Now, we summarise the position which is as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after 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 appeal court.

(ii) 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.

(iii) 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 Rule 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 and Pawan these documents were not found prima facie credible while in Jitendra Singh 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 Seciton 7A and order an enquiry for determination of the age of the delinquent.

(iv) 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 age of the delinquent.

(v) 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 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 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.

(vi) 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 threshold whenever raised.

13. I have perused the judgment passed by both the courts below.

14. Section 8 of The Juvenile Justice (Care and Protection of Children) Act, 2015 provides the powers, functions and responsibilities of the Board, which reads as under:-

(1) Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise.

(3) The functions and responsibilities of the Board shall include--

(a) ensuring the informed participation of the child and the parent or guardian, in every step of the process;

(b) ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation;

(c) ensuring availability of legal aid for the child through the legal services institutions;

(d) wherever necessary the Board shall provide an interpreter or translator, having such qualifications, experience, and on payment of such fees as may be prescribed, to the child if he fails to understand the language used in the proceedings;

(e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed;

(f) adjudicate and dispose of cases of children in conflict with law in accordance with the process of inquiry specified in section 14;

(g) transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any stage, thereby recognising that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved;

(h) disposing of the matter and passing a final order that includes an individual care plan for the child's rehabilitation, including follow up by the Probation Officer or the District Child Protection Unit or a member of a non-governmental organisation, as may be required;

(i) conducting inquiry for declaring fit persons regarding care of children in conflict with law;

(j) conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement in quality of services to the District Child Protection Unit and the State Government;

(k) order the police for registration of first information report for offences committed against any child in conflict with law, under this Act or any other law for the time being in force, on a complaint made in this regard;

(l) order the police for registration of first information report for offences committed against any child in need of care and protection, under this Act or any other law for the time being in force, on a written complaint by a Committee in this regard;

(m) conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the observation home; and

(n) any other function as may be prescribed.

15. Section 9 of The Juvenile Justice (Care and Protection of Children) Act, 2015 provides procedure to be followed by

a Magistrate who has not been empowered under this Act, reads as under:

(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:

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.

16. Section 18 of the Act, 2015 provides that if it is found that any child below the age of 16 years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, may pass orders like allowing child to go home after advice or admonition or to direct the child to participate in group counselling or perform community service or may be released on probation of good conduct or he may be sent to special home for such period not exceeding three years etc. Perusal of provisions of the Act, 2015 establish that in no case the child below sixteen years of age having committed an heinous offence can be detained as convict in regular jails. The punishment as provided under the above provisions is basically of reformative nature. The general principles of care and protection of children as given in Chapter 2 of J. J. Act also include a principle of repatriation and restoration of every child with his family at the earliest.

17. Section 94 of the Act, 2015 provides presumption and determination of age of juvenile and such presumption is not conclusive to prove the case and is rebutable on the evidence lead by the aggrieved parties. Section 94 of the Act, 2015 is reproduced herein below:

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.

18. In the M.R. Register of K.C.M. School, Civil Lines, Moradabad, in which the opposite party No.2 has studied from Class VII to XI, the name of the opposite party No.2 was registered at serial No. 16352 and it has also been proved by the statement of the Principal of the said institution and on the M.R. Register of K.G.Methodist School Civil Lines, Moradabad in which the opposite party No.2 studied from Class 2 to 3 her name was registered as Serial No. 537 and the Manager of the said institution stated on oath this fact. Further, Principal G.K.Vailhm College Moradabad, in which the opposite party No.2 had studied in Class Nursery, has also stated on oath that on the M.R. Register her name was registered at Serial No. 521 and thus it is beyond doubt that from K.G. to XI the date of birth of the opposite party No.2 was registered as 16.11.1999 and this Court is satisfied that all the entry relating to date of birth entered is one of the valid proofs of evidence for determination of age and it has also been proved by the statement of the Principal of the said institutions, therefore, undoubtedly opposite party No.2 was juvenile aged about 16 years 03 months and 09 days on the date of incident and there is no dispute as per the school record.

It is settled position in law that if the matriculation or equivalent certificates are available and there is no other material evidence to create doubt on the date of birth mentioned in the matriculation or equivalent certificate or genuineness of the certificate, then the date of birth mentioned in the matriculation certificate shall be treated as date of birth of the accused/juvenile. However, if there is any doubt, further enquiry shall be made and the Board/Court shall be justified to determine the age of the accused/juvenile

claiming juvenility, on the basis of medical opinion from a duly constituted medical board. In view of the provision of Section 94 (2) of the Act, 2015 while making enquiry for determining the age of an accused/juvenile who is involved in a grave and heinous offence, the Board/Court should be more careful and conscious and once the the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available and is proved then there was no justification to consider the age certificate issued by Municipal Corporation, Moradabad for determining the age of the accused-opposite party No.2 or determining the age by the medical Board.

In the present case in the school certificate from Class UKG to XI the date of birth of the opposite party No.2 is recorded as 16.11.1999, therefore, undoubtedly opposite party No.2 was juvenile on the date of incident, therefore, objection of the revisionist has no force that she is not juvenile on the date of incident.

The Court below has rightly considered the certificate issued by the Board from where the opposite party No.2 has passed her matriculation examination in which her date of birth is recorded as 16.11.1999 and the court below has passed the impugned order considering the provision of Section 94 (2) of the Act, 2015.

19. In view of the aforesaid discussion and considering the above proposition of law laid down by the Hon'ble Apex Court, I am in full agreement and I find no illegality or perversity in the impugned order dated 09.03.2017 passed by Special Judge (POCSO Act) Additional Sessions Judge Court No. 12 Moradabad in Appeal No. 207/2016 (Shane Abbas Vs. Kumar Fiza Zaidi) dismissing the appeal of the present revisionist and confirmed the order dated 20.10.2016 passed by Juvenile Justice Board Moradabad in Case No. 77/2016 arising out of Case Crime No. 237/2016, under Sections 302, 120B I.P.C. Police Station Civil Lines, District Moradabad.

20. **Accordingly**, the revision does not require any interference by this Court and is hereby **dismissed.**

21. The file is consigned to record.

22. Let the copy of this judgment and order be placed before he Registrar General, High Court, Allahabad to communicate the same to all the District Judges and the Presiding Officer of all the Juvenile Justice Board of the districts for its necessary compliance.

(2022)06ILR A1112
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.06.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Revision No. 1126 of 2022
With
Criminal Revision No. 1187 of 2022
With
Criminal Revision No. 1122 of 2022

Mukesh Bansal ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rajeev Nayan Singh, Sri Ritukar Gupta, Sri Vinod Prakash Srivastava (Senior Adv.), Ms. Diksha Gupta, Sri Siddharh Srivastava

Counsel for the Opposite Parties:
Govt. Advocate, Sri Raj Kumar Kesari, Sri Ajay Kumar Sharma (AGA), Sri Raj Kumar

Criminal Law - Code of Criminal Procedure, 1973 - Section 227-Discharge application of the husband and in laws rejected-typical sweeping remark by informant-only exaggeration and magnifying the incident to thousands fold for obvious reasons and purpose-trial court ought to weigh entire material on record specially for in laws-no arrest or police action without concluding the "cooling period" of two months from lodging of FIR; cases be immediately referred to Family Welfare Committee.

Criminal Revision no. 1126 of 2022 and 1187 of 2022 allowed.(E-9)

Criminal Revision no. 567 of 2019 (husband's revision) rejected. (E-9)

List of Cases cited:

1. St. of Karnataka Vs L. Munishwamy & ors. Reported in 1977 AIR 1489

2. Sanjay Kumar Rai Vs St. of Uttar Pradesh and another reported in 2021 AIR(SC) 2351

3. Union of India Vs PrafullaKumar Samal reported in 1979 3 SCC 4

4. Dilwar Balu Kurane Vs St. of Maharashtra reported in (2002) 2 SCC 135

5. Sajjan Kumar Vs Central Bureau of Investigation, reported in 2010 (9) SCC 368

6. Tarun Ji Tejpal Vs St. of Goa reported in (2015) 14 SCC 481

7. K. Subba Rao Vs St. of Telangana reported in 2018 (14) SCC 452

8. Kahkashan Kausar@Sonam (17) Vs St. of Bihar in Criminal Appeal No.195 of 2022 decided on 01.02.2022

9. Priti Gupta Vs St. of Jharkhand, 2010(71) SCC 667

10. Social Action Forum for Manav Adhikar Vs Union of India reported in 2018 (10) SCC 443

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

[1] Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Rajiv Nayan Singh and Sri Ritukar Gupta learned counsel for the revisionists, Sri Raj Kumar Kesari, learned counsel for opposite party no. 2 and learned A.G.A for the State.

[2] Pleadings have been exchanged between the parties in all the above captioned revisions and as such, all the matters has ripe for final submissions to be adjudicated on merits.

[3] Coincidentally, all the aforesaid three revisionists, are assailing the legality and validity of the order dated 03.03.2022 through their respective revisions mentioned above whereby learned Additional Sessions Judge (Fast Track Court-I), Hapur, by three different orders of the same date i.e 03.03.2022, have rejected all the discharge applications of the revisionists under section 227 Cr.P.C. in S.T. No. 19 of 2020 (State v. Manju Bansal and others) arising out of Case Crime No. 567 of 2018, under sections 498-A, 504, 506, 307 and 120-B IPC and ¾ of the Dowry Prohibition Act, P.S. Pilakhuwa, District Hapur.

Since, order dated 03.03.2022 has been passed on three different applications in the same Sessions Trial, therefore, for the sake of brevity and convenience, all the aforesaid three revisions are clubbed together and decided by a common judgement by this Court.

FACTS OF THE CASE & SUBMISSIONS BY THE COUNSEL FOR THE REVISIONISTS:-

[4] As per prevailing practice nowadays in the society mostly in the cases of matrimonial discord, misunderstanding and incompatibility between the married couples, results into ever abhorring FIR. Here too, it seems to be a repetition of the same practice. In the instant case, the FIR was lodged by none other than the wife Ms. Shivangi Bansal herself against her husband as well as her in-laws. From the perusal of the FIR, it is borne out that for the incident of 04.10.2018, the present FIR came into existence on 22.10.2018 lodged at Police Station-Pilkhua, District-Hapur(native place of Ms. Shivani Bansal) against five named accused including husband and his relatives. In addition to above named accused persons, two more namely Chirag Bansal brother-in-law(devar) and Smt. Shipra Jain, married sister-in-law(nanad) were also roped in these offences. From the text of the FIR, following salient factual features of the case are apparent :-

[5] The written complaint signed by the informant Ms. Shivangi Bansal was sent to the office of the Prime Minister, Government of India, Chief Minister, State of U.P., Police Commissioner, New Delhi, D.G.P. Lucknow, Superintendent of Police, Hapur and Circle Officer, Police Station-Pilkhua, District-Hapur with the allegations that opposite party no.2 Ms. Shivangi Bansal was married with Sahib Bansal on 05.12.2015 according to Hindu rites and rituals. It seems that there was a deep rooted misunderstanding, and thorough incompatibility and discord between husband and wife, in fact, both of them were fierce-foe of each other.

[6] It is alleged that in the marriage, her parents have spent about Rs.2 crores in the shape of cash, jwellery, clothing, utensils, furniture and other gifts worth Rs.50 lacs. But, all the above named five persons were not happy by the aforesaid dowry and were demanding Rs.20 lacs more as an additional dowry which later on swelled to the figure of Rs.50 lacs. It is alleged that (a) the informant's father-in-law Mukesh Bansal wanted to have sexual favours from opposite party no.2 and not only this, her devar Chirag Bansal also have tried to ravish her physically. (b) The husband-Sahib Bansal used to lock her in the bathroom after taking away her mobile phone.(c) When the informant got pregnant, then they asked some astronomer to predict the sex of 'still born' baby. Then, her mother-in-law and sister-in-law pressurized her to get aborted. On making refusal, all the family members became physical with her. (d) During the stage of pregnancy, her husband tried to establish sexual relationship per-force. Not only this, he tried to have unnatural and oral sex and even, pissed in her mouth. (e) There was constant demand of additional dowry and on refusal by opposite party no.2 to oblige them, she was assaulted brutally by fists and kicks and maltreated and humiliated to its optimum.

[7] On 03.04.2017, Mukesh Bansal, (father-in-law) tried to distance with the warring couple and they shifted to some other rented accommodation, leaving behind the husband & wife to 130, First Floor, Rajdhani Enclave, Pithampura, New Delhi. In the month of September, 2017, when the informant was impregnated for the second time, the family members got her aborted in 2017 itself. On 03.10.2018, there was again demand of additional dowry of Rs.50 lacs and again on refusal, her husband attempted to strangulate her by 'chunni' and to further humiliate her, got her head into the commode of the toilet. On

04.10.2018, she dialed '100' and thereafter, gave written tehrir to A.S.P., Women Cell, New Delhi and then, left the company of her husband and returned to her place at Hapur.

[8] The story narrated in the FIR is not only abhorring, full of dirt, filth and venomous accusations where the informant fiercely abused her own husband and in-laws by using all the ways and means in the tone, tenor and texture in the extreme manner. The graphic and vivid descriptions of the incident without any shame or hitch of any sort which, speaks out volume of mental condition and amount of venom and poison in the mind of the informant. She without mincing any word, rather exaggerating the incident to manifolds, had vomitted the snide before the Court. Interestingly, general and sweeping allegations have been fastened against all the family members for committing sodomy, attempt to rape and illegal abortion etc. upon all the family members with special focus upon her husband, Sahib Bansal.

[9] As such, it is clear that the couple Sahib Bansal and Shivangi Bansal was married in December, 2015. Parents-in-law of the informant withdrew themselves from the company of their son and daughter-in-law keeping in view the growing acrimony between them and started residing to some other place in a rented accommodation. Thus, in-fact Mukesh Bansal and Smt. Manju Bansal(parent-in-law) remained in the company of warring Sahib Bansal (son) and daughter-in-law Shivangi Bansal, for almost one year and four months only and in order to achieve larger good, they came out silently from the lines of their son and daughter-in-law with hope and trust that bitterness between them would be diluted and the relationship between them would congenial.

[10] Learned counsel for the revisionist drew attention of this Court to GD Entry 027-A dated 04.10.2018, a call received by PCR that, in House No. 130 First Floor, Rajdhani Enclave, Peetampura, New Delhi, the husband is beating his wife. On 04.10.2018 at 10.10 P.M. an endorsement was made to the Police personnels, after meeting Ms. Shivangi Bansal, it was disclosed that the informant got married with Sahib Bansal about three years back, who constantly used to tease, beat and assault her for additional dowry. Thereafter, Ms. Shivangi Bansal after collecting her belongings along with her daughter's clothes and toys, proceeded to the house of her father Rajesh Goyal and mother-Sandhya Goyal at Pilkhuwa, Hapur. She has also given a handwritten application, enclosing a photostat copy of her complaint filed in the office of ACP, Women Cell, Rani Bagh, New Delhi and then proceeded to Pilakhuwa, District Hapur. On the same breath, she made similar allegations that her husband made demand for additional dowry of Rs. 50 Lacs and sought sexual favours in the shape of anal and oral sex and various other cruel acts of sex. She has also reiterated all the versions of the FIR in this application too. In the same application, she, in no uncertain terms, have stated that "I do not want to live with him(husband)." "I am not physically hurt." "I am not going for medical examination." It is crystal clear that despite all allegations of marpeet, she has made a candid statement that she was not physically assaulted, therefore, does not want to undergo any medical examination. On the same date, husband-Sahib Bansal also gave a detailed application with the allegation, exploiting the ugly situation that

Shivangi Bansal has demanded Rs.5 crore else she would make the life of Sahib Bansal(husband) and his family members miserable like hell. The detailed application running into five pages is at Page-54 onwards of the affidavit.

[11] Interestingly, by giving application on 04.10.2018 as mentioned above, Shivangi Bansal categorically denying any physical assault upon her by her husband and she does not want to get herself medically examined. On the other hand, she appeared before the police on 22.10.2018 to get herself medically examined in C.H.C. Hapur wherein the doctor in the medical report, has candidly mentioned that she has sustained no injury on her person, annexure-3 to the petition.

However, in the counter affidavit filed by learned counsel for the opposite party no.2 and injury report issued by Bhagwan Mahavir Hospital, Pitampura, New Delhi dated 04.10.2018 at 9:11 pm is annexed whereby, it discloses certain injuries over her persons. It is alleged that these injuries were sustained by her husband who was present at his flat. She has made a complaint to the doctor that she was assaulted by her husband who tried to strangulate her and she made a complaint of pain around her neck and also nausea and vomitting. The condition of the patient was conscious and oriented and making a physical investigation, the doctor has opined that there is linear transverse bruise seen over lateral part of the neck. There is small burn sign seen at left forearm and tenderness in the backside. Thus, in totality, it is alleged that the husband had tried to strangulate her by a scarf resulting into a bruise over the neck. Except this, there is no vital injury over her person. Thus, it is quite clear that the instant is a no injury case wherein the informant has sustained a single scratch over her person and so far as strangulating her neck by chunni is concerned, there is sign and mark of struggle over her neck suggestive of the fact that husband has made an effort to gag her neck.

[12] The police, after probing the matter in depth, has submitted the charge sheet dropping all the offences, wherein the informant had made wild accusations in the FIR against her husband and his family members. The aforesaid charge sheet has been filed only under sections 498A, 323, 504, 506, 307 IPC and ¾ of D.P. Act. Thus, it is explicitly clear that the FIR is nothing but a virtual canard and full of venom where the informant unmindful of the fact to its far-reaching repercussions, pasted all the filth upon revisionist in wild manner but was unable to produce any documentary evidence/proof to substantiate the levelled allegations and thus, all the sections of unnatural/oral sex, forcible abortion have gone to haywire resultantly dropped from charge sheet. Not only this, names of Chirag Bansal and Ms. Shipra Jain finds no place in the charge sheet, so filed by the police.

[13] It is also relevant to point out here that under the auspices of Hon'ble the Apex Court and this Court as well, the matter was referred twice for mediation and conciliation proceeding so as to sort out and patch up the matter outside the court in an amicable way. But, unfortunately its ultimate result was a big zero. The parties failed to avail the advantage of the opportunity offered by the Apex Court as well as this Court. Eventually, after getting themselves bailed out from the court concerned, the husband Sahib Bansal, Mukesh Bansal, father-in-law, and Manju

Bansal, mother-in-law moved the different discharge applications and vide order dated 03.03.2020, all the three applications stood dismissed by the learned sessions Judge, Hapur. On this factual backdrop of the case, the present three different revisions have been tabled before this Court by Sahib Bansal(husband), Mukesh Bansal(father-in-law) and Manju Bansal(mother-in-law).

[14] This Court has perused the order impugned and the submissions advanced by the respective parties and the grounds taken by the learned counsel for the revisionists, is that the order impugned passed by the court below which was canvassed as an illegal, perverse and without application of judicial mind, besides, it is a misuse of the procedure of the court.

[15] It is further urged by learned counsel for the revisionist that so far as Mukesh Bansal and Manju Bansal are concerned, they are parents-in-law of the opposite party no.2, informant who got married in December, 2015 with the son, Sahib Bansal. They remained in the company of the son and daughter-in-law upto 30.04.2017, to be precise 1 year, 4 months and 25 days from the date of marriage. During this, they repeatedly tried to pacify and get the rifts patched up but sensing that situation, heated up from bad to worse, they themselves decided to resile from the company of their son and daughter-in-law and started to reside in a distant place i.e. 44, Kapil Vihar, North-west, Delhi, a rented accommodation. Thus, from 30.04.2017, the physical presence of the old and pained couple from the site of the plagued situation on the place of said occurrence is completely cut off. The opposite party no.2 is a furious lady who wants to level the score with her husband as well as in-laws and the tone, texture and tenor of the FIR speaks volume about her mental condition. Her psyche and amount of venom in the mind of the informant goes to show that in order to take revenge from her husband and in-laws, she has gone to any extent, crossing all the limits of decency. On making an inquiry, except one small bruise over her neck, there is no other scratch over her person. The injuries shown may or may not touch the four corners of Section 307 IPC only against her husband who was residing with her at relevant point of time. On top of it, it has been contended by learned counsel for the revisionist that it is true, that there are certain specific allegations against the husband who resides with opposite party no.2 in the same flat and it is just possible that relationship between the husband and wife may be sore but so far as parent-in-law are concerned, they are out of canvass since 30.04.2017. The parent-in-law and other family members are roped in just because they are the parent, brother and sister of the husband-Sahib Bansal.

Lastly, learned counsel for the revisionist has drawn the attention of the Court to the allegations of the FIR whereby it is mentioned that parents of the informant spent Rs.two crores on her marriage and has given gifts worth Rs.50 lacs.

Learned counsel for the revisionist has drawn the attention of the Court to the annexure 3 and 4 of the rejoinder affidavit which are Income Tax Return of the opposite party no.2. The ITR of assessment year of 2014-15 shows that Shivangi Bansal has a gross total income of Rs.2,24,542/- whereas in the year 2015-16, she has shown her gross total income of Rs.2,75,246/- whereas her father's ITR of 2015-16, 2016-17, gross total income is Rs.3,53,693/- and Rs.5,54,772/-

respectively and after having deduction, the total income was Rs.3,85,500/-. Their financial health on which they have given tax, clearly indicates their financial status and to suggest that the amount of Rs.2 crore was spent in the marriage and gifts of Rs.50 lacs were given, is simply cock and bull story. The informant has mentioned astronomical figures without any basis for which she is required to give a reasonable justification. The ITRs of father and daughter indicates that both of them belongs to upper middle-class, a well-to-do businessman.

[16] Thus, in the instant revision, judicial scrutiny of order dated 03.03.2022 passed by the Additional District and Sessions Judge/F.T.C.-I, Hapur is required to be done by this Court.

[17] Section 227 of Cr.P.C. has to be read with Section 228 of the Code of Criminal Procedure is indeed precious safe-guard for the defence to have a pre-battle protection conferred by the legislation under chapter XVI of Cr.P.C. There is no provision which empowers the Magistrate to discharge the accused. This extra-ordinary power can only be exercised by the trial Court and not by the Magistrate for the offences which are exclusively tried by the Court of Sessions itself. It is settled law that charge sheet constitute prima facie evidence constituting the offence for the proceedings and it is only the learned trial Judge after assessing the material on record and after affording the opportunity of hearing to the contesting parties, framed charges against the accused persons. Prior to this, the avenue has been created by the legislation giving a weapon of discharge in the hands of accused so as to rely upon the material collected by the police during investigation and citing the loopholes and pitfalls in the prosecution story and the material collected by the Investigating Officer of the case during investigation, and after assessing those materials collected during investigation and critically examined them, if the court finds that there is no sufficient or confidence generating material collected in the investigation, the trial court well within its power to discharge the accused and record the reasons for doing so.

In the instant case, except a typical sweeping remark by the informant and her parent that entire family used to harass her for the additional dowry of Rs.20 lacs or Rs.50 lacs ?? Thereafter, the applicant and his son Chirag Bansal used to seek sexual favours from her, putting her head in the commode, pissing in her mouth, all these are nothing but exaggaration and magnifying the incident to thousands fold for obvious reasons and purpose. Learned trial Judge ought to have weighed entire material on record specifically the fact that the Mukesh Bansal and his wife since 30.04.2017 are out of scene and they have got feeble reason or occasion for them to demand additional dowry.

[18] For the purpose of determining that whether there is sufficient ground for proceeding against the accused, the Court assess compartively wider discretion in exercise of which it can determine the question, whether the material on record, if undisputed is such on the basis of which conviction can be of such reasonable possibility. Only the prima facie case is to be seen whether the case is beyond reasonable doubt or not, cannot be assessed at this stage. If the Court comes to the conclusion that the commission of the offence, is probable consequence, prima facie case of framing charge exist then the

charges would be framed. At the stage of framing the charge, probative value of materials cannot be gone into. The basic underline idea behind section 227 and 228 Cr.P.C. is to ensure that the court should be satisfied that the accusation made against the accused is not frivolous and fictitious but on the contrary, some material for proceeding against the named accused persons.

[19] It would be hazardous to act upon the discrepancies in the material collected during investigation unless they are so apparent and glaring as to adversly affect the credibility of the prosecution case in its totality, without affording the reasonable opportunity to the prosecution to substantiate the allegations. The only prima facie case is to be seen while assessing all the facts and circumstances, materials collected during investigation, strict standard or proof while evaluating the material to ascertain, whether there is prima facie case against the accused or not.

Sri Srivastava, learned Senior Counsel appearing on behalf of the revisionist in order to buttress his submissions, has relied upon the celebrated judgment of Hon'ble the Apex Court in the case of **State of Karnataka Vs. L. Munishwamy and others** reported in ***1977 AIR 1489***, paragraph nos.7 and 8 of which are quoted hereinbelow :-

"The second limb of Mr. Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legiti- mately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says. the learned counsel, the case must go on and the High Court has no jurisdiction. to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept.

-Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:

"If, upon consideration of the record of the case and the documents submitted there- with, and after hearing the submissions of the accused and the prosecution in this be- half, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

This section is contained in Chapter XVIII called "Trial Before a Court of Sessions". It is clear from the provi- sion that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be re- corded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is of is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case.....

Let us then turn to the facts of the case to see, wheth- er the High Court was justified in holding that the proceed- ings against the respondents ought to be quashed in order to prevent abuse of the process of the court and in order to secure the ends of justice. We asked the State counsel time and again to point out any data or material on the basis of which a reasonable likelihood of the respondents being convicted of any offence in connection with the attempted murder of the complainant could be predicated. A few bits here and a few bits there on which the prosecution proposes to rely are woefully inadequate for connecting the respond- ents with the crime, howsoever, skilfully one may attempt to weave those bits into a presentable whole. There is no material on the record on which any tribunal could reason- ably convict the respondents for any offence connected with the assault on the complainant. It is undisputed that the respondents were nowhere near the scene of offence at the time of the assault. What is alleged against them is, that they had conspired to commit that assault. This, we think, is one of those cases in which a charge of conspiracy is hit upon for the mere reason that evidence of direct involvement of the accused is lacking. we have been taken through the statements recorded by the police during the course of investigation and the other material. The worst that can be said against the respondents on the basis thereof is that they used to meet one another frequently after the dismissal of accused No. 1 and prior to the commission of the assault on the complainant. Why they met, what they said, and whether they held any deliberations at all, are matters on which no witness has said a word. In the circumstances, it would be a sheer waste of public time and money to permit the proceedings to continue against the respondents. The High Court was therefore justified in holding that for meeting the ends of justice the proceedings against the respondents ought to be quashed."

[20] Hammering further, learned Senior Counsel, Sri Srivastava has relied upon the recent judgment of Hon'ble the Apex Court in the case of ***Sanjay Kumar Rai Vs. State of Uttar Pradesh and another*** reported in 2***021 AIR(SC) 2351*** in which three Judges Bench of the Court has pointed out and underlined need of Discharge in the Cr.P.C., paragraph no.16 of which is quoted hereinbelow :-

"16. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office or mouth piece to the prosecution. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. ***[Union of India v. Prafulla Kumar Samal].*** *Likewise, the Court has sufficient discretion to order further investigation in appropriate cases, if need be. "*

[21] In this regard, there are two earlier celebrated judgment of Hon'ble the Apex Court on the issue of Discharge i.e. (i) ***Union of India Vs. Prafulla Kumar Samal*** reported in *1979 3 SCC 4* ; (ii) ***Dilwar Balu Kurane Vs. State of Maharashtra*** reported in ***(2002) 2 SCC 135.*** In ***Prafulla Kumar Samal's case,*** scope of Section 227 of Cr.P.C. was considered and after adverting to various judgments, the Court has enumerated following principles :-

(i) The Judge while considering the question of framing the charges under section 227 of the Code has the undoubted powers to sift and weigh the evidence for the limited purpose of finding out whether or not, a prima facie case against the accused has been made out.

(ii) Where the materials placed before the Court disclose "grave suspicion" against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

[22] Similarly, in the case of **Dilawar Balu Kurane (supra)**, the principle enunciated in **Prafull Kumar Samal case** has been reiterated as held that the jurisdiction under section 227 of the Cr.P.C., "Judge which under the present Code, an experience Court, cannot act merely as a postoffice or a mouthpiece of the prosecution but has to consider the broad prababilities of the case, the total impact of the evidence and the documents produced before the court, the basic infirmities appearing in the case and so on. It is however, does not mean that Judge should make a roving inquiry into the pros and cons of the matter and weigh the evidence as if he is conducting a trial. The Court is not required to hold a mini-trial at the state of Discharge.

[23] After evaluating the material and various case laws discussed in the judgment of ***Sajjan Kumar VS. Central Bureau of Investigation***, reported in ***2010 (9) SCC 368*** Hon'ble the Apex Court has broadly formulated the parameters to be exercised while dealing the case under section 227 and 228 of Cr.P.C. Paragraph no.17 of the aforesaid judgment is quoted as under :-

"17) Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a

roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

Toing the similar lines in recent judgment of ***Tarun Ji Tejpal Vs. State of Goa*** reported in ***(2015) 14 SCC 481,*** same ratio has been reiterated as in the case of Sajjan Kumar's case(supra).

[24] Now, coming to the precise question involved in the present case has to level the omnibus allegations of dowry related harassment of all the family members connected with the husband in recent judgment of Hon'ble the Apex Court in the case of ***K. Subba Rao Vs. State of Telangan***a reported in ***2018 (14) SCC 452 ,*** it was observed by Hon'ble the Apex Court that the Court should be extremely careful and vigilant in proceeding against the distant relative of the husband in the crimes pertaining to the dispute even in dowry deaths. All the relatives of the husband should not be roped in on the basis of omnibus allegations unless Specific Instances of the involvement in the crime as alleged and surfaced during investigation with materials certainty. The sweeping and general allegations are very frequent now-a-days and if such people are put to trial on such a casual and omnibus allegations, it would bound to lead the disastreous result and unwarranted hardships to those persons.

In the instant case where her in-laws Mukesh Bansal and Manju Bansal remained in the company of their warring son and daughter-in-law barely for one year and four months and 25 days, left their company on 30.04.2017. Since, thereafter, the affair is between son and the victim alone. In addition to this, in their respective statement under section 161 Cr.P.C., a casual and sweeping allegations were fastened against them also when they are not in position to demand any additional dowry. It was further argued that victim priot to 03.10.2018, has not made a single whisper regarding dowry relatedd

harassment and atrocities upon her by her parent-in-law. Then, the court has got no reason to presume that the in-laws were also active participants in extending dowry related harassment from the distance. It is urged by learned counsel for the revisionist that obnoxious allegations are motivated one, driven by a sheer retaliation without any iota of any sanctity to it.

Sri Srivastava, learned Senior Counsel also relied upon the latest judgment of Hon'ble the Apex Court in the case of ***Kahkashan Kausar@Sonam Vs. State of Bihar in Criminal Appeal No.195 of 2022 decided on 01.02.2022***, following observations were made by the Apex Court :-

"18. The above-mentioned decisions clearly demonstrate that this court has at numerous instances expressed concern over the misuse of section 498A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them."

SUBMISSIONS ADVANCED BY OPPOSITE PARTY NO.2 :-

[25] Per contra, Sri Raj Kumar Kesari, learned counsel for the complainant has drawn the attention of the Court to the 161 and 164 Cr.P.C. statements of the victim annexed as Annexure-4 to the revision. The most interesting feature of the entire counter affidavit is that there is not a single averment in the entire affidavit which is dedicated exclusively to parent-in-law Mukesh and Manju Bansal. As usual, vague and sweeping allegations are made not only in the FIR but also in the averments of the counter affidavit qua her parent-in-law.

[26] I have perused the statement carefully. Being the youngest among the children of Rajesh Kumar Goyal and Sandhya Goyal, opposite party no.2 completed her B.Com Hons. from Sri Ram College of Commerce, New Delhi University. She is aged about 28 years and got married with Sahib Bansal on 05.12.2015. Besides Mukesh Bansal and Manju Bansal, she has included Chirag Bansal, unmarried devar and Shipra Jain, married nanad(sister-in-law). The couple were blessed with daughter Raina Bansal. The date of incident is 03.04.2018 and from the 161 Cr.P.C. statement, its questionaire and 164 Cr.P.C. statement, it is abunduntly clear that on the fateful day, oppposite party no.2 along with her husband and Raina Bansal were at the residence residing at 130, First Floor, Rajdhani Enclave, Pitampura, New Delhi. So far as parent-in-law are concerned, she states that her devar chirag also resides with her parent-in-law at Kapil Vihar, Pitampura, New Delhi. Both of them are in distinct domestic and separate entity on 30.04.2017. She has made severe allegations of assault and unnatural sex with her upon her husand and in this questionaire, she had made completely sweeping allegations of having sexual favours upon her own father-in-law and brother-in-law on unspecified date and time. Though, she has levelled omnibus

allegations of demanding additional dowry upon all the named accused persons. In addition to this, there was also accusation with regard to forcible abortion and second time pregnancy. But its accusation got flat when the Investigating Officer inquired from Dr. Amita Agrawal, her Gynechologist who in no uncertain terms, gave the statement to the I.O. of the case that the second abortion was made on her own acceptance and willingness. There was nothing like forced abortion. However, in her statement, learned counsel for the complainant has tried to defend the orders of learned Additional Sessions Judge, Hapur that in parcha no.17, the statement of Rajesh Kumar Goyal and Sandhya Goyal was recorded in which they stated that both of them also demanded additional dowry and became physical with her on this score.

LEGAL DISCUSSION:-

I have perused the order impugned passed by Additional Sessions Judge, Fast Track Court, Hapur dated 03.03.2022 and while rejecting the discharge application, it has been mentioned :

"Case Diary ke parcha no.17 par gavahan Rajesh Kumar va Smt. Sandhya Goyal म इंलंद ंदजंतहंज 161 Cr.P.C. me abhiyukt dwara pidita ke sath dahej ki maang ko lekar marpeet ki gayi aur pidita k sath Sahib va saas va sasur dahej ki maang karne ka kathan kiya hai. Vivechak dwara vivechana ke dauran ekatrit kiye gaye sakshyo ke aadhar par, prarthi/abhiyukt Mukesh Bansal ke virudh antargat dhara 498-A, 323, 504, 506, 307, 120B IPC va 3/4 D.P. Act me aarop patra preshit kiya gaya hai |"

It is indeed an unfortunate that the learned trial Judge has consciously ignored the plethora of evidence collected by the I.O. during investigation that Mukesh Bansal and his wife are residing separately since 30.04.2017 and they have got no occasion to demand additional dowry. Moreover, at some places, there is demand of Rs.20 lacs and at some place, it has been swelled to Rs.50 lacs ??? In addition to this, there is general and sweeping allegation without any material particulars of demand of dowry by the parent-in-law makes the entire prosecution story a doubtful and revengful proposition. Still, the learned Sessions Judge has picked up few lines in 161 Cr.P.C. statement ignoring the rest of the averments and material caste a serious expulsion upon the order impugned.

[27] Learned counsel for the complainant in his counter affidavit has annexed the injury report of the complainant dated 04.10.2018 by making a mention that she was examined on the date of incident by Bhagwan Mahavir Hospital, Pitampura, New Delhi with the report that physical assault has been made by her husband and had tried to strangulate her as told by the patient. But surprisingly, in the entire counter affidavit, except making a mention that "since at the time of marriage", the revisionist and all the family members were demanding dowry continuously, there is nothing special indicting the parent-in-laws in this offence. It is further most important to mention that Mukesh Bansal and Manju Bansal had left the company of her son and daughter-in-law on 30.04.2017 itself and residing in a separate accommodation as independent domestic unit and therefore, there is no chance of any interference in the matrimonial or personal matter of Sahib Bansal and Shivangi Bansal.

[28] I have perused the 161 Cr.PC. Statement of the witness Neha(aunt of Shivangi Bansal), Shweta(Aunt), Anand Prakash, family acquaintance, Chandra Mohini Goyal, independent witness, Vinay

Agrawal, independent witness, Sri Bhagwan, Vina Jain. None of these witnesses in their respective 161 Cr.P.C. statements, even whispered against the parent-in-law for their alleged act of misbehaviour on account of additional dowry and seeking sexual favours from their daughter-in-law.

In our traditional Indian family, where they are residing in a joint family with unmarried son, it is highly improbable and difficult to digest the allegations of demanding sexual favours from her daughter-in-law by father-in-law or brother-in-law. The stray and tangent allegations of demanding dowry by father-in-law and mother-in-law would not bring them within four corners of Section 498-A IPC and keeping in view the ratio laid down by Hon'ble the Apex Court in the case of ***Sajjan Kumar(supra) and Kahkashan Kausar@Sonam*** and assessing them with the facts of the present case, I find that the order of learned trial Judge is well short of standards enumerated in the aforesaid case, so far as it relates to Mukesh and Manju Bansal.

No doubt, Sahib Bansal, being the husband and the allegations are clearly against him for committing marpeet, atrocities and treating her in inhuman way, the Court is not in a position to make any comment either ways. But since, he was residing with opposite party no.2 at the relevant point of time, his complicity in the commission of offence cannot be ruled out altogether.

[29] Hence, considering the facts and circumstances of the case, the present revision with regard to *Mukesh Bansal and Manju Bansal* is hereby allowed for the reasons enumerated above and the order impugned dated 03.03.2022 is hereby set-aside. So far as husband-Sahib Bansal is concerned, the revision relates to him is dismissed and he is directed to regularly and faithfully appear before the court concerned and contest the trial to its logical conclusion.

ROLE OF ADVOCATES WHILE DEALING WITH MATRIMONAL MATTTERS AND LANGUAGE OF THE F.I.R./COMPLAINT

[30] Yet coming to another aspect of the issue which is disturbing and mind-boggling to the Court. After reading the FIR allegedly lodged by Ms. Shivangi Bansal after 18 days of the incident, which is ever-abhorring, full of dirt and filth. The graphical description portrayed by her in her FIR is deplorable to be condemned in its strongest terms. The FIR is the place where the informant gives the story mobilizing the State Machinery engaging in the commission of cognizable offence. It is not soft porn literature where the graphical description should be made. Hon'ble the Apex Court in its judgment in the case of ***Priti Gupta Vs State of Jharkhand, 2010(71) SCC 667*** has fastened the liability upon the counsels, paragraph nos.30, 31, 32 and 33 are quoted hereinbelow :-

"30. It is a matter of common experience that most of these complaints under section 498-A IPC are filed in the heat of the moment over trivial issues without proper deliberations. We come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment are also a matter of serious concern.

31. The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fiber of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under section 498-A as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fiber, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases.

32. Unfortunately, at the time of filing of the complaint the implications and consequences are not properly visualized by the complainant that such complaint can lead to insurmountable harassment, agony and pain to the complainant, accused and his close relations.

33. The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. 34. Before parting with this case, we would like to observe that a serious relook of the entire provision is warranted by the legislation. It is also a matter of common knowledge that exaggerated versions of the incident are reflected in a large number of complaints. The tendency of over implication is also reflected in a very large number of cases.

35. The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society."

[31] Therefore, the Court is of the opinion that while deciding the present issue, the Court should not take into these graphical description of the accusation made by the complainant and simply over-look these graphic and distressful allegations made by a lady who after receiving legal advice, pasted those dirt and filth upon her husband and other family members. The interesting feature is that she has been unable to substantiate those allegations even at the time of investigation and these allegations were found false and the sections related to it were dropped.

The Court records its strongest exception to such type of language used by the informant. The language of the FIR should be decent one and no amount of atrocities faced by the informant, would justify her to use such type of castic expressions. FIR/complaint is the gateway of any criminal case even soft and decent

expression would well communicate the alleged atrocities faced by her.

CONSTITUTION OF FAMILY WELFARE COMMITTEES :-

[32] In this connection, there is yet another judgment of Hon'ble the Apex Court in the case of ***Social Action Forum for Manav Adhikar Vs. Union of India reported in 2018 (10) SCC 443***. The Hon'ble Apex Court was aware that Section 498A IPC and its allied sections is mercilessly used by the advocates to serve the objective of their clients and that is why after exaggerating the incident manyfold, tailored an imaginary and abhorring story. This laudable section was brought into the Statute Book in the year 1983. The objective and the reasons for introducing Section 498-A IPC can be gathered from the Statements of Object and Reasons of the criminal law(Second amendment Act, 1983) which reads thus :-

"Increasing graph of dowry death is matter of serious concern. The extent of effort has been commented by the Joint Committee of the House constituted to examine the working of Dowry Prohibition Act, 1961. The cases of cruelty by the husband and other relatives which culminated in the society or murder, hapless women concerned constitute only a small fraction of cases involving the cruelty. It is therefore proposed to amend the IPC, Code of Criminal Procedure and Indian Evidence Act suitably to deal effectively not only with the cases of dowry deaths but also cases of cruelty to married woman by her in-laws".

[33] However, it has been contended that Section 498A IPC since its introduction, has increasingly deal vilified and associated with the perception and its misuse by the women who frequently used it as a weapon against her in-laws. As the petitioners, though there is general complaint that Section 498A IPC is subject to gross misuse, yet there is no concrete data to indicate how frequently the provision has been misused. Further, the Court by whittling down the stingency of Section 498A IPC is proceeding on an erroneous premises that there is misuse of said provision whereas infact misuse by itself cannot be ground to repeal the panel provision or take away its teeth.

It is question of a common observation that every matrimonial case is being exaggerated manifold with all the pungent and castic allegations dowry related atrocities involving the husband and all family members. This rampant practice now a days has adversaly affecting our social fibre especially in the northern India. In the metro cities, the doctrine of 'live-in relationship' has silently sneaked into our socio-cultural ethos by replacing our traditional marriages by its new modern abrasion in the name of 'live-in relationship'. This is a ground reality and one has to accept it willy-nilly which is nowhere similar to our traditional marriage. It is defined as domestic co-habitation between adult couple who are not married. It is a stress free companionship without any legal obligation, it has many complication, responsibilities and legal liabilities. It is a voluntary agreement in it that unmarried male or female decides to live together in one roof in a sexual and romantic relationship which seems to be marriage in alternative or substitute to the traditional marriage in which unmarried couple lives together without marrying with each other free from its legal implications, committment and responsibilities. In fact,

this is an off shoot of traditional indian marriage just to save the couple from the hazards and legal complications and bickering between them, The two young couples agree to have sexual and romantic relationship. The traditional fragarance of our age-old institution of marriage would completely evapourated over period of time if such gross and unmindful misuse of section 498-A IPC would keep on pasted rampantly.

[34] Thus assesing the totality of the circumstances, object and the allegation of misuse of this piece of legislation in a shape of Section 498A IPC, the Court is proposing the safeguards after taking the guidace from the judgment of Hon'ble the Apex Court in the case of ***Social Action Forum for Manav Adhikar Vs. Union of India (Supra)*** keeping in view the growing tendency in the masses to nail the husband and all family members by a general and sweeping allegations.

[35] Thus, It is directed that :-

*(i) No arrest or police action to nab the named accused persons shall be made after lodging of the FIR or complaints without concluding the "**Cooling-Period**" which is two months from the lodging of the FIR or the complaint. During this "**Cooling-Period",** the matter would be immediately referred to Family Welfare Committe(hereinafter referred to as FWC) in the each district.*

(ii) Only those cases which would be transmitted to FWC in which Section 498-A IPC along with, no injury 307 and other sections of the IPC in which the imprisonment is less than 10 years.

*(iii) After lodging of the complaint or the FIR, no action should take place without concluding the "**Cooling-Period**" of two months. During this "C**ooling-Period",** the matter may be referred to Family Welfare Committee in each districts.*

(iv) Every district shall have at least one or more FWC (depending upon the geographical size and population of that district constituted under the District Legal Aid Services Authority) comprising of at least THREE MEMBERS. Its constitution and function shall be reviewed periodically by the District & Sessions Judge/Principal Judge, Family Court of that District, who shall be the Chairperson or Co-chairperson of that district at Legal Service Authority.

(v) The said FWC shall comprise of the following members :-

(a) a young mediator from the Mediation Centre of the district or young advocate having the practices up to five years or senior most student of Vth year, Government Law College or the State University or N.L.Us. having good academic track record and who is public spirited young man, OR;

(b) well acclaimed and recognized social worker of that district having clean antecedant, OR;

(c) retired judicial officers residing in or nearby district, who can devote time for the object of the proceeding OR;

(d) educated wives of senior judicial or administrative officers of the district.

(vi) The member of the FWC shall never be called as a witness.

(vii) Every complaint or application under Section 498A IPC and other allied sections mentioned above, be immediately referred to Family Welfare Committee by the concerned Magistrate. After receiving the said complaint or FIR, the Committee shall summon the contesting parties along with their four senior elderly persons to have personal interaction and would try to settle down the issue/misgivings between them within a period of two months from its lodging.

The contesting parties are obliged to appear before the Committee with their four elderly persons (maximum) to have a serious deliberation between them with the aid of members of the Committee.

(viii) The Committee after having proper deliberations, would prepare a vivid report and would refer to the concerned Magistrate/police authorties to whom such complaints are being lodged after expiry of two months by inserting all factual aspects and their opinion in the matter.

(ix) Continue deliberation before the Committee, the police officers shall themselves to avoid any arrest or any coercive action pursuant to the applications or complaint against the named accused persons. However, the Investigating Officer shall continue to have a peripheral investigation into the matter namely preparing a medical report, injury report, the statements of witnesses.

(x) The said report given by the Committee shall be under the consideration of I.O. or the Magistrate on its own merit and thereafter suitable action should be taken by them as per the provision of Code of Criminal Procedure after expiry of the "Cooling-Period" of two months.

(xi) Legal Services Aid Committee shall impart such basic training as may be considered necessary to the members of Family Welfare Committee from time to time(not more than one week).

(xii) Since, this is noble work to cure abrasions in the society where tempos of the contesting parties are very high that they would melow down the heat between them and try to resolve the misgivings and misunderstanding between them. Since, this is a job for public at large, social work, they are acting on a pro bono basis or basic minimum honrarium as fixed by the District & Sessions Judge of every district.

(xiii) The investigation of such FIRs or complaint containing Section 498A IPC and other allied sections as mentioned above, shall be investigated by dynamic Investigating Officers whose integrity is certified after specialized training not less than one week to handle and investigate such matrimonal cases with utmost sincerity and transparancy.

(xiv) When settlement is reached between the parties, it would be open for the District & Sessions Judge and other senior judicial officers nominated by him in the district to dispose of the proceedings including closing of the criminal case.

At the cost of repetition, it is made clear that after lodging of the F.I.R. or the complaint case without exhausting the "**Cooling-Period**" of two months, no arrest or any coercive action shall be taken against the husband or his family members in order to derail the proceedings before the Family Welfare Committee.

[38] Let copy of this order be circulated by the Registrar General of this

High Court for wide circulation to all the concerned, the Director General of Police, U.P.; Chief Secretary, Govt. Of U.P.; Principal Secretary (Law), Govt. Of U.P. and all the District & Sessions Judges to constitute and establish Family Welfare Committees and make them operational within a period of next three months positively. Let a circular to this effect may be isused by all the concerned authorities attaching utmost sincerity and frame rules for the said purpose within a period of next two months positively.

For the reasons narrated in paragraph no.29 out of three revisions, Criminal Revision No.1126 of 2022 and 1187 of 2022 are hereby **ALLOWED.** Order impugned date 03.03.2022 is hereby quashed with regard to Mukesh Bansal and Manju Bansal respectively and they shall stand discharged from the allegations of Section 498A, 504, 506, 307, 120-B IPC and Section 3/4 of D.P. Act. in S.T. No.19 of 2020 arising out of case crime no. 567 of 2018 pending in the court of Additional Sessions Judge, F.T.C.-I, Hapur and so far as Criminal Revision No.1122 of 2022 is concerned in Re : Sahib Bansal Vs. State of U.P and anr is hereby **REJECTED.**

(2022)06ILR A1130
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.06.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Revision No. 588 of 2022

Shyam Sunder Prasad ...Revisionist
Versus
C.B.I., Lucknow ...Opposite Parties

Counsel for the Revisionist:
Sri Dhananjay Singh

Counsel for the Opposite Parties:
Shiv P. Shukla

Criminal Law - Indian Evidence Act, 1872- Section 65 B - Code of Criminal Procedure Act-Section 311- After framing of charges-first prosecution witness was examined-11 witness have been examined-application u/s 311 CRPC filed to bring on record two certificates u/s 65-B Indian Evidence Act -as those were filed with chargesheet but not in a proper form-Trial court allowed the application-if court considers the evidence to be essential-it can summon such person even on its own-by allowing the application u/s 311 Cr.P.C. no prejudiced is caused to the accused.

Revision dismissed. (E-9)

List of Cases cited:

1. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal & ors., reported in (2020) 7 Supreme Court Cases 1

2. Anvar P.Vs Vs P.K.Basheer, reported in (2014) 10 SCC 473

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

1. Heard Sri Ajay Kmar Rai, learned counsel for the accused-revisionist and Sri Shiv P.Shukla, learnerd counsel for the Central Bureau of Investigation, Lucknow.

2. Present Criminal Revision under section 397 readwith section 401 of the Code of Criminal Procedure, 1973 has been filed against the impugned order dated 02-05-2022 passed by the Special Judge, C.B.I. Court No. 6, Lucknow on an application filed by the C.B.I. under section 311 Cr.P.C. in Criminal Case No. 04 of 2014, Union of India Versus Shyam Sunder Prasad, arising out of RC006202014A0015 registered under section 7 & 13(2) readwith

13(1)(d) of the Prevention of Corruption Act,1988.

3. The case in question was registered vide RC No. 006202014A0015 against the accused-revisionist, Sri Shyam Sunder Prasasd, the then Branch Manager, Punjab National Bank, Branch-Dhanghata district-Sant Kabir Nagar under section 7 of the Prevention of Corruption Act, 1988, on 26-04-2014 on the basis of written complaint made by Sri Kaleem Ahmad. It was alleged in the F.I.R. that the complainant, Sri Kaleem Ahmad was sanctioned the Cash Credit Limit of Rs. 8 Lakh from the Punjab National Bank, Dhanghata Branch, district-Sant Kabir Nagar on 26-03-2014. The complainant was issued one Cheque Book bearing nos. UKM 065501 to 065520 in respect of this Cash Credit Limit Loan Account. The complainant had issued eight cheques from the said cheque book and out of the these eight cheques, three cheques issued by him got cleared and three cheques were bounced/dishonoured. The complainant therefore, requested the parties to whom the remaining two cheques had been issued, not to produce/present them as the cheques issued by him in respect of the Cash Credit Limit Loan Account were being bounced/dishonoured.

4. It is alleged that the complainant enquired from the accused-revisionist about the reason for the cheques which got dishourned/bounced. The accused-revisionist replied that the account had been frozen. It was further alleged that the accused-revisionist had demanded bribe of Rs. 80,000/- from the complainant for defreezing the account. It was also alleged that the accused-revisionist had demanded the bribe through cheques to be issued in the name of other person.

5. The complaint made by the complainant was verified and a criminal case was registered against the accused-revisionist under section 7 of the Prevention of Corruption Act,1988 on 26-04-2014. It is further said that during verification of the complaint, on 25-04-2014, when the complainant met and requested the accused-revisionist for reducing the bribe amount, he agreed to accept the bribe of Rs. 50,000/- by cheque. This conversation was recorded and transferred into a blank Compact Disc, marked as Q-1 and taken into record. The C.B.I. Team was formed on the instructions of Head of Branch, CBI, ACB, Lucknow including Sri Diwakar Pande, Inspector(Trap Laying Officer) for laying of trap. The Trap Laying Team completed the pre trap proceedings and Cheque No. UKM 065514 for a sum of Rs. 50,000/- was drawn which was to be given as illegal gratification to the accused-revisionist and it was treated with phenolphthalein powder to be handed over to the accused-revisionist during the trap proceedings. The accused-revisionist was caught red-handed with tainted bribe cheque. The conversation between the accused-revisionist and the complainant was recorded during the transaction of bribe cheque and the same was transferred into a blank Compact Disc, marked as Q-2. The voice samples of the accused-revisionist were sent to CFSL, New Delhi for voice analysis.

6. During course of the investigation, the C.B.I. noted that the Cash Credit Loan Account of the complainant was de-frozen a day before the trap to facilitate the payment of illegal gratification.

7. The C.B.I. after investigation of the offence, filed chargesheet for the offences punishable under sections 7 & 13(2) readwith section 13(1)(d) of the Prevention of Corruption Act, 1988 against the accused-revisionist.

8. After framing of the charges against the accused-revisionist, the first prosecution witness was examined on 26-09-2014 and in so far as many as 11 witnesses in the case have been examined. An application under section 311 of the Code of Criminal Procedure, 1973 was filed on 22-11-2021 to bring on record two certificates dated 24-09-2021 & 25-09-2021 under section 65-B of the Indian Evidence Act, 1872 as well as to recall the witnesses to prove those certificates. It was said that the certificates were produced alongwith the chargesheet, but, same were not in a proper form and during the trial proceedings, proper certificates have been prepared, which need to be produced in prescribed forms. It was further said that the application was not an attempt to fill up the lacuna of the prosecution case. In the said application, the C.B.I. also relied on the Judgment of the Hon'ble Supreme Court in the case of ***Arjun Panditrao Khotkar Versus Kailash Kushanrao Gorantyal and Others***, reported in ***(2020) 7 Supreme Court Cases 1,*** to say that the certificates under section 65-B of the Indian Evidence Act can be produced at any stage of the trial, if the same was not produced alongwith electronic record or not produced in the court with the chargesheet.

9. The accused-revisionist filed his objections to the said application and the learned trial court after looking at the certificates, noted that the certificates of section 65-B of the Indian Evidence Act in respect of the Compact Disc marked as SQ-1 were issued by Sri Raka Kant Tewari, Investigating Officer.

10. During verification of the complaint on 25-04-2021, Compact Disc. marked as Q-1 and Investigation Copy Q-1 was prepared. This certificate was in respect of recording of the conversation between the accused-revisionist and the complainant. The conversation was recorded in a Digital Voice Recorder in presence of an independent witness namely, Sri Amir Ali. This recorded conversion was copied in two empty compact Discs in the presence of independent witnesses and no tampering was made in the recording.

11. Sri Diwakar Pandey,Trap Laying Officer, had issued certificates marked as Compact Discs marked as Q-2 and S-1 and during the trap proceedings, the investigation copy, S-1 was prepared, in which the conversation between the accused-revisionist and the complainant was recorded. The certificates had been issued for recording the said conversation in the presence of the independent witness and sealing the same and there was no tampering in the said recording of the conversation.

12. Learned Trial Court after taking note of the provisions of Section 65- B(4) of the Indian Evidence Act and the Judgment of of the Hon'ble Supreme Court in the case of ***Anvar P.V. Versus P.K.Basheer***, reported in ***(2014) 10 SCC 473 as well as Arjun Panditrao Khotkar(Supra),*** held that the powers of section 311 Cr.P.C. are to be used for just and fair decision in the case. It is held that the trial is still on and therefore, for a just and fair decision in the trial, the certificates issued under section 65-B (4) of the Indian Evidence Act are to be taken on record. The trial court allowed the application for taking on record the certificates issued by Sri Raka Kant Tiwari and Sri Diwakar Pandey and they have been summoned by the impugned order to prove the certificates.

13. Sri Ajay Kumar Rai, learned counsel for the accused-revisionist has submitted that the C.B.I did not file any certificate of Section 65-B of the Indian Evidence Act, 1872 alongwith the chargehseet in respect of the Compact Discs. marked as Q-1 and Q-2 in the manner as prescribed under law. During the examination of the prosecution witnesses, the Compact Discs. were exhibited without having the certificates as contemplated under section 65-B of the Indian Evidence Act.

14. It is submitted that now the certificates under section 65-B of the Indian Evidence Act have been sought to be produced at the belated stage when the prosecution witnesses have already been examined and only the Investigating Officer remains to be examined. It is submitted that at this belated stage, there was no occasion for the trial court to allow the application of the prosecution to produce the certificates under section 65-B of the Indian Evidence Act and recalling the witnesses, who are the C.B.I. Officers to prove them.

15. It is further submitted that the C.B.I. has wrongly stated that alongwith chargesheet, certificates under section 65-B of the Indian Evidence Act were filed, however, they were not in correct form and therefore, fresh certificates in correct form were to be filed. He has further submitted that as a matter of fact no certificate under section 65(B) of the Indian Evidence Act was filed with the Compact Discs marked as Q-1 & Q-2 initially with the chargehseet. He has further submitted that no reason is coming forth in the application for issuing the certificates under section 65-B of the Indian Evidence Act so belatedly inasmuch as the chargesheet was filed in the year 2014 itself, but, the certificates are of the years 2021. When the certificates are being issued by the C.B.I. Officers itself, at this belated stage accepting the certificates and allowing the application to recall the witnesses is highly prejudicial to the trial of the accused-revisionist. He therefore, submits that the C.B.I. is trying to fill up the lacuna inasmuch as in the absence of the certificates issued under section 65-B of the Indian Evidence Act are mandatory for proving the conversation allegedly recorded in the Compact Discs and in the absence of the certificates, the said Compact Discs would not have been evidence in law and therefore, to that extent, the accused-revisionist would be prejudiced.

16. On the other hand, Sri Shiv P.Shukla, learned counsel representing the C.B.I. has submitted that the certificates issued under section 65-B of the Indian Evidence Act can be produced at any stage of the trial in respect of the electronic evidence being relied on by the prosecution. He has further submitted that the trial is still on and the witnesses are being examined and therefore, producing the certificates under section 65-B of the Indian Evidence Act in respect of the two Compact Discs would not create any prejudice to the accused-revisionist in any manner rather the trial court after considering the provisions of the Indian Evidence Act and the law laid down by the Hon'ble Supreme Court as mentioned above, allowed the application under section 311 Cr.P.C. for a just and proper decision in the case. He further submits that the present revision is without merits and is liable to be dismissed.

17. I have considered the submissions advanced on behalf of learned counsel for

the accused-revisionist as well as learned counsel for the C.B.I.

18. By amending the section 65 of the Act of 2000 w.e.f. 17th October, 2000, a special provision as to evidence led into electronic record and admissibility of the electronic record have been incorporated in section 65-A & 65-B of the Indian Evidence Act. The contents of the electronic record may be proved as per the provisions of section 65-B of the Indian Evidence Act. The subject matter of sections 65-A & 65-B of the Indian Evidence Act is the proof of information contained in electronic records. These are the special provisions relating to evidence led in electronic records. For convenience, Section 65-A & Section 65-B of the Indian Evidence Act, read as under :-

*"**[65A. Special provisions as to evidence relating to electronic record.-** The contents of electronic records may be proved in accordance with the provisions of section 65B.*

***[65B. Admissibility of electronic records.-** (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.*

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:?

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether?

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,?

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,?

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.?For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]"

19. Section 65-B (i) of the Indian Evidence Act begins with an non absenting clause and it provides that any information

that is contained in electronic record printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

20. Sub. Section (2) of Section 65-B of the Indian Evidence Act refers to the condition that must be satisfied in respect of the computer output and states that the test of being included in conditions are provided in Section 65-B (2) (a) to Section 65-B (2) (d) which states that computer be regularly used to store or process of information for the purposes of any activities regularly carried on over the period in question. The conditions mentioned in sub. section 2(a) to sub. section 2(d) must be satisfied cumulatively. Sub. Section 4 of Section 65-B provides that a certificate is to be produced that identifies the electronic record containing the statement and describing the manner in which it was produced or gives particulars of any device involved in the production of that electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or person who is in the management of relevant activities-whichever is appropriate.

21. The Hon'ble Supreme Court in the case of ***Arjun Panditrao Khotkar(Supra)*** held that for admissibility of an electronic record/document, section 65-B(4) is mandatory for recording it in evidence. When the electronic record is produced in evidence without proper certificate, trial court must summon the person/persons referred in Section 65-B (4) of the Indian Evidence Act, and require that such certificate be given by such person/persons. It has further held that in criminal trials, the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial under section 207 Cr.P.C. to enable the accused to prepare for the trial before it commences. However, that does not mean that the trial court cannot exercise powers under section 311 Cr.P.C. in permitting the evidence to be filed at a later stage. The only caveat is that the same should not result in serious or irreversible prejudice to the accused-revisionist. The Hon'ble Supreme Court in para no. 56 of the said Judgment held that in appropriate cases, the trial court depending on the facts and circumstances of the case may exercise its discretion under section 91 or section 311 Cr.P.C. or Section 165 of the Indian Evidence Act as the case may be and can allow the prosecution to produce the certificates under section 65-B of the Indian Evidence Act at later point of time and same would also be the case in respect of an accused who desires to produce the requisite certificates as part of his defence. Para no. 56 of the said Judgment, which is relevant, is extracted hereinunder :-

"56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application

by the prosecution under Sections 91 or 311 of the CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the Court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the Court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case - discretion to be exercised by the Court in accordance with law."

22. Section 311 Cr.P.C. empowers the court that if the court considers the evidence of witnesses to be essential for a just and fair decision of the case, it can summon such a person not only on the motion of either prosecution or of the defence case, but, also it can do so on its own motion. The court has power to recall any witness or witnesses already examined or to summon any witness even if the evidence in both sides is closed so long as the court retains seisin of the criminal proceedings.

23. In the present case, the two Compact Discs have already been supplied to the accused-revisionist and only certificates under section 65-B of the Indian Evidence Act have been allowed to be produced to prove and by allowing the application under section 311 Cr.P.C., this court does not find that the accused-revisionist is prejudiced in any manner by producing the certificates in respect of the electronic record/evidence, which are being relied upon by the prosecution, which have already been supplied to the accused-revisionist at the stage of complying with the provisions of Section 207 Cr.P.C. The trial court has exercised its discretion as vested in it under section 311 Cr.P.C. for just and valid reasons for rendering a just and proper decision in the trial and therefore, this court does not find that there is any error of law or jurisdiction which has been committed by the trial court by allowing the application of the C.B.I. under section 311 Cr.P.C. by the impugned order.

24. Thus, this court, does not find that there is any scope for interference with the impugned order and the present revision is ***dismissed.***

(2022)06ILR A1137
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.06.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 584 of 2022

Vijay Mishra ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ram Prakash Singh, Sri Vivek Kumar

Counsel for the Opposite Parties:
Govt. Advocate

Civil Law - Code of Civil Procedure, 1908 - Section 228 (1) (a) -Indian Penal Code, 1860 - Section 308 IPC-for transferring the case to Magistrate-rejected-Revisionist claim that no injury was life threatening-section 308 IPC to be expunged and case be transferred to the Magistrate-Medical examination-all injuries on vital part-prima facie the act was with intention or knowledge of causing death-if he fails in his attempt he still guilty of committing an offence punishable u/s 308 IPC-the case cannot be transferred to the Magistrate.

Revision dismissed. (E-9)

Held, *legislative mandate in Section 308 is that whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, but inspite of the effort made by him he completely fails to achieve his goal of committing culpable homicide not amounting to murder, he shall still be held guilty of committing an offence under Section 308 I.P.C. and he shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. However, if by his attempt hurt is caused to any person by such act, shall be yet be guilty of committing an offence under Section 308 I.P.C. and in such a situation a higher punishment of imprisonment of either description for a term which may extend to seven years, or fine, or both will be inflicted upon the accused.* ***(para 15)***

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Anoop Kumar Upadhyay, Advocate holding brief of Sri Ram Prakash Singh, learned counsel for the revisionist and Sri Tilak Raj Singh, learned A.G.A. for the State respondents and perused the record.

2. The instant revision under Sections 397/401 of the Criminal Procedure Code has been filed by the accused-revisionist seeking to challenge the validity of the order dated 27.05.2022 passed by the learned Sessions Judge, Gonda in Sessions Trial No. 338 of 2022 (State vs. Vijay Mishra & Others), arising out of Case Crime No. 90 of 2019, under Sections 323, 325, 308 I.P.C., Police Station- Umari Begumganj, District- Gonda whereby the application under Section 228 (1) (a) of the Cr.P.C. filed on behalf of the accused-revisionist for transferring the case to the Court of Magistrate, has been rejected.

3. The aforesaid case has been instituted on the basis of an F.I.R. alleging that the four named accused persons, including the revisionist, had assaulted the informant's brother with sticks, because of which he fell unconscious. The injured was taken to the police station while he was still unconscious. On these allegations, the F.I.R. was registered in respect of offences under Sections 323, 325 and 308 I.P.C.

4. The medical examination report of the injured mentions following injuries suffered by the victim:-

1. Lacerated Wound - 8 x .5cm I Bron above (Right) ear.

2. Lacerated Wound - 4.8 cm x 1cm Top of Head.

3. Lacerated Wound - 2x2 cm (Right) Leg above 12cm (Right) Ankle.

4. Contused- Swelling 6x4 cm over right shoulder.

5. Contused- Swelling over (Left Right) wrist all around.

6. Swelling over (Right) Ankle.

7. Complaint of Pain- Over back of chest abdomen B/ 1 upper & lower limbs.

8. Contusion 25cm X 13cm right side back of chest.

5. On the basis of the aforesaid F.I.R., a Sessions Trial No. 338 of 2022 has been instituted, which is pending before the learned Sessions Judge, Gonda.

6. The accused persons filed an application under Section 228 (1) (a) of Cr.P.C. in the aforesaid Session Trial stating that none of the injuries reported in the medical examination report of the injured person indicates that death could have been caused by such injury. As there is no injury which could be life threatening, prima facie no offence under Section 308 I.P.C. is made out and it can at the most lead to commission of offences punishable under Section 323 and 325 I.P.C., both of which are triable by a Magistrate. The accused persons accordingly prayed that Section 308 I.P.C. may be expunged and the case be transferred to the Court of Magistrate for its trial.

7. The aforesaid application was rejected by the learned Sessions Judge, Gonda by means of the order dated 27.05.2022 holding that the injured has suffered injuries on his head and head injuries could be life threatening. Therefore, the accused persons have rightly been charged with an offence under Section 308 I.P.C. Accordingly, the application filed under Section 228 (1) (a) Cr.P.C. has been rejected.

8. Assailing the aforesaid order dated 27.05.2022 before this Court in Revision, the learned counsel for the revisionist has submitted that the order dated 27.05.2022 has been passed in a mechanical manner without properly considering the evidence available on record, which does not support the prosecution story regarding commission of an offence under Section 308 I.P.C. The learned counsel for the revisionist has further submitted that the ingredients of Section 308 I.P.C. are not made out in the present case and this aspect has been ignored by the learned court below.

9. On the other hand, Sri Tilak Raj Singh, learned A.G.A. has submitted that there is sufficient material on record to indicate commission of an offence under Section 308 I.P.C. and the order dated 27.05.2022 passed by the learned court below is based on sound reasons and it needs no interference by this Court in exercise of the revisional jurisdiction.

10. Before proceeding to decide the rival submissions made before this Court, it would be appropriate to look at the provisions of Section 308 I.P.C., which provides as follows:-

"308. Attempt to commit culpable homicide.--Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Illustration A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section."

11. The essential ingredients of the first part of Section 308 I.P.C. are that

(i) a person does any act

(ii) with intention or knowledge to commit culpable homicide not amounting to murder,

(iii) that the offence was committed under such circumstances that if by that act the accused caused death, he would be guilty of culpable homicide not amounting to murder.

12. A bare perusal of the aforesaid statuory mandate makes it clear that by enacting Section 308 I.P.C., the Legislature has made a composite provision in order to deal with two spearate situations.

13. The first part of Section 308 does not make any inference to any hurt being caused by the accused persons and, therefore, any hurt being caused is not an essential condition to attract the provisions of Section 308 I.P.C.

14. The second part of Section 308 provides that if hurt is caused to any person by an act which falls within the purview of the Section, the accused shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

15. A combined reading of both the parts of Section 308 clarifies that the legislative mandate in Section 308 is that whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, but inspite of the effort made by him he completely fails to achieve his goal of committing culpable homicide not amounting to murder, he shall still be held guilty of committing an offence under Section 308 I.P.C. and he shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. However, if by his attempt hurt is caused to any person by such act, shall be yet be guilty of committing an offence under Section 308 I.P.C. and in such a situation a higher punishment of imprisonment of either description for a term which may extend to seven years, or fine, or both will be inflicted upon the accused.

16. Now I proceed to consider the submission made by the learned Counsel for the Revisionist that the medical examination report does not mention any injury on any vital part of the victim's body and, therefore, prima facie the accused-revisionist cannot be tried for an offence under Section 308 I.P.C. and he can only be tried for offences under Section 323 and 325 I.P.C., both of which are triable by Magistrate and, therefore, his case should be transferred from the Court of Sessions to a Court of Magistrate under Section 228 (1) (a), Cr.P.C. This contention is liable to be rejected for two reasons. First, the medical examination report of the injured shows that he has suffered a Lacerated Wound of size 8x.5cm above his right ear, a Lacerated Wound of size 4.8 cm x 1cm on the top of his head and he has also suffered a Contusion of size 25cm X 13cm on the right side of back of his chest. All these injuries are on vital parts of the injured's body and, therefore, the contention of the learned Counsel for the revisionist that the accused-revisionist did not cause any injury on any vital part of the injured's body is incorrect and the same is rejected.

17. Secondly, assuming that the injured did not suffer any injury on any vital body of his body, even then prima facie it appears that the accused-revisionist committed an act with an intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not

amounting to murder, then even if the accused-respondent failed completely in his attempt and he could not inflict any hurt on the body of the injured, the accused-revisionist would still be guilty of committing an offence punishable under the first part of Section 308 I.P.C. and he has to face a trial for the said offence. For this reason also, the contention of the learned Counsel for the revisionist is liable to be rejected.

18. The order under challenge in this revision has been passed upon an application filed by the accused under Section 228 (1) (a) of Cr.P.C., which reads as under:-

"228. Framing of charge.

(1)If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

19. Since from the discussion made above, the contention of the accused-respondent that no injury has been caused on any vital part of the body of the injured and, therefore, the charges against him at the most make out a case under Section 323 and 325 I.P.C. and no offence under Section 308 I.P.C. is made out, has already been rejected, therefore, the accused-applicant cannot maintain an application under Section 128 (1) (a) Cr.P.C. for transferring the case from the Court of Sessions to a Court of Magistrate on the ground that no offence under Section 308 I.P.C. is made out against him.

20. Whether the accused has committed the offence punishable under Section 308 I.P.C. or not and if yes, whether his act would fall under the first part of Section 308 or in the second part thereof, are matters to be decided during the trial and at this stage only this much can be said that the accused has to face trial for the offence under Section 308 I.P.C., which is triable by a Court of Sessions and, therefore, the case cannot be transferred to a Court of a Magistrate.

21. Keeping in view the aforesaid discussions, this Court is of the considered view that the order dated 27.05.2022 passed by the learned Sessions Judge, Gonda, rejecting the accused-revisionist's application under Section 228 (1) (a) Cr.P.C. does not suffer from any illegality so as to call for an interference by this Court in exercise of its revisional jurisdiction..

22. The revision lacks merit and is, accordingly, ***dismissed.***

23. However, there is no order as to costs.

(2022)06ILR A1142
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 494 of 2022

Vikas Asthana ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rajesh Chandra Mishra, Sri Akhilesh Kumar Kalra

Counsel for the Opposite Parties:
Govt. Advocate

Criminal Law - Code of Criminal Procedure, 1973 - Section 227- Application for discharge rejected-challenged-probative value of the material on record cannot be gone into -material on record has to be accepted as true-it shows prima facie case against accused=no right to produce any document at the stage of framing of charges-power of discharging should be exercised very sparingly.

Revision dismissed. (E-9)

List of Cases cited:

1. St. of Orissa Vs Devendra Nath Padhi

2. Rekha Jain Vs St. of Karn. & anr.; 2022 SCC online SC 585

3. Sanjay Kumar Rai Vs St. of U. P. & anr.; 2021 SCC Online SC 367

4. N. Vijay Kumar Vs St. of T. N.; (2021) 3 SCC 687;

5. Central Bureau of Investigation, Hyderabad Vs K. Narayana Rao; (2012) 9 SCC 512

6. Archana Rana Vs St. of U.P. & anr.; (2021) 3 SCC 751.

7. St. of Raj. Vs Fatekh Karan Medhu; (2017) 3 SCC 198

8. St. Represented By Deputy Superintendent of Police, Vigilance And Anti-Corruption, Tamil Nadu Vs J. Doraiswamy & ors. (2019) 4 Supreme Court Cases 149

9. Srilekha Sentil Kumar Vs Deputy Superintendent Of Police, Central Bureau OF Investigation, ACB, Chennai; (2019) 7 SCC 82

10. St. By Karnataka Lokayukta, Police Station, Bengaluru Vs M. R. Hiremath; (2019) 7 SCC 515

11. M. E. Shivalingamurthy Vs Central Bureau of Investigation, Bengaluru; (2020) 2 SCC 768

(Delivered by Hon'ble Brij Raj Singh, J.)

1. This criminal revision has been filed with a prayer to set aside the order dated 26.02.2022 passed by Additional Session Judge/Special Judge, Prevention of Corruption Act, 1988, Court No. 9, Lucknow in Criminal Case No. 957 of 2018 (State Vs. Vikas Asthana & Others) whereby the application for discharge filed by the revisionist has been rejected as well as to quash the order dated 06.04.2022 whereby the ourt below has framed the charges against the revisionist under Section 7/13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, under Section 8/13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, under Section 420 I.P.C. and under Section 120B I.P.C. arising out of Case Crime No. 264 of 2017, under Sections 7, 8, 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 and Sections 410, 420, 120B, 34 I.P.C, PS

Barhpura, District Etawah and discharge the revisionist-accuesd from all the charges.

2. Prior to discussing the present controversy, it is necessary to discuss the detail background of "discharge" enshrined under Criminal Procedure Code which would be also relevant to decide the present controversy.

3. Introductory Part:-

The provison of discharge is available to the accused to demonstrate before the court that after perusing the material and evidence, he has been maliciously charged. Under the Criminal Procedure Code, 1973, the Discharge Application is envisaged to provide remedy to the person who has been maliciously charged. If the allegations which have been made against him are false, this Code provides the provisions for filing a discharge application. If the evidence given before the Court is not sufficient to satisfy the offence and in the absence of any prima facie case against him, he is entitled to be discharged.

4. Division of Criminal Cases:-

There are two major classifications of criminal cases under the Code of Criminal Procedure that is:

(1) Cases instituted on the basis of a police report (Section 238-243).

(2) Cases instituted otherwise than on police report based on the complaint (Section 244-247).

There are four types of the trial procedures provided under CrPC:

1. Summary trials (Section 260-265),

2. Trial of summons cases by Magistrates (Section 251-259),

3. Trial of warrant cases by Magistrates (Section 238-250), and

4. Trial before a court of Sessions (Section 225-237).

The procedure of warrant cases is used for the trial of warrant cases by the Magistrates and the trial before the court of sessions whereas trial of summons cases by Magistrates and summary trials are tried in a summons case trial.

5. Summons Cases:-

Section 2 (w) of the CrPC defines "Summons case' as a case that is related to an offence and it is also not a "warrant case'. It includes those offences other than warrant cases i.e, those offences which are not punishable with death, life imprisonment, or imprisonment exceeding two years.

6. The Warrant Cases:-

Warrant case is defined under Section 2 (x) of the CrPC as a case of an offence which is punishable with death, life imprisonment, or imprisonment exceeding two years.

Discharge on the basis of a police report:-

The procedure of law is that the police after completing its investigation files the final charge sheet under Section 173 of the code. Trial against the accused begins by the concerned Court thereafter.

However, Section 239 and 227 of CrPC, provide provisions that before the charges are framed against an Accused person, he can be discharged. However, in warrant cases only, these provisions can be used by the Accused.

7. Discharging in warrant case on a police report before Magistrate:-

It is procedure of law that the police, after completing its investigation, files the final charge sheet against the accused. Thereafter the accused has to face trial as the charges are framed against him, by the concerned Court. However, the Code of Criminal Procedure grants a procedure that states that the Accused person can be discharged before the charges are framed against him.

Section 239 of the Code of Criminal Procedure states when accused shall be discharged.

Upon due consideration of the police reports and all the documents sent under Section 173, after hearing prosecution as well as accused, the Magistrate may consider the charge to be groundless against the accused and he can discharge the accused and also record his reasons for doing so.

The significant value of the materials on record cannot be looked into at the stage of framing of a charge by the Magistrate and the materials brought on record by the prosecution against the accused have to be trusted as true at that stage. The emerging judicial view is that the Court cannot initiate an in-depth inquiry into the evidence at this stage.

8. Important elements for Discharge:-

The Court will have to consider the Charge sheet and the Police Report submitted to it by the Police under Section 173, following are the essential elements:

- The Magistrate may, if he deems fit, examine the Accused.

- Thereafter the arguments of both the Prosecution and the Accused Parties and their versions would be heard versions.

- Grounds against the accused to be baseless- There should not be any evidence present against the accused. The Court also has to assure itself that there is no prima facie case against the accused.

If all the above conditions are fulfilled, then the Accused shall be discharged.

9. Whether the magistrate has to take cognizance of the material brought by the accused?

Under Section 239 of the code, the Magistrate has to give the prosecution and the accused a chance of being heard besides taking cognizance of the police report and the documents sent therewith. The Code makes it mandatory for the Court to give a hearing to the accused to determine whether it is essential to proceed to the next stage. It is a matter of the application of the judicial mind.

Nothing in the code restricts the scope of such an audience to oral arguments. If the accused produces any trustworthy material at that stage which might drastically affect even the very feasibility of the case, it would be very inappropriate to recommend that no such

material shall be taken into consideration by the Court at that stage. The word ground includes the insufficiency of evidence to justify the charge.

10. When accused shall be discharged in Sessions trial:-

Section 227 of the Code defines that if the judge considers that there is no sufficient ground for proceeding against the accused, upon hearing the submissions of the prosecution and the accused in the behalf and consideration of the record of the case along with the documents submitted therewith, he shall discharge the accused and record his reasons also for so doing.

Only after considering allegations in the charge-sheet and the relevant case-law, the Discharge of an accused can be ordered.

11. Mandatory cases where Sessions Judge is bound to discharge:-

1. Where he is precluded from proceeding because of a prior judgment of High Court,

2. Where the prosecution is clearly barred by limitation,

3. Where the evidence produced is not sufficient,

4. Where there is no legal ground for proceeding against the accused, or

5. Where no sanction has been obtained.

12. Decision of Court for Sufficient ground:-

As per Section 227 of the Code, the magistrate should ensure that there is no sufficient ground for proceeding, it means that no prudent person can conclude that there are grounds or even a single ground to sustain the charge against the accused. If the Sessions Judge is certain that the trial would only be a futile exercise or complete waste of time, he has the authority to discharge the accused.

For the purpose of deciding whether the grounds are sufficient for proceeding against an accused, the Court determines the question whether the material on record, if it is un-rebutted, is sufficient to make the conviction possible. It postulates the exercise of the judicial mind to the facts of the case to decide whether a case has been made out by the prosecution for trial.

13. Judicial Scrutiny for prima facie case:-

It is only through the facts of each case through which the judge can determine if it is a prima-facie case and in this regard, it is neither possible nor desirable to formulate rules of universal application. However, if both of the views are possible and the Judge is convinced that the evidence presented before him gives rise to suspicion but not grave suspicion, he can discharge the accused. At this stage, he does not need to bother whether the trial will lead in conviction or not.

The test to be applied is whether the materials on record, if unrebutted, is sufficient to make conviction possible. The ground word used in the context is a ground for putting the accused on trial and not a ground for conviction. If the evidence produced is not sufficient for the judge to

proceed against the accused, it may be a ground or that the prosecution is barred by limitation or as no sanction has been obtained, the accused cannot be proceeded with or due to a prior judgment of the High Court, he is precluded from holding the trial.

14. Whether the material which is produced by the accused can be looked into by the session's court?

In the case of **Satish Mehra v. Delhi Administration and Another reported in (1996) 9 SCC 766**, the Hon'ble Supreme Court held that if the accused produces any convincing material at the stage framing of charge which might drastically affect the very sustainability of the case, it is unfair to suggest that no such material should be considered into by the court at that stage.

It was held that the main motive of granting a chance to the accused of making submissions as envisaged in Section 227 of the CrPC, is to assist the court to determine whether it is required to proceed to conduct the trial. It was also observed that nothing in the Code limits the ambit of such hearing to oral arguments only and, therefore, the trial court can consider the material produced by the accused at the stage observed under Section 227 of the Code. However, the said judgement Satish Mehra (supra) decided by Hon'ble Supreme Court, has been turned down by Hon'ble Supreme Court in the case of **State of Orissa Vs. Devendra Nath Padhi** and it has been observed by Apex Court that at the time of framing charge or taking cognizance the accused has no right to produce any material. No provision in the code of criminal procedure 1973 grants to the accused any right to file any material or document at the stage of framing of charge.

15. The Judicial power of the Court at the time of considering the discharge application:-

The Magistrate cannot be assumed to be a post office to frame the charges at the instruction of the prosecution, and application of judicial mind to the facts of the case is necessary to determine whether a case has been made out by the prosecution for trial. In determining this fact, it is not mandatory to dive into the pros and cons of the matter by the court.

At the stage observed under Section 227, the Judge has to merely examine the evidence in order to determine whether or not the grounds are sufficient for proceeding against the accused. The nature of the evidence recorded by the police or the documents produced in which prima facie reveals that there is a suspicious situation against the accused so as to frame a charge against him before the court would be taken into account in order to find out the sufficiency of ground.

16. Discharge after Framing of Charge:-

If there are no sufficient grounds for proceeding against the accused, the accused has to be discharged, but if the Court is of the opinion after such consideration that there is ground for presuming that the accused has committed the offence which is exclusively triable by the Court of Session then the charge against the accused must be framed. Once the charges are framed, the accused is put to trial and thereafter either acquitted or

convicted, but he cannot be discharged. Once charges are framed under Section 228 of the code, there is no back-gear for discharging the accused under Section 227 of the code. Discharge post framing of charge is not viewed in CrPC.

17. Discharge is not Acquittal:-

The discharge of an accused under Section 227 of CrPC, is not tantamount to the acquittal of an accused. Under Section 227 of the code, the accused is released on the ground of non-availability of the materials collected by the officeduring the investigation, the Court does not absolve the accused from all the charges at that stage. The discharge may be due to inept inquiry and investigation. The discharged person can again be charged subsequently after proper investigation and collection of relevant materials. The basic intention of the legislature is to prevent one's subjection to the judicial process without any foundation.

18. Review of a Discharge Order:-

Discharge Order does not lead to acquittal as no trial has taken place. Where the Magistrate had discharged some of the accused after recording the evidence let in by the prosecution, but if the fresh materials are found against the discharged accused, he can consider the offence as it is not the review of the discharge order, earlier passed by the Magistrate.

19. Discharge of the accused by Court of Sessions:-

In the case of Sanjay Gandhi vs Union of India reported in AIR 1978 SC 514, it was held that there is no such provision that permits the Magistrate to discharge the accused. Discharge order can be given only by a trial court and in respect of the offences exclusively triable by a court of session, the court of the Judicial Magistrate is not the trial Court.

20. Discharge of accused in Warrant Cases instituted on Complaint:-

Section 245 of CrPC: When accused shall be discharged;

1) If the Magistrate views that no case has been made out against the accused which, if unrebutted, would warrant his conviction, after taking all the evidence referred to in Section 244, for reasons to be recorded, the Magistrate shall discharge him

2) Nothing in this section can forbid a Magistrate from discharging the accused at any precedent stage of the case if he contemplates the charge to be groundless and the reasons shall be recorded by him.

Under Section 245(1), the Magistrate has to consider whether the evidence produced by the prosecution, if remains unrebutted, is sufficient to make conviction of the accused possible. If there is no convincing material on record against the accused, then the Magistrate shall proceed to discharge the accused under Section 245(1) CrPC.

Section 245(2) CrPC empowers the Magistrate to discharge the accused at any precedent stage of the case which means even before such evidence is led. However, the Magistrate has to come to the conclusion that the charge is groundless in order to discharge an accused under Section 245(2) CrPC. The Magistrate can

take this decision even prior to the appearance of the accused before the Court or the evidence which is taken under Section 244 CrPC. The words "At any previous stage of the case' written in Section 245(2) CrPC. brings clarity to this position.

21. What is the previous stage?

The previous stage in the context means that any stage prior to the evidence of the prosecution, under Section 244(1) of the code, is completed. Such stages would lie under Section 200 Cr.P.C. to Section 204 CrPC.

22. Discharge in Summons Case:-

Whether the magistrate is empowered to drop proceedings and discharge an accused in a Summons case which is instituted on a complaint has the power?

Section 251 of the CrPC states:

The substance of accusation to be stated- In a summons case, When the accused appears or is brought before the Magistrate, he should be made aware of the particulars of the offence of which he is accused, and the question shall be asked to him whether he pleads guilty or has any defence to make, but it shall not be obligatory to frame a formal charge. On a bare reading ofSection 251 CrPC, it becomes clear that there is no particular power to discharge or drop proceedings granted to the Magistrate in a Summons Trial.

23. Brief facts of the case:-

The revisionist filed application before the Court below to discharge him from the charges in Case No. 0264 of 2017, under Sections 7, 8, 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 and Sections 410, 420, 120B, 34 I.P.C, PS Barhpura, District Etawah.

In the application it is stated that provision of Section 120B I.P.C. and Section 34 I.P.C., both cannot stand simultaneously and charge sheet is vitiated. It is further stated in the application that C.O. V. S Veer Kumar arrested the revisionist first and thereafter, the first information report was lodged and made entry in G.D. The proceeding was done on the information given by unknown informant who was not made eye witness of the recovery. It has further been submitted in the application that accused alongwith other co-accused were doing their public duty, therefore, the offence under Sections 419 and 420 I.P.C. is not made out. It has further been submitted in the application that applicant was posted as Passenger Tax Officer in Farrukhabad and he was assigned the duties by the office and in pursuance of the order passed by the department, he was checking at the check post village Udi, District Etawah. As a public officer he was performing his duties and Rs 9,500/- recovered by the police but the said amount was belonging to revisionist. The total recovery of Rs.20,290/- has been shown against all the 7 accused persons which is not a case of trap. The procedure of Section 212 Cr.P.C. has not been followed and the recovery has been said to be illegal.

24. The prosecution had opposed the application for discharge and after hearing both the parties, the impugned orders dated 26.02.2022 and 06.04.2022 have been passed by the Court below.

25. Heard Sri Akhilesh Kumar Kalra, learned counsel for the revisionist and Sri

Anurag Verma, learned A.G.A. for the State.

Sri Akhilesh Kumar Kalra has argued that Sections 7, 13 of the Prevention of Corruption Act, 1988 and Section 120 B I.P.C. are not made out. He has also invited attention towards the paper which is part of case diary as contained Annexure-8 and argued that the said paper indicates that the revisionist was posted as Passenger Tax Officer at the relevant place and he has not committed offence. Sri Akhilesh Kumar Kalra has also invited attention towards challan which was done by the revisionist in his official duty as contained in Annexure-10 and has argued that he was doing his official duty but has been falsely implicated in the present case. It has been argued by counsel for the revisionist that A.R.T.O. had entrusted duty on 1st Ocober, 2017 by which the revisionist was directed to check the Udi check post situated at District Etawah and thus, he was doing his official duty but police has implicated him falsely. Sri Akhilesh kumar Kalra, learned counsel for the revisionist has placed reliance on the following judgements reported by Hon'ble Supreme Court:-

(i) Rekha Jain Vs. State of Karnataka and Another; 2022 SCC online SC 585 (ii) Sanjay Kumar Rai Vs. State of Uttar Pradesh and Another; 2021 SCC Online SC 367 (iii) N. Vijay Kumar Vs. State of Tamil Nadu; (2021) 3 SCC 687; (iv) Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao; (2012) 9 SCC 512 (v) Archana Rana Vs. State of Uttar Pradesh and Another; (2021) 3 SCC 751.

26. Sri Anurag Verma, learned A.G.A. has made submission that order passed by the court below is justified and there is sufficient evidence and material against the revisionist. The court below has recorded finding after considering the evidences and material collected by the police and the discharge application has rightly been dismissed. He has further submitted that once there was sufficient material available before the court below, there is no option left except to frame charges and the court under the revisional jurisdiction has limited jurisdiction to see the legality and perversity of the order. He has further submitted that court in revisional jurisdiction cannot exercise power of the appellate court and evidences cannot be weight and appreciated, collected by the police and he has placed reliance of the several following judgements pronounced by the Hon'ble Apex Court :-

(i) State of Rajasthan Vs Fatekh Karan Medhu; (2017) 3 SCC 198 (ii) State Represented By Deputy Superintendent of Police, Vigilance And Anti-Corruption, Tamil Nadu Vs. J. Doraiswamy And Others (2019) 4 Supreme Court Cases 149 (iii) Srilekha Sentil Kumar Vs. Deputy Superintendent Of Police, Central Bureau OF Investigation, ACB, Chennai; (2019) 7 SCC 82 (iv) State By Karnataka Lokayukta, Police Station, Bengaluru Vs. M. R. Hiremath; (2019) 7 SCC 515 (v) M. E. Shivalingamurthy Vs. Central Bureau of Investigation, Bengaluru; (2020) 2 SCC 768

27. Sri Akhilesh Kumar Kalra has submitted that provision of 7/13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, under Section 8/13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 is not attracted in the present case. After looking into the material on record, it is evident that revisionist was standing at barriers situated

at Village Udi, District Etawah and he was illegally receiving money from the trucks by using barriers and upon the raid made by C.O. he was was arrested. Thus, Section 7/13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, under Section 8/13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 is made out. Similarly conspiracy was made by accused/revisionist alongwith co-accused Constable Laxmikant, Constable Shobhit Kumar, Constable Rajnesh, Rampratap, Umesh Chandra and Janved Singh and illegal money was obtained by stopping the truck, all the accused had conspired by making plan and illegal money was received by them. Thus, Section 420 I.P.C. is made out against all the accused. Section 120B I.P.C. is also made out for the reason that accused/revisionist and all the other co-accused had made conspiracy and committed offence which is a penal offence under Section 120B I.P.C. Paragraph Nos.10 and 11 of the judgement Rekha Jain (supra) will not be applicable in the present case. In the case of Rekha Jain (supra) there was no allegation whatsoever to the effect that accused Rekha Jain induced the complainant to part with the gold jewellery. In the absence of allegation of inducement Rekha Jain was not liable to be prosecuted but in the present case, the specific allegation has been levelled against the accused and co-accused who made conspiracy to receive illegal money by stopping trucks at the barrier. The said case Rekha Jain will not be applicable in the present case.

28. Counsel for the revisionist has placed the judgement of Sanjay Kumar Rai (supra) which is regarding the maintainbility of the revision. There is no doubt that under the revisional jurisdiction, the court is not merely a post office. After looking the entire evidences, if the court comes to the conclusion that no charge is made out, the Court can discharge. Thus, there is no claimer on the point of maintainbility. The case Archana Rana (supra) has been relied by the counsel for the revisionist. Paragraph Nos. 7 and 8 of the said judgement has been placed before me in which it is observed that even if averments made in the complaint are taken on their face, they do not constitute the ingredients necessary for the offence under Sections 419, 420 I.P.C. In the present case the material evidences collected by the Investigating Officer indicates that offence is made out under Sections 420 and 120-B I.P.C.

29. Sri Akhilesh Kalra has relied on the para-22, 23, 24 and 30 of judgement of Central Bureau of Investigation, Hyderabad (supra). The ingredients of offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire even if some acts are proved to have been committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were charges to the alleged conspiracy. In the present case, I have seen that all the seven accused including the revisionist have conspired to receive illegal money by stopping the truck and all of them committed offence and recovery was made to that effect. Since, there was sufficient material, therefore, the court framed the charges and there was no option left to court while considering the evidences collected by the Investigating Officer.

30. The next judgement cited by Sri Akhilesh Kumar Kalra, learned counsel for the revisionist, N. Vijay Kumar (supra) is not applicable in the present controversy

for the reason that accused was convicted and sentenced was imposed for the offence committed under the Prevention of Corruption Act. Against the judgement, appeal was preferred before the High Court which too was dismissed on 15.09.2020. It is thus clear that said case is arising out of the judgement of trial court and this is discharge application which has been dismissed and the aforesaid judgement relied by counsel for the revisionist is not applicable in the present case.

31. Per contra, Sri Anurag Verma, learned A.G.A. has cited the judgement of State of Rajasthan (supra). Paragraph nos. 26, 27, 28 and 29 of the said judgement are quoted below:-

"26. The scope of interference and exercise of jurisdiction under Section 397 CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of the Code of Criminal Procedure.

27. Now, reverting to the limit of the scope of jurisdiction under Section 397 CrPC, which vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in the proceeding.

28. It is useful to refer to the judgment of this Court in Amit Kapoor v. Ramesh Chander [Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460 : (2012) 4 SCC (Civ) 687 : (2013) 1 SCC (Cri) 986] , where scope of Section 397 CrPC has been succinctly considered and explained. Paras 12 and 13 are as follows : (SCC p. 475)

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and

cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under CrPC."

29. The Court in para 27 has recorded its conclusion and laid down principles to be considered for exercise of jurisdiction under Section 397 particularly in the context of quashing of charge framed under Section 228 CrPC. Paras 27, 27.1, 27.2, 27.3, 27.9 and 27.13 are extracted as follows : (Amit Kapoor case [Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460 : (2012) 4 SCC (Civ) 687 : (2013) 1 SCC (Cri) 986] , SCC pp. 482-83)

"27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1.Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2.The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3.The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.9.Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the Court is concerned

primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.13.Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie."

32. erintendent of Police, Vigilance And Anti-Corruption, Tamil Nadu (supra). Paragraph nos. 11, 13, 14 and 15 of the aforesaid judgement are relevant and the same are quoted below:-

"11. We find that the High Court acted like an appellate court than as a revisionary court as if it was hearing the appeal against the final verdict of the Special Court.

13. In our view, such approach of the High Court while deciding the discharge applications of the respondents (accused) is not legally correct and, therefore, it cannot be upheld.

14. In our view, consideration of the record for discharge purpose is one thing and the consideration of the record while deciding the appeal by the appellate court is another thing.

15. While considering the case of discharge sought immediately after the charge-sheet is filed, the court cannot become an appellate court and start appreciating the evidence by finding out inconsistency in the statements of the witnesses as was done by the High Court in the impugned order [State v. J. Doraiswamy, 2016 SCC OnLine Mad 17955] running in 19 pages. It is not legally permissible."

33. Sri Anurag Verma has also shown the judgement of Srilekha Sentil Kumar (supra). Paragraph no. 9 of the said judgement is quoted below:-

"9.In other words, we are of the view that the issues urged by the appellant and the same having been refuted by the respondent are such that they can be decided more appropriately and properly during trial after evidence is adduced by the parties rather than at the time of deciding the application made under Section 239 CrPC."

34. Sri Anurag Verma has further relied the judgement of State By Karnataka Lokayukta, Police Station, Bengaluru (supra). Paragraph no. 25 of the said judgement is quoted below:-

"25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary

to constitute the offence. In State of T.N. v. N. Suresh Rajan [State of T.N.v.N. Suresh Rajan, (2014) 11 SCC 709 : (2014) 3 SCC (Cri) 529 : (2014) 2 SCC (L&S) 721] , adverting to the earlier decisions on the subject, this Court held : (SCC pp. 721-22, para 29)

"29. ... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

35. Pragraph Nos. 17.7, 17.8, 18, 28 and 29 of the judgement of M. E. Shivalingamurthy (supra) has been relied by Sri Anurag Verma, learned A.G.A. and the aforesaid paragraphs are quoted below:-

"17.7.At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8.There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 CrPC (see State of J&K v. Sudershan Chakkar [State of J&K v. Sudershan Chakkar, (1995) 4 SCC 181 : 1995 SCC (Cri) 664 : AIR 1995 SC 1954]). The expression, "the record of the case", used in Section 227 CrPC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police (see State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568 : 2005 SCC (Cri) 415 : AIR 2005 SC 359]).

28. It is here that again it becomes necessary that we remind ourselves of the contours of the jurisdiction under Section 227 CrPC. The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the trial court to discharge the accused.

29.It is not open to the accused to rely on the material by way of defence and persuade the court to discharge him."

36. The arguments advanced by Sri Anurag Verma has force, it is true that

probative value of the material on record cannot be gone into and the material brought on record by the prosecution has to be accepted as true. The material available on record goes to show prima facie the case against the accused, therefore, he cannot be discharged. The court does not give any right to accused to produce any document at the stage of framing of charges.

37. In my opinion, the court cannot become an appellate court and appreciation of evidence by finding inconsistency in the evidences cannot become ground for discharging the accused. It is well settled proposition that power of quashing the criminal proceeding at the time of framing of charge should be exercised very sparingly with circumspection and in the rarest of rare cases. I have to apply the test as to whether uncontroverted allegations as made from the record and evidence prima facie established the offence or not.

38. In view of the aforesaid discussion, I do not find any infirmity, illegality, perversity in the orders dated 26.02.2022 and 06.04.2022; thus, the revision being devoid of merit is **dismissed.**

39. No order as to costs.

40. However, it is made clear that the observations made above will not influence the trial in any manner and revisionist is at liberty to seek any remedy available to him under the law.

(2022)06ILR A1155
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 340 of 2004

Virendra Kumar ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri H.N. Singh, Sri B. Narayan Singh, Fatma Khatoon, Sri Satyendra Prakash Srivastava, Sri Gajendra Pratap Singh (Senior Adv.)

Counsel for the Opposite Party:
Govt. Advocate

Criminal Law - Probation of Offenders Act,1938 - Section 4- Prevention of Food Adulteration Act, 1954-Impugned order-conviction for guilty of offence u/s 7/16 Prevention of Food Adulteration Act, 1954 - admitted fact that provision of section 16 not attracted-Revision is entitled of the relief of the Act,1938-Provisions of Act,1938 is not excluded in cases under Prevention of Food Adulteration Act-such application is subject to non applicability of section 16 of the Act,1938.

Revision allowed. (E-9)

List of Cases cited:

1. Badan Singh Vs St. of U.P. in Criminal Revision No. 2066 of 1973 (decided on 31.03.1976).

2. Isher Das Vs St. of Pun. : AIR 1972 SC 1295.

3. Jai Narain Vs Municipal Coirporation of Delhi : AIR 1972 SC 2607

4. Pyarali K, Tejani Vs Mahadeo Ramchandra Dange & ors. : AIR 1974 SC 28

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This revision has been filed challenging the judgment and order dated 28.01.2004 passed by learned Additional District and Sessions Judge (F.T.C.), District Sonbhadra, dismissing Criminal Appeal No. 5 of 1998 (Virendra Kumar Vs.

State), preferred against the judgment and order dated 18.02.1998 passed by learned Special Judicial Magistrate, Duddhi, District Sonbhadra in Criminal Case No. 228 of 1987 (State Vs. Shyam Sundar Agrahari and another), under Section 7/16 of Food Adulteration Act, Police Station Shakti Nagar, District Sonbhadra, convicting and sentencing the revisionist under Section 7/16 of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the, "Act, 1954') with a punishment of six months rigorous imprisonment along with a fine of Rs. 1,000/- with default stipulation.

2. Heard Shri Gajendra Pratap Singh, the learned Senior Counsel, assisted by Shri Satyendra Prakash Srivastava, the learned counsel for the revisionist, Shri Suresh Bahadur Singh, the learned A.G.A. for the State and perused the record.

3. Learned counsel for the revisionist submits that the complaint was filed in the year 1986 and the revisionist was convicted and sentenced by the trial court for six months rigorous imprisonment in the year, 1998, which judgment and order was affirmed by the learned appellate court in the year, 2004. The date of birth of the revisionist is 25.10.1968 and on the date of alleged incident he was aged about 17 years, 07 months 23 days and as such at that time he was minor and by now 36 years have already been elapsed. The delay in trial deprives the right of the revisionist of speedy trial and he may be given benefit of first offender under the provisions of the U.P. First Offenders Probation Act, 1938 (hereinafter referred to as the, "Act, 1938'). In support of his submission he placed reliance upon a judgment given by this Court in the case of **Badan Singh Vs. State of U.P. in Criminal Revision No. 2066 of 1973 (decided on 31.03.1976).**

4. From perusal of impugned order of conviction it appears that the accused-revisionist was held guilty for an offence punishable under Section 7/16 of Prevention of Food Adulteration Act as he was found keeping exposed for sale Gram Pulses which was found adulterated with 9.86% Khesari which is prohibited. The article was thus adulterated within the meaning of clause (f) of sub-Section (1) of Section 2 of the Act, 1954. It was not disputed that the provision to Section 16 of the Act was not attracted and as such he was liable to be punished with imprisonment for a term not less than six months and with fine of Rs. 1,000/-.

5. The relevant portion of sub-section (1) of Section 4 of the Act, 1938 reads as under:

(1) When any person is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the court before which he is convicted, regard being had to the age, character, antecedents or physical or mental condition of the offender and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and in the meantime to keep the peace and be of good behaviour :

Provided .....

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the State Government, which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for special reasons to be recorded in writing, it does not consider it proper to do so.

6. Sub-section (1) of Section 4 of the Act is applicable to persons of all ages subject to conditions which have been specified therein. It is applicable to a person convicted of an offence not punishable with death or transportation of life provided that no previous conviction is proved against him and further if it appears to the court before which is convicted that it is expedient that he be released on probation of good conduct regarding had to the age, character, antecedents or physical mental condition of the offender and to the circumstances in which the offence was committed. Section 4(1) of the Act, 1938 is applicable to all offences punishable with a less severe sentence than death or life imprisonment. It is clear that there the conviction is for an offence of less than a certain degree of gravity, the degree of gravity being measured by maximum punishment which can be imposed for the offence, the benefit of the section can be extended to such an offender. No other exception with regard to the nature of the offence is contemplated by the provision.

7. The second proviso to Section 4(1) of the Act, 1938 lays down that if a person under 21 years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the State Government and the maximum punishment provided for the offence does not exceed six months, the court shall extend the benefit of the section unless, for special reasons to be recorded in writing, the court does not consider it proper to extend the benefit of the provision to him. While in the case of offenders above the age of 21 years, absolute discretion is given to the court, in the case of the offenders below the age of 21 years, an injunction is issued to the court not to sentence the young offenders to imprisonment unless the court for special reasons does not consider it proper to extend to him the benefit of the First Offenders Probation Act.

8. Sub-section (1) of Section 16 of the Act, 1954 provides the punishment which may be awarded to a person found guilty of the various offences under that Act. In addition the penalty to which he may be liable under Section 6, he shall be punishable with imprisonment for a term which shall not be less than six months, but it may extend to six years and with fine which shall not be less than Rs. 1,000/-. The proviso lays down that in case of the offences specified therein, a lesser sentence may be imposed for adequate and special reason be mentioned in the judgment.

9. As observed above, Section 4 of the First Offenders Probation Act does not contemplate any exception other than those specifically mentioned therein, i.e., (1) the offence is not punishable with death or transportation for life, (2) no previous conviction is proved against the offender, (3) the court finding him guilty is of the opinion that having regard to the age, character, antecedents or physical and mental condition of the offender and to the

circumstances in which the offence was committed, it is expedient to release him on probation of good conduct and (4) the accused in such an event enters into a bond with or without sureties to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and in the meantime to keep the peace and be of good behaviour. In case of a person under 21 years of age, the proviso imposes a duty on the court not to sentence him to imprisonment unless for special reasons to be recorded in writing, it does not consider it proper to extend the benefit of the First Offenders' Probation Act. There is nothing in the Offenders Act to indicate that its operation is excluded in the case of persons found guilty of offences undo the Prevention of Food Adulteration Act. In the absence of a clear indication to that effect, the provisions of the Offenders Act would be applicable to a person found guilty of offences under the Prevention of Food Adulteration Act in spite of the fact that a minimum sentence is provided for in respect of certain offences committed under that Act.

10. The question of the applicability of the Probation of Offenders Act, 1938, to the case of a person found guilty of an offence under the Prevention of Food Adulteration Act came up for consideration before the Supreme Court in **Isher Das v. State of Punjab : AIR 1972 SC 1295**. The Supreme Court held that the provisions of the Probation of Offenders Act is not excluded in the case of the persons found guilty of the offences under the Prevention of Food Adulteration Act. No distinction was made between a case which entails the minimum sentence prescribed under Section 1(c)(1) and a case to which the proviso to that section was attracted. The court, however, cautioned that the provisions of the Probation of Offenders Act should not be lightly resorted to in view of the fact that the Prevention of Food Adulteration Act has been enacted with the aim of eradicating that anti-social evil and for ensuring purity in the articles of food. It is true that the decision of the Supreme Court was influenced by the fact that Section 4(1) of the Probation of Offenders Act contained the non obstinate clause "notwithstanding anything contained in any other law for the time being in force" and that Section 18 of the Act excluded from its operation only the offence under Sub-section (2) of Section 5 of the Prevention of Corruption Act and further that the First Offenders' Probation Act was enacted subsequent to the enactment of the Prevention of Food Adulteration Act, but that would make no difference in determining the question whether the operation of the Offenders Act is excluded in the case of persons found guilty of offences under the Prevention of Food Adulteration Act, The underlying object of both the Central and the State Acts obviously is that an accused person should be given a chance of reformation which he would lose in case he is incarcerated in prison and associated with hardened criminals. That object is further emphasised in enacting that a person who is less than 21 years of age and is convicted for an offence punishable with imprisonment not exceeding six months, the court is under a duty not to sentence him to imprisonment unless there exists special reasons which justify such a course.

11. In **Jai Narain v. Municipal Coirporation of Delhi : AIR 1972 SC 2607,** the court reiterated the principle that the provisions of the Probation of Offenders Act apply to persons found guilty under the Prevention of Food

Adulteration Act, although on the facts and circumstances of the case, the court came to the conclusion that it was neither expedient nor in consonance with the object with which the Prevention of Food Adulteration Act was passed to apply Section 4 of the Probation of Offenders Act to the case in hand. The principle laid down in **Isher Das's case (supra)** was again affirmed in **Pyarali K, Tejani v. Mahadeo Ramchandra Dange and others : AIR 1974 SC 28**. In the words of Iyer, J.:

"The rehabilatory purpose of the Probation of Offenders Act, 1958, is pervasive enough technically to take within its wing? an offence even under the Act."

12. The principle that emerges from these decisions is that the Probation of Offenders Act apply to offences under the Prevention of Food Adulteration Act, Its operation cannot be whittled down or circumscribed by the fact that a minimum sentence is provided for certain offences and no discretion is left to the court in that matter.

13. In view of above, this Court is of the view that the benefit of the First Offenders Probation Act can be allowed to an accused who is found guilty of an offence under the provisions of Prevention of Food Adulteration Act (Act No. 37 of 1954), to which the proviso to Section 16 of the Act does not apply.

14. Considering the fact and circumstance of the case, I am of the view that the benefit of provision of Probation of Offender Act, 1958 should be provided to the accused/appellant.

15. Thus, the revision is **partly allowed.** The judgment and order dated 28.01.2004 passed by learned Additional District and Sessions Judge (F.T.C.), District Sonbhadra, dismissing Criminal Appeal No. 5 of 1998(Virendra Kumar Vs. State), preferred against the judgment and order dated 18.02.1998 passed by learned Special Judicial Magistrate, Duddhi, District Sonbhadra in Criminal Case No. 228 of 1987 (State Vs. Shyam Sundar Agrahari and another), under Section 7/16 of Food Adulteration Act, Police Station Shakti Nagar, District Sonbhadra, so far as it relates with the conviction of revisionist is maintained, but the sentence is modified. Instead of sending the revisionist, Virendra Kumar, to jail, he is given benefit of Section 4 of the Probation of Offenders Act, 1938. He is directed to file two sureties bonds of Rs.20,000/- and a personal bond of same amount to the effect that he shall maintain peace and good behaviour and shall not commit any offence during the period of one year. The bonds aforesaid be filed by him within two months from the date of this judgment before District Probation Officer, Sonbhadra.

16. Copy of this judgment along with lower court record be sent to the District Judge, Sonbhadra with immediate effect for compliance.

(2022)06ILR A1159
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 119 of 2022

Sachin ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sunil Kumar

Counsel for the Opposite Parties:
Govt. Advocate, Sri Ishwar Chandra Tyagi

Criminal Law - Juvenile Justice Act, 2015 - Section 94 (2) & 7A r/w Rule 12 of Juvenile Justice Rules-Presumption and determination of age-Revisionist was juvenile on the date of alleged incidence-high school certificate-minor-chargesheet recorded 20 years age-impugned order considered age to be 20 years by taking margin of two years- section 7A of Act, 2015 r/w Rule 12 of the 2007 Rules-any other certificates will be considered only in the absence of matriculation or equivalent certificates-impugned order set aside and reversed-**Revision allowed.** (E-9)

List of Cases cited:

1. Ashwani Kumar Saxena Vs St. of M.P. in Criminal Appeal No. 1403 of 2021 (decided on 13.09.2012)

2. Sanat Kumar Yadav Vs St. of M.P. in Criminal Revision No. 3049 of 2016 (decided on 02.01.2017)

3. Akhilesh Yadav Vs Vishwanath Chaturvedi, 2013(2) SCC 1

4. Rishipal Singh Solanki Vs St. of U.P. in Criminal Appeal No. 1240 of 2021 (decided on 18.11.2021)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Sunil Kumar, learned counsel for the revisionist as well as Sri Ishwar Chandra Tyagi, learned counsel for the opposite party No.2 and Sri Abhishek Shukla, learned A.G.A.-1 for the State and perused the record.

2. This revision is directed against the order dated 14.10.2021 passed by the Additional District and Session Judge, Court No.4, Amroha, on an application (paper no. 13-B) dated 14.10.2021 moved on behalf of the revisionist in Session Trial No. 200 of 2018 arising out of Case Crime No. 735 of 2017: State of U.P. Vs. Pravav and others, under Section 395, 397, 427, 412 I.P.C. Police Station Gajraula, District Amroha by which he was pleased to reject the application dated 14.10.2021 of the revisionist-applicant seeking declaration of applicant to be Juvenile conflict with law and to refer his case to the Juvenile Justice Board, Amroha.

3. Learned A.G.A. has filed counter affidavit, which is on record. Learned counsel for the opposite party no.2 submits that he will argue the case in absence of counter affidavit and learned counsel for the revisionist submits that there is no need to file rejoinder affidavit, therefore, this court has no option to hear and proceed with the matter.

4. Learned counsel for the revisionist submits that the court below has passed the impugned order without jurisdiction vested in it, therefore, the revisionist has approached this Court directly by filing of the present revision and without filing the appeal under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act, 2015') and the impugned order is totally illegal on the face of the record.

5. Facts which are the genesis of the present dispute are that an F.I.R. dated 29.12.201 was registered by the opposite party no.2 as Case Crime No. 0735 of 2017 against six known and one unknown persons namely, Pranav Kumar alias Raghav, Abrar, Mujeem, Pawan Kumar, Amar Pal Yadav, and Bittu Chauhan, under Sections 147, 148, 149, 394, 307, 427 and 506 I.P.C. with the allegation that he is

District Coordinator of B.J.P. On 28.12.2017 when he was sitting in his office then accused persons along with 30-40 unknown persons having illegal arms in their hands entered in his office. Accused Raghav opened fire by which he has sustained injury in his hand. Again accused Raghav shot fired which hit his computer. In this incident Mahaveer Singh Chauhan, Pintu Singh, Sudhir Teetu alias Saurabh Choudhary and Anil Gupta have sustained injuries. The accused persons also committed loot of his golden chain, cash of Rs. 1,40,000/- and other document besides mobile phone and computer. They also damaged Scorpio Car, Scooter and Motor Cycle on account of the election enmity.

6. In the said F.I.R, the date of incident as alleged was 28.12.2017. The investigations were carried out and charge sheet was filed and after filing of the Charge-sheet the case was committed to the Court of Sessions where it was numbered as Session Trial No. 200 of 2018 : State Vs. Pranav and others. The trial was transferred to the Court of IV Additional District and Session Judge, Amroha where the proceedings of the present trial are going on.

7. The revisionist has claimed to be declare as a juvenile on the basis of his High School Certificate which indicates his date of birth as 10.07.2000, by filing an application dated 14.10.2021 before the Additional District and Session Judge, Court No.4, Amroha to consider his case and to refer this case for hearing before the Juvenile Justice Board, Amroha. The Additional District and Session Judge, Court No.4, Amroha relying on the age of the revisionist shown in the charge-sheet i.e. 20 years, rejected the application of the revisionist.

8. Learned counsel for the revisionist submits that the revisionist is a child. His date of birth is 10.07.2000 and the same has been recorded in his High School Certificate-cum-marksheet dated 17.05.2015 issued by the Board of High School and Intermediate Education U.P. (Madhyamik Shiksha Parishad, U.P.) for High School Examination 2015 which the revisionist passed with Roll No. 0723441 being regular student of S.P.L.D.S.V. M.I.C. Hasanpur Amroha and as such on the alleged date of incident i.e. 28.12.2017 the revisionist was less than 18 years old.

9. Learned counsel for the revisionist further submits that neither the revisionist was named in the F.I.R. nor he was put for identification from any prosecution witness nor there is any recovery or discovery of any case property or weapon of assault either from the possession or on the pointing of the revisionist, nor he was named as an accused by any witness nor there was any direct, indirect or circumstantial evidence to connect the revisionist with the alleged crime has been collected by the Investigating Officer nor there is any legal evidence collected against the revisionist but despite of that merely on the basis of confessional statement of co-accused, the revisionist has been made accused in the present case on the basis of charge-sheet filed by the police.

10. Learned counsel for the revisionist further submits that the revisionist is innocent and he has been falsely implicated in the present case by the police, during the course of investigation as he was not named in the F.I.R.

11. Learned counsel for the revisionist further submits that vide impugned order dated 14.10.2021 learned trial court

rejected the aforesaid application of the revisionist in gross violation of the provisions of law and without following the procedure established by law to refer the matter to the Committee or the Board for determination against the spirit of the provisions made under the Act, 2015. He further submits that the court below did not have jurisdiction to decide the claim of juvenility and Juvenile Justice Board is empowered to decided the said question.

12. Learned counsel for the revisionist has drawn attention of this Court towards Section 94 (2) of the Act, 2015 and submits that Section 94 (2) provides the manner in which the determination of age is to be undertaken as well as also provides the preferential documents serially having the overriding effect on the other documents. The said provision does also contain a special clause that if any document as provided is not available then how the determination of the age is to be undertaken.

13. Learned counsel for the revisionist further submits that the Child Welfare Committee or the Juvenile Justice Board are the only authorities competent to hold the enquiry either regarding the determination of the age of the Juvenile. Accordingly the regular trial court holding trial of any criminal case is not competent to hold any such enquiry for determination to the age of a Juvenile conflict with law and to pass the order accordingly. As such the learned Fourth Additional District and Session Judge was supposed to refer the application moved by the applicant before the committee or before the Board (as the case may be) for determination and he will continue to proceed with the trial of rest of the accused persons . Whenever the report of Board or committee may be submitted before the aforesaid court after determination of age, thereafter the trial court has to proceed accordingly but in any case the learned trial court could not reject the application out rightly on the basis of the those grounds which are not known to law and in conflict of the law.

14. Learned counsel for the revisionist further submits that the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board is given top preference and in case if such a certificate is not available then as a secondary measure, the birth certificate given by the corporation or the Municipal authorities or Panchayat is to be given preference and if even this certificate is not available then only in absence of both above certificates, determination of age is to be done by an ossification test or by any other latest medical determination test conducted on the orders of the Committee or Board. Since in the present case the revisionist has relied upon his matriculation certificate issued by Board of High School and Intermediate Education U.P dated 17.05.2015 wherein the date of birth of the revisionist has been specifically mentioned as 10.07.2020 which proved itself that the revision was juvenile, and since the aforesaid document is an undisputed document and is having top priority in view of Section 94 (2) of the Act, therefore the learned trial court has committed gross illegality while rejecting the application dated 14.10.2021 of the revisionist out rightly without considering the provisions of law.

15. Learned counsel for the revisionist further submits that the learned trial court has himself noted in the impugned order dated 14.10.2021 that on the date of alleged

incident i.e. 28.12.2017 the revisionist was aged about 17 years 5 months and 18 days old (and his date of birth is 10.07.2000). The learned trial court has also taken note of the High School certificate of the revisionist in the impugned order which apparently proved that the learned trial court was conscious about both these facts, but while passing the impugned order has totally ignored and overlooked the facts and the impugned order was passed ignoring the material on record.

16. Learned counsel for the revisionist further submits that the trial court has also noted the objections raised by the learned Additional Government Advocate (Criminal) on the margin of the application dated 14.10.2021 filed by the revisionist-applicant in the impugned order and has wrongly been relied upon the said objection that in the charge-sheet the age of the revisionist is shown as 20 years but surprisingly enough the learned trial court has illegally been observed that there is a margin of two years both sides of the age shown in the High School Certificate and the revisionist is appearing to be 20 years of age physically.

17. Learned counsel for the revisionist further submits that the findings recorded by the learned court below in the impugned order is perverse in nature and contrary to the record as well as wholly illegal and without jurisdiction. Accordingly these findings are liable to be set aside and the impugned order is also liable to be set aside, the trial court has exceeded its jurisdiction which is not vested in him, the impugned order is illegal and liable to be set aside as the same is passed in violation of the Act, 2015.

18. Learned A.G.A. and learned counsel for opposite party no. 2 have conceded that the trial court has no jurisdiction to decide the juvenility of a person, in view of the provision of Section 94 (2) of the Act, 2015.

19. I have heard the learned counsel for the parties and persued the record.

20. Before this Court proceeds further to assess the evidence and to consider and decide the case on merits, it shall be appropriate to examine the nature and scope of enquiry as contemplated under the law.

21. The Supreme Court of India in **Ashwani Kumar Saxena Vs. State of M.P. in Criminal Appeal No. 1403 of 2021 (decided on 13.09.2012),** examined the scope of an enquiry expected from a Court, the Juvenile Justice Board and the Committee in the light of earlier judgements and was pleased to observe in para-27 as under:-

"Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an "inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the

Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence."

22. The Hon'ble Supreme Court held that the enquiry on the point of juvenility has nothing to do with the enquiry as contemplated under other legislations and gave an opinion in paras-32, 34 and 36 of the aforesaid judgment of **Ashwani Kumar Saxena (supra)** as below:

32. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in section 7A read with Rule 12.

34. "Age determination inquiry" contemplated under section 7A of the Act r/w 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 need 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 need 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 above mentioned 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.

36. Age determination inquiry contemplated under the JJ Act and 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, J.J. Board or a Committee functioning under the J.J. 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 J.J. Board or the Committee need to go for medical report for age determination.

23. The Madhya Pradesh High Court in S**anat Kumar Yadav Vs. State of M.P. in Criminal Revision No. 3049 of 2016 (decided on 02.01.2017)** held that the age determination enquiry has to be conducted within the purview of Section 9(2) of the Act, 2015 by seeking evidence and by

obtaining documents mentioned under Section 94(2) of the Act, 2015 which are comparable with Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the, "Act, 2000) and the Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the, "Rules, 2007'). In the above case the Madhya Pradesh High Court referred to judgment of the Hon'ble Supreme Court in **Akhilesh Yadav Vs. Vishwanath Chaturvedi, 2013(2) SCC 1,** to stress the point that the courts are not expected to conduct a roving enquiry into the correctness of school certificate or the date of birth certificate. Madhya Pradesh High Court gave an opinion that school record kept during the normal course of business and whose authenticity or genuineness has not been questioned can form the basis of the determination of age of a juvenile.

24. In the case of **Rishipal Singh Solanki Vs. State of U.P. in Criminal Appeal No. 1240 of 2021 (decided on 18.11.2021)**, the Hon'ble Supreme Court held that where an application is filed before the court claiming juvenility, the provisions of sub Section 2 of Section 94 of the Act, 2015 would have to be applied or read along with sub Section 2 of Section 9 so as to seek the evidence for the purpose of finding as regard the age. The Apex Court also held that the burden of proving is on the person raising such claim, however, the documents mentioned in the relevant rules of 2007 made under the Act, 2000 or the relevant Rules under Section 94(2) of the Act, 2015 shall be sufficient for prima facie satisfaction of the court. The Hon'ble Supreme Court held that such presumption is not conclusive to prove the age and is rebutable on the evidence lead by opposite side. The Hon'ble Supreme Court also cautioned that a hyper technical approach should not be adopted when evidence is adduced on behalf of the accused in support of plea of juvenile.

25. Section 8 of The Juvenile Justice (Care and Protection of Children) Act, 2015 provides the powers, functions and responsibilities of the Board, which reads as under:-

(1) Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise.

(3) The functions and responsibilities of the Board shall include--

(a) ensuring the informed participation of the child and the parent or guardian, in every step of the process;

(b) ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation;

(c) ensuring availability of legal aid for the child through the legal services institutions;

(d) wherever necessary the Board shall provide an interpreter or translator,

having such qualifications, experience, and on payment of such fees as may be prescribed, to the child if he fails to understand the language used in the proceedings;

(e) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed;

(f) adjudicate and dispose of cases of children in conflict with law in accordance with the process of inquiry specified in section 14;

(g) transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any stage, thereby recognising that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved;

(h) disposing of the matter and passing a final order that includes an individual care plan for the child's rehabilitation, including follow up by the Probation Officer or the District Child Protection Unit or a member of a non-governmental organisation, as may be required;

(i) conducting inquiry for declaring fit persons regarding care of children in conflict with law;

(j) conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement in quality of services to the District Child Protection Unit and the State Government;

(k) order the police for registration of first information report for offences committed against any child in conflict with law, under this Act or any other law for the time being in force, on a complaint made in this regard;

(l) order the police for registration of first information report for offences committed against any child in need of care and protection, under this Act or any other law for the time being in force, on a written complaint by a Committee in this regard;

(m) conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the observation home; and

(n) any other function as may be prescribed.

26. Section 9 of The Juvenile Justice (Care and Protection of Children) Act, 2015 provides procedure to be followed by a Magistrate who has not been empowered under this Act, reads as under:

(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:

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.

27. Section 18 of the Act, 2015 provides that if it is found that any child below the age of 16 years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, may pass orders like allowing child to go home after advice or admonition or to direct the child to participate in group counselling or perform community service or may be released on probation of good conduct or he may be sent to special home for such period **not exceeding three years etc.** Perusal of provisions of the Act, 2015 establish that in no case the child below sixteen years of age having committed an heinous offence can be detained as convict in regular jails. The punishment as provided under the above provisions is basically of reformative nature. The general principles of care and protection of children as given in Chapter 2 of J. J. Act also include a principle of repatriation and restoration of every child with his family at the earliest.

28. Section 94 of the Act, 2015 provides presumption and determination of age of juvenile and such presumption is not conclusive to prove the case and is rebutable on the evidence lead by the aggrieved parties. Section 94 of the Ac, 2015 is reproduced herein below:

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.

29. In view of the facts and circumstances as discussed above and in agreement with the law laid down by Hon'ble Apex Court in the cases of **Ashwani Kumar Saxena (supra), Akhilesh Yadav (supra) and Rishipal Singh Solanki (supra)**, as well as in view of the law laid down by Hon'ble Madhya Pradesh High Court in the case of **Sanat Kumar Yadav (supra)**, this revision **succeeds** and is **allowed**. The impugned order dated 14.10.2021 passed by the Additional District and Session Judge, Court No.4, Amroha in Session Trial No. 200 of 2018 arising out of Case Crime No. 735 of 2017: State of U.P. Vs. Pravav and others, under Section 395, 397, 427, 412 I.P.C. Police Station Gajraula, District Amroha is hereby **set aside** and **reversed.**

The matter is remanded back to court of Additional District and Session Judge, Court No.4, Amroha to pass a fresh orders within two months from today in accordance with law, without granting any unnecessary adjournments to either of the parties.

(2022)06ILR A1168
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.05.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Revision No. 136 of 2012
AND
Criminal Revision No. 176 of 2012

Smt. Poonam Devi ...Revisionist
Versus
Narendra Kumar ...Opposite Party

Counsel for the Revisionist:
Sri Satish Chandra Srivastava, Sri Manoj Kumar Jaiswal, Sri Shishir Chandra Srvastav, Sri Suyash Gupta

Counsel for the Opposite Party:
Sri Mukul Rakesh

Criminal Law - Code of Criminal Procedure, 1973 - Section 125-Revision petitions of husband and wife connected-wife claimed for enhancement of maintenance amount-and lumpsum cost-whereas husband sought setting aside of the order granting maintenance-impugned order granted

maintenance from the date of application-legal-law settled-claimant residing away from husband is justified and has been neglected by husband-as far as enhancement is concerned-no fresh circumstances have been brought-liberty to file application u/s 127 Cr.P.C.-upon proof of change in circumstances. **Criminal Revision no.136/2012 partly allowed.**

Criminal Revision no. 176/2012 dismissed. (E-9)

List of Cases cited:

Rajnesh Vs Neha & anr. : 2020 SCC Online SC 903

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. These are two Criminal Revisions against the judgment and order dated 6.3.2012 passed by the Principal Judge, Family Court, Lucknow, by which Criminal Misc. Case No.760 of 2004, Smt. Poonam Devi vs. Narendra Kumar, filed under Section 125 Cr.P.C. by Smt. Poonam Devi (wife/revisionist) has been allowed.

2. Smt. Poonam Devi has filed the Criminal Revision No. 136 of 2012 inter alia praying for enhancement of the maintenance allowance @ Rs. 5000/- per month from the date of filing of the application under Section 125 Cr.P.C. i.e. 2.8.2004 and has also prayed for awarding the cost of Rs. 15,000/- lump sum, whereas Criminal Revision No. 176 of 2012 has been filed by Shri Narendra Kumar, who is the husband of Smt. Poonam Devi, praying for setting aside the order dated 6.3.2012 passed by the learned Principal Judge, Family Court, Lucknow in Case No. 760 of 2004.

3. Since both the criminal revisions arise out of the common factual matrix and law as well as the common judgment, therefore, these two criminal revisions are being decided by the common judgment and order.

4. Heard Shri Mukul Rakesh, learned Senior Counsel, who has put in appearance for the husband Narendra Kumar in Criminal Revision No.176 of 2012 and Shri Satish Chandra Srivastava, who has appeared for Smt. Poonam Devi in Criminal Revision No. 136 of 2012.

5. Shri Satish Chandra Srivastava, learned counsel for revisionist Smt. Poonam Devi in Criminal Revision No. 136 of 2012 has submitted that the application under Section 125 Cr.P.C. filed by the revisionist/claimant Smt. Poonam Devi remained pending since 2.8.2004 and thus eight years were taken for deciding the application under Section 125 Cr.P.C., which is summary proceeding and therefore, she is entitled for the maintenance allowance to be given from the date of the filing of the application under Section 125 i.e. 2.8.2004.

6. Learned Counsel for the revisionist/claimant/Poonam Devi has further submitted that at least 1/3rd of the amount of the income of the husband ought to have been awarded in her favour. He submits that as less than 1/3rd amount has been awarded by means of the impugned order by the learned Principal Judge, Family Court, Lucknow, therefore, the amount awarded in favour of the claimant/ revisionist is liable to be enhanced.

7. Refuting the aforesaid submissions made by learned Counsel for the revisionist/claimant/Poonam Devi, Shri Mukul Rakesh, learned Senior Counsel for the revisionist/husband/Narendra Kumar has submitted that there was no reason for the trial court to award the maintenance of Rs.1500/- per month from the date of application. The order impugned is ambiguous as learned trial court has

wrongly interpreted the statement of the opposite party 2 i.e. Smt. Poonam Devi recorded before this Court in Habeas Corpus Writ Petition No. 284 of 2004 : *Smt. Poonam Devi Vs. Ram Narain.* He submits that the trial court has erroneously drawn adverse conclusion against the revisionist/husband/Narendra Kumar for filing a suit under Section 13 of the Hindu Marriage Act at Unnao ignoring the fact that respondent no.2/wife/Poonam Devi is permanent resident of Unnao.

8. Having heard learned counsel for the parties and perused the record, this Court finds that it is not in dispute that Smt. Poonam Devi (revisionist/wife) was married with the Narendra Kumar (revisionist/husband) on 28.4.2002. The dispute arose between the parties after six months of their marriage. The revisionist/Poonam Devi was living separately away from her husband (revisionist/Narendra Kumar) for justified reasons as her father had died and her in-laws were forcing her to sell her ancestral land so that Maruti Car be purchased. From the evidence led before the trial court it has come on record that the Revisionist/Poonam Devi was subjected to mental and physical cruelty for demand of dowry.

9. It transpires from the impugned order that learned trial Court, while deciding the case, has framed three issues i.e. (i) whether the husband has no source of income; (ii) whether the husband is neglecting his wife and is not maintaining his wife; and (iii) whether the wife is able to maintain herself. The finding given by the learned trial court is extracted below:-

"प्रस्तुत मामले में साक्ष्य से स्पष्ट है कि यादिनी अपने पति से अलग रह रही है। वादिनी के अनुसार उसके पिता की मृत्यु हो चुकी है और उसके पति -सास-ससुर तथा परिवार के अन्य सदस्य, पिता की जमीन अपने नाम कराने के लिए वादिनी पर दबाव डालने लगे तथा वादिनी को प्रताड़ित करने लगे और उसके पति व ससुराल वाले वादिनी से अपने पिता की जमीन बेचकर मारुति कार खरीदने के लिए कहते थे तथा मानसिक व शारीरिक रूप से प्रताड़ित करते थे। यह भी उल्लेख किया गया है कि वादिनी की ससुराल वालों ने उसका तीन माह का गर्भ गिरवा दिया और वादिनी के चाचा राम नरायन जब उससे मिलने आये, तो वादिनी के ससुराल वालों ने वादिनी को जबरदस्ती उनके साथ भेज दिया और कहा कि जब तक अपने पिता की जमीन बेचकर मारुति कार खरीद नहीं लेती हो, ससुराल वापस मत आना। वादिनी के चाचा द्वारा वार्तालाप कर मामले को सुलझाने का प्रयास किया गया, किन्तु वादिनी के पति वादिनी को ले जाने के लिए तैयार नहीं हुए।

प्रतिवादी-पक्ष द्वारा वादिनी द्वारा अभिकथित तथ्यों से इन्कार किया गया है, और यह अभिकथित किया गया है कि वादिनी, प्रतिवादी के यहां कोई काम नहीं करती थी और वह अपने चाचा के साथ स्वयं चली गई थी। प्रतिवादी उसे कई बार लेने गया, किन्तु वह वापस नहीं आई और अन्ततः प्रतिवादी ने मा० उच्च न्यायालय में एक हैवियस कारपस दाखिल किया, जिसमें वादिनी ने उपस्थित होकर बताया कि वह अपनी मर्जी से चाचा के साथ रह रही है और प्रतिवादी के साथ रहने से इन्कार कर दिया। उसके बाद प्रतिवादी ने पारिवारिक न्यायालय, कानपुर में वाद संख्या-88/ 2004 - अन्तर्गत धारा-9 हिन्दू विवाह अधिनियम प्रस्तुत किया। उल्लेखनीय है कि प्रतिवादी ने उन्नाव न्यायालय से विवाह-विच्छेद की डिकी प्राप्त कर ली है और दूसरी शादी भी कर ली है, जिससे उसे एक 12 महीने की पुत्री भी है। वादीनी ने अपनी प्रतिपरीक्षा में बताया है कि वह विदा

होकर जब प्रतिवादी के घर आई तो पहली बार सालभर रही। इस बीच उसके मायके वाले आते-जाते थे और वह भी आती-जाती थी। वादिनी ने अपनी प्रतिपरीक्षा में यह भी बताया कि वह ससुराल से बिदा होकर नहीं आई, बल्कि उसको मारपीट कर निकाल दिया गया था साक्षी ने यह भी बताया कि वह दिनांक 10.06.2003 को अपने मायके गई थी, तो उसके पिता बिदा कराने आये थे, तो मोटरसाइकिल की चाभी फेककर कहा कि दहेज में कार दोगे, तभी विदा करायेंगे। साक्षी ने बताया कि उसने उच्च न्यायालय में बयान दिया था कि उसकी हिम्मत नहीं है कि वह अपने पति के साथ जाना चाहे, इसलिए अपने चाचा के साथ जाना चाहती है

दोनों पक्षों की साक्ष्य से स्पष्ट है कि वादिनी तथा प्रतिवादी की शादी के 6 माह बाद विवाद उत्पन्न हुआ। वादिनी के अनुसार प्रतिवादी तथा उसके परिवार के लोग दहेज के लिए उसको प्रताउित करते थे और उसके पिता की मृत्यु के बाद कहते थे कि यह जमीन बेचकर मारुति कार खरीद कर दे, जबकि प्रतिवादी का कथन है कि वादिनी घर में कोई काम नहीं करती थी और छोटी-छोटी बातों में विवाद उत्पन्न करती थी। साक्ष्य से स्पष्ट है कि पार्दिनी के परिवार के लोग शादी मैं जो मोटरसाइकिल प्रतिवादी को दिये थे, यह वादिनी ने वापस ले लिया है, क्योंकि प्रतिवादी कार की मांग करता था।

प्रतिवादी द्वारा प्रस्तुत लिखित बहस में उल्लेख किया गया है कि वादिनी दिनांक 08.06.2003 को अपने चाचा के साथ चली गई थी और जब प्रतिवादी उसे विदा कराने गया तो वह मायके में नहीं मिली, वह अपनी बहन के यहां गई हुई थी। उसके बाद पुनः प्रतिवादी, वादिनी के घर गया, तो वादिनी के परिवार वालों ने प्रतिवादी के साथ अभद्रता की तथा मोटरसाइकिल यू0पी0-35सी 9387 छीन ली। दिनांक 24.08.2007 को प्रतिवादी ने प्रधान न्यायाधीश, पारिवारिक न्यायालय, कानपुर में धारा-9 हिन्दू विवाह अधिनियम का वाद संस्थित किया। प्रतिवादी ने दिनांक (02.04 2008 को एक हैवियस कारपस रिट संख्या-216/2004 प्रस्तुत किया, जिसमें वादिनी ने अभिकथन किया कि वह प्रतिवादी के साथ नहीं रहना चाहती है, बल्कि अपने चाचा के साथ जाना चाहती है। प्रतिवादी ने धारा-9 हिन्दू विवाह अधिनियम का वाद खारिज कराकर उन्नाव में धारा-13 हिन्दू विवाह अधिनियम में वाद संख्या-226/2005 दिनांक 18.05.2005 को संस्थित किया, जिसमें वादी को डिक्री प्राप्त हो गई। दिनांक 27.11.2009 को प्रतिवादी ने शिवरानी नामक औरत से विवाह कर लिया. जिससे एक पुत्री हुई, जिसका नाम वैष्णवी है और उसकी उम्र 12 माह है। इस प्रकार स्पष्ट है कि प्रतिवादी वादिनी को दहेज के लिए प्रताड़ित करता था तथा वादिनी पर दबाव बनाता था कि वह अपने पिता की जमीन बेचकर मारुति कार खरीदे और उसके लिए उसे मानसिक व शारीरिक रूप से प्रताड़ित करता था। प्रतिवादी ने हैवियस कारपस की रिट तथा धारा 9 हिन्दू विवाह अधिनियम का वाद भी संस्थित किया था और बाद में उन्नाव में धारा-13 हिन्दू विवाह अधिनियम की याचिका प्रस्तुत कर विवाह-विघटन की डिकी भी प्राप्त कर ली और पुनः शिव रानी नामक औरत से शादी कर ली है, जिससे उसे एक पुत्री भी है, जिसकी उम्र लगभग 12 माह है। इस प्रकार समस्त परिस्थितियों से स्पष्ट है कि प्रतिवादी, बादिनी को जानबूझकर उपेक्षित करते हुए उसका भरण-पोषण नहीं कर रहा है।

प्रतिवादी-पक्ष की ओर से देव नरायन हालदार बनाम श्रीमती अनुश्री हालदर ए आई आर 203 सुप्रीम कोर्ट 3174 का सन्दर्भ प्रस्तुत किया गया है, जिसमें माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है कि यदि दहेज मांग करने की साक्ष्य तथा वादिनी को

शारीरिक व मानसिक रूप से प्रताड़ित करने की साक्ष्य पत्रावली पर न हो और वादिनी स्वयं अलग रह रही हो, तो यह भरण-पोषण भत्ता प्राप्त करने की अधिकारिणी नहीं है

इसी प्रकार संजय सुधाकर भोसले बनाम कतिना किमिनल रिवीजन अप्लीकेशन नं०- 226/2002 जो दिनांक 08.04.2008 को मा० उच्च न्यायालय बॉम्बे की औरंगाबाद पीठ द्वारा निर्णीत किया गया है, का भी सन्दर्भ प्रस्तुत किया गया है, जिसमें यह अवधारित किया गया है कि दहेज की मांग की पुष्टि न हो और वादिनी स्वयमेव अलग रह रही हो, तो यह भरण-पोषण भत्ता प्राप्त करने की अधिकारिणी नहीं है।

प्रस्तुत मामले में, जैसा कि ऊपर विश्लेषित किया गया है, प्रतिवादी द्वारा वादिनी को दहेज के लिए प्रताड़ित किया जाता था तथा उस पर दबाव डाला जाता. था कि वह अपने पिता की जमीन को बेचकर प्रतिवादी के लिए मारुति कार खरीद कर दे और इसी सम्बन्ध में प्रतिवादी ने उसे मारपीट कर भगा दिया था। प्रतिवादी ने हैवियस कारपस रिट प्रस्तुत की तथा कानुपर न्यायालय में धारा-9 हिन्दू विवाह अधिनियम का वाद प्रस्तुत किया, जिसे प्रतिवादी ने खारिज करा लिया और धारा-13 हिन्दू विवाह अधिनियम का वाद उन्नाव में प्रस्तुत किया, जबकि प्रतिवादी ने एक वाद अन्तर्गत धारा-9 हिन्दू विवाह अधिनियम कानपुर में प्रस्तुत किया था और वह कानपुर में रहता था, तो उन्नाव न्यायालय में धारा-13 हिन्दू विवाह अधिनियम का वाद प्रस्तुत करने का क्या औचित्य था। जनपद उन्नाव में प्रतिवादी द्वारा वाद प्रस्तुत किया गया. जिससे स्पष्ट है कि प्रतिवादी येन-केन-प्रकारेण वादिनी से छुटकारा पाना चाहता था और उन्नाव न्यायालय से विवाह विघटन की डिक प्राप्त कर दूसरा विवाह भी कर लिया जिससे उसे एक पुत्री भी है, किन्तु प्रतिवादी ने इस तथ्य का अपनी मुख्य परीक्षा में अथवा किसी अन्य साक्ष्य के माध्यम से पत्रावली पर प्रस्तुत नहीं किया है। उक्त तथ्य प्रतिवादी की प्रतिपरीक्षा में सामने आया है, जिससे स्पष्ट है कि प्रतिवादी ने इस तथ्य को छिपाने का प्रयास किया और प्रतिवादी का यह आचरण भी इस बात का द्योतक है कि वादिनी द्वारा आरोपित तथ्य सही है। अतएव, यह कहना समीचीन नहीं है कि वादिनी स्वयं प्रतिवादी से अलग रह रही है और दहेज की मांग अथवा मानसिक व शारीरिक प्रताड़ित किये जाने की तथ्य को सिद्ध नहीं कर सकी।

जहां तक, प्रतिवादी की आय का सम्बन्ध है, यह निर्विवादित है कि प्रतिवादी एच०ए०एल०, कानपुर में टेक्निशियन के पद पर कार्यरत है और उसे रु० 15,000/- प्रतिमाह प्राप्त होते हैं। जहां तक इस तथ्य का प्रश्न है कि उसके परिवार में उसके भाई, पिता तथा अन्य सदस्य हैं, जिनका भरण-पोषण भी प्रतिवादी पर आश्रित है, स्वीकार करने योग्य नहीं है, क्योंकि प्रतिवादी ने अपनी प्रतिपरीक्षा मे यह स्पष्ट किया है कि वह अपने परिवार से अलग रहता है। इस प्रकार प्रतिवादी के पास पर्याप्त साधन है. उसके बावजूद भी वह अपनी पत्नी का भरण-पोषण नहीं कर रहा है।

जहां तक, वादिनी की आय के स्रोत का प्रश्न है, प्रतिवादी ने अपनी आपत्ति में अभिकथन किया है कि वादिनी के बाबा के पास लगभग 20 बीघा कृषि योग्य भूमि है तथा उसके चाचा के पास भी 25 बीघा जमीन है। पिता की मृत्यु के बाद यादिनी अपनी कृषि योग्य भूमि की देखभाल करती है और इससे वादिनी की मासिक आय रु०5000/- है। प्रतिवादी द्वारा लिखित बहस में भी इस बात का उल्लेख किया गया है कि वादिनी की ग्राम पहाड़पुर में सात बीघा कृषि योग्य भूमि है, जिसमे वादिनी का 1/3 हिस्सा है तथा पहाडपुर गाँव में सात कमरे का पक्का मकान है, जिसकी कीमत नो लाख रुपये

है, जिसमें वादिनी का 1/3 हिस्सा है। कृषि योग्य भूमि से वादिनी रु०60.000/- वार्षिक की आय प्राप्त करती है तथा बाग से रु०15,000/- आय प्राप्त करती है तथा दो मकान हैं, जिससे रु 2000/- किराया प्राप्त करती है। प्रतिवादी द्वारा कुछ खतौनी के उद्धरण प्रस्तुत किये गये हैं, जिसमें कृषि योग्य भूमि में वादिनी का नाम खसरा सं०- 1737 स्थित ग्राम भदेसुवा परगना निगोहा तहसील मोहनलाल गंज पर वारिस के रूप में अन्य सहखातेदारों के साथ अंकित दिखाया गया है। इस गाटे का क्षेत्रफल 6640 हेक्टेयर है। प्रतिवादी द्वारा वादिनी की कृषि योग्य भूमि का विवरण तो प्रस्तुत किया गया है, किन्तु अपनी कृषि योग्य भूमि का कोई विवरण प्रस्तुत नहीं किया गया है। यदि कृषि योग्य भूमि में वांदिनी का कोई हिस्सा है भी तो यह नहीं कहा जा सकता कि उसके पास भरण-पोषण के लिए पर्याप्त साधन हैं। जहां तक प्रतिवादी पक्ष द्वारा अपनी लिखित बहस में आय का विवरण दिया गया है, उसकी कोई साक्ष्य प्रस्तुत नहीं की गई है, अतः यह स्वीकार करना समीचीन नहीं है कि वादिनी के पास अपने भरण-पोषण के लिए पर्याप्त साधन हैं।

उपरोक्त विश्लेषण से स्पष्ट है कि वादिनी जो प्रतिवादी की विवाहिता पत्नी है. युक्तियुक्त कारण से प्रतिवादी से अलग रह रही है और प्रतिवादी उसकी उपेक्षा करके भरण-पोषण नहीं कर रहा है। यादिनी की अपनी स्वयं की कोई आय नहीं है, अतएव यह प्रतिवादी से भरण-पोषण प्राप्त करने की अधिकारिणी है।

जहां तक, भरण-पोषण की धनराशि का प्रश्न है. यह निर्विवादित है कि प्रतिवादी एच०ए०एल०, कानपुर में टेक्निशियन के पद पर कार्यरत है, जहां उसे रु० 15,000/- मासिक प्राप्त होते हैं, अतएव, वादिनी प्रतिवादी से रु04000/ प्रतिमाह भरण-पोषण की धनराशि प्राप्त करने की अधिकारिणी है।

<u>आदेश</u>

प्रार्थिनी / वादिनी का प्रार्थना पत्र अन्तर्गत धारा-125 द०प्र०सं० स्वीकार किया जाता है। विपक्षी / प्रतिवादी को आदेशित किया जाता है कि वह प्रार्थिनी / वादिनी को प्रार्थना पत्र प्रस्तुत करने की तिथि से निर्णय की तिथि तक रू. 1,500/- (एक हजार पाँच सौ रुपये मात्र) प्रतिमाह तथा निर्णय की तिथि से रु0 4000 / - (चार हजार रुपये मात्र) प्रतिमाह भरण-पोषण भत्ता की धनराशि का भुगतान करेगा।"

10. A perusal of the impugned judgment of the learned trial Court, it is evident that learned trial Court has considered the statement of the wife Poonam Devi given before this Court in Habeas Corpus Writ Petition No. 284 of 2004 on 01.10.2004, where she has stated that she, on her own accord, is residing with her uncle and has refused to go with her husband (Narendra Kumar). Thereafter, a Suit for Restitution Of Conjugal Rights was filed by the husband/Narendra Kumar under Section 9 of the Hindu Marriage Act, which was registered as Suit No.88 of 2004 in the Court of Principal Judge, Family Court, Kanpur. Thereafter, the husband Narendra Kumar had filed a suit for divorce in the Court of Principal Judge, Family Court, Unnao. Has also obtained the decree and re-married and out of the wedlock he had 12 months old daughter. The claimant/ Poonam Devi has clarified the statement given by her before the High Court that she doesn't have the guts/courage to go with her husband so she wants to go with her uncle. After scrutinizing the evidence learned trial court has arrived at a conclusion that the claimant/Poonam Devi has been deliberately neglected and was denied the maintenance. Learned trail court has further considered that Habeas Corpus Writ

Petition (supra) was filed at High Court, Lucknow by the husband Narendra Kumar. Thereafter in Family Court, Kanpur an application under Section 9 Hindu Marriage Act was filed. Subsequent thereto a suit under Section 13 of the Hindu Marriage Act was filed at Unnao thereafter had arrived at a conclusion that the husband somehow wanted to get rid of the claimant and after getting the divorce decree from Unnao he has remarried and had a daughter. However, the husband in his examination-in-chief or by way of any other evidence has not brought these facts on record rather the same has been revealed in his cross examination and therefore has rightly inferred that the husband/ Narendra Kumar has tried to conceal these facts and considering this conduct of the husband/Narendra Kumar the trial court has found the allegations made by the claimant/wife Poonam Devi correct and therefore has rightly arrived at a conclusion that it will not be proper to say that claimant herself is residing away from her husband Narendra Kumar and could not prove the demand of dowry and the mental and physical cruelty which she was subjected and thus has decided the issue no.2 in favour of the claimant.

11. So far as income of the respondent/husband/ Narendra Kumar is concerned issue no.1 was framed. It is not in dispute that Narendra Kumar is employee in HAL Kanpur on the post of Technician and he is getting Rs.15000/- per moth. It has been rightly held that he has enough source of income and still he is not maintaining his wife. The wife though has some ancestral agricultural land but on that basis it has been rightly held that she cannot maintain herself. The husband has not given any details of his agricultural income and he has not adduced any evidence regarding the income of the wife except the objections filed by him and thus trial court has rightly concluded that the claimant/Poonam Devi is the legally wedded wife of the respondents and is residing away from him for justified reasons and the respondents is not maintaining her and she has no source of income and therefore she is entitled to receive maintenance from the husband.

12. So far as the amount of maintenance is concerned, on the basis of undisputed facts that the respondents is a Technician in HAL Kanpur where he is getting Rs.15,000/- per month and therefore learned trial court has held that the claimant/Poonam Devi is entitled to get Rs.4,000/- per month maintenance amount from the husband/Narendra Kumar, I do not find any illegality in the order impugned. The same is in conformity with the law however, considering the fact that the maintenance application remained pending since 2004, therefore, I am of the opinion that the claimant is entitled to a cost of Rs.15000/- as the expenses which has been incurred by her during these eight years while contesting this case before the trial court. Learned trial court has awarded Rs.15,00/- per month maintenance from the date of filing of the application and Rs.4,000/- per month from the date of the order to be paid to the claimant by the respondents.

13. So far as awarding the maintenance amount from the date of the application filed under Section 125 Cr.P.C. is concerned, it would be apt to mention here that Hon'ble Supreme Court in Rajnesh Vs. Neha and another : 2020 SCC Online SC 903, has held in paragraph-10 that the maintenance has to be awarded from the date of application. The relevant

part of the judgment is reproduced as under :-

"IV Date from which Maintenance to be awarded

There is no provision in the HMA with respect to the date from which an Order of maintenance may be made effective. Similarly, Section 12 of the D.V. Act, does not provide the date from which the maintenance is to be awarded.

Section 125(2) Cr.P.C. is the only statutory provision which provides that the Magistrate may award maintenance either from the date of the order, or from the date of application. [K. Sivaram vs. K. Mangalamba and others: 1989(1) APLJ (HC) 604].

In the absence of a uniform regime, there is a vast variance in the practice adopted by the Family Courts in the country, with respect to the date from which maintenance must be awarded. The divergent views taken by the Family Courts are : first, from the date on which the application for maintenance was filed; second, the date of the order granting maintenance; third, the date on which the summons was served upon the respondent.

(a) From date of application

The view that maintenance ought to be granted from the date when the application was made, is based on the rationale that the primary object of maintenance laws is to protect a deserted wife and dependant children from destitution and vagrancy. If maintenance is not paid from the date of application, the party seeking maintenance would be deprived of sustenance, owing to the time taken for disposal of the application, which often runs into several years.

The Orissa High Court in Susmita Mohanty v Rabindra Nath Sahu, 1996(I) OLR 361 held that the legislature intended to provide a summary, quick and comparatively inexpensive remedy to the neglected person. Where a litigation is prolonged, either on account of the conduct of the opposite party, or due to the heavy docket in Courts, or for unavoidable reasons, it would be unjust and contrary to the object of the provision, to provide maintenance from the date of the order.

In Kanhu Charan Jena v. Smt. Nirmala Jena, 2001 Cri L.J. 879, the Orissa High Court was considering an application u/S. 125 Cr.P.C., wherein it was held that even though the decision to award maintenance either from the date of application, or from the date of order, was within the discretion of the Court, it would be appropriate to grant maintenance from the date of application. This was followed in Arun Kumar Nayak v Urmila Jena, (2010) 93 AIC 726 (Ori) wherein it was reiterated that dependents were entitled to receive maintenance from the date of application.

The Madhya Pradesh High Court in Krishna Jain v Dharam Raj Jain, 1993 (2) MPJR 63 held that a wife may set up a claim for maintenance to be granted from the date of application, and the husband may deny it. In such cases, the Court may frame an issue, and decide the same based on evidence led by parties. The view that the "normal rule" was to grant maintenance from the date of order, and the exception was to grant maintenance from the date of application, would be to insert something more in Section 125(2)Cr.P.C., which the Legislature did not intend. Reasons must be recorded in both cases. i.e. when maintenance is

awarded from the date of application, or when it is awarded from the date of order.

The law governing payment of maintenance u/S. 125 Cr.P.C. from the date of application, was extended to HAMA by the Allahabad High Court in Ganga Prasad Srivastava v Additional District Judge, Gonda & Ors.51 The Court held that the date of application should always be regarded as the starting point for payment of maintenance. The Court was considering a suit for maintenance u/S. 18 of HAMA, wherein the Civil Judge directed that maintenance be paid from the date of judgment. The High Court held that the normal inference should be that the order of maintenance would be effective from the date of application. A party seeking maintenance would otherwise be deprived of maintenance due to the delay in disposal of the application, which may arise due to paucity of time of the Court, or on account of the conduct of one of the parties. In this case, there was a delay of seven years in disposing of the suit, and the wife could not be made to starve till such time. The wife was held to be entitled to maintenance from the date of application / suit.

The Delhi High Court in Lavlesh Shukla v Rukmani, Crl. Rev. Pet. No. 851/2019, decided by the Delhi High Court vide order dated 29.11.2019, held that where the wife is unemployed and is incurring expenses towards maintaining herself and the minor child / children, she is entitled to receive maintenance from the date of application. Maintenance is awarded to a wife to overcome the financial crunch, which occurs on account of her separation from her husband. It is neither a matter of favour to the wife, nor any charity done by the husband.

(b) From the date of order

The second view that maintenance ought to be awarded from the date of order is based on the premise that the general rule is to award maintenance from the date of order, and grant of maintenance from the date of application must be the exception. The foundation of this view is based on the interpretation of Section 125(2) Cr.P.C. which provides :

"(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be."

The words "or, if so ordered" in Section 125 has been interpreted to mean that where the court is awarding maintenance from the date of application, special reasons ought to be recorded. [Bina Devi & Ors. v State of Uttar Pradesh & Ors. (2010) 69 ACC 19]In Bina Devi v State of U.P., (2010) 69 ACC 19, the Allahabad High Court on an interpretation of S.125(2) of the Cr.P.C. held that when maintenance is directed to be paid from the date of application, the Court must record reasons. If the order is silent, it will be effective from the date of the order, for which reasons need not be recorded. The Court held that Section 125(2) Cr.P.C. is prima facie clear that maintenance shall be payable from the date of the order.

The Madhya Pradesh High Court in Amit Verma v Sangeeta Verma & Ors. C.R.R. No. 3542/2019 decided by the Madhya Pradesh High Court vide Order dated 08.1.2020, directed that maintenance ought to be granted from the date of the order.

(c) From the date of service of summons

The third view followed by some Courts is that maintenance ought to be granted from the date of service of summons upon the respondent.

The Kerala High Court in S. Radhakumari v K.M.K. Nair, AIR 1983 Ker 139, was considering an application for interim maintenance preferred by the wife in divorce proceedings filed by the husband. The High Court held that maintenance must be awarded to the wife from the date on which summons were served in the main divorce petition. The Court relied upon the judgment of the Calcutta High Court in Samir Banerjee v Sujata Banerjee, 70 CWN 633, and held that Section 24 of the HMA does not contain any provision that maintenance must be awarded from a specific date. The Court may, in exercise of its discretion, award maintenance from the date of service of summons.

The Orissa High Court in Gouri Das v Pradyumna Kumar Das, 1986 (II) OLR 44, was considering an application for interim maintenance filed u/S. 24 HMA by the wife, in a divorce petition instituted by the husband. The Court held that the ordinary rule is to award maintenance from the date of service of summons. It was held that in cases where the applicant in the maintenance petition is also the petitioner in the divorce petition, maintenance becomes payable from the date when summons is served upon the respondent in the main proceeding.

In Kalpana Das v Sarat Kumar Das, AIR 2009 Ori 133, the Orissa High Court held that the wife was entitled to maintenance from the date when the husband entered appearance. The Court was considering an application for interim maintenance u/S. 24 HMA in a petition for restitution of conjugal rights filed by the wife. The Family Court awarded interim maintenance to the wife and minor child from the date of the order. In an appeal filed by the wife and minor child seeking maintenance from the date of application, the High Court held that the Family Court had failed to assign any reasons in support of its order, and directed :

"9. ?Learned Judge. Family Court has not assigned any reason as to why he passed the order of interim maintenance w.e.f. the date of order. When admittedly the parties are living separately and prima facie it appears that the Petitioners have no independent source of income, therefore, in our view order should have been passed for payment of interim maintenance from the date of appearance of the Opposite Party-husband?"

Discussion and Directions

The judgments hereinabove reveal the divergent views of different High Courts on the date from which maintenance must be awarded.

Even though a judicial discretion is conferred upon the Court to grant maintenance either from the date of application or from the date of the order in S. 125(2) Cr.P.C., it would be appropriate to grant maintenance from the date of application in all cases, including Section 125 Cr.P.C. In the practical working of the provisions relating to maintenance, we find that there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that

maintenance is awarded from the date of the application.

ourt held that the entitlement of maintenance should not be left to the uncertain date of disposal of the case. The enormous delay in disposal of proceedings justifies the award of maintenance from the date of application. In Bhuwan Mohan Singh v Meena, (2015) 6 SCC 353, this Court held that repetitive adjournments sought by the husband in that case resulted in delay of 9 years in the adjudication of the case. The delay in adjudication was not only against human rights, but also against the basic embodiment of dignity of an individual. The delay in the conduct of the proceedings would require grant of maintenance to date back to the date of application.

The rationale of granting maintenance from the date of application finds its roots in the object of enacting maintenance legislations, so as to enable the wife to overcome the financial crunch which occurs on separation from the husband. Financial constraints of a dependant spouse hampers their capacity to be effectively represented before the Court. In order to prevent a dependant from being reduced to destitution, it is necessary that maintenance is awarded from the date on which the application for maintenance is filed before the concerned Court.

In Badshah v Urmila Badshah Godse (2014) 1 SCC 188, the Supreme Court was considering the interpretation of Section 125 Cr.P.C. The Court held :

"13.3. purposive interpretation needs to be given to the provisions of Section 125 CrPC. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society."

It has therefore become necessary to issue directions to bring about uniformity and consistency in the Orders passed by all Courts, by directing that maintenance be awarded from the date on which the application was made before the concerned Court. The right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remained pending is not within the control of the applicant."

14. From the aforesaid dictum, it transpires that controversy in this regard has been settled by the Hon'ble Supreme Court and it has been directed by Hon'ble Supreme Court that maintenance be awarded from the date on which the application was made before the concerned Court. It was also held by the Apex Court that the right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remained

pending is not within the control of the applicant. The judgement being retrospective shall apply in this case also. Therefore, a sum of Rs.4,000/- awarded by the learned trial court in favour of the claimant/wife has to be paid by the husband/Narendra Kumar to the claimant/wife from the date of filing of the application under Section 125 Cr.P.C. i.e. w.e.f. 2.8.2004.

15. Accordingly, **Criminal Revision No. 136 of 2012** filed by Smt. Poonam Devi is **allowed in part**. The judgment and order dated 6.3.2012 passed by the trial court is modified to the extent that the husband-Narendra Kumar is directed to pay a sum of Rs. 4,000/- to his wife-Smt. Poonam Devi from the date of application filed under Section 125 Cr.P.C. i.e. w.e.f. 2.8.2004. It is clarified that any amount paid by the husband-Narendra Kumar during pendency of the case under Section 125 Cr.P.C. before the learned trial Court shall be adjusted from the amount payable to Smt. Poonam Devi.

16. So far as the enhancement of the maintenance as awarded by the trial Court is concerned, no fresh circumstances have been brought before this Court so as to enhance the maintenance, however, liberty is granted to the claimant/wife to move an application under Section 127 Cr.P.C. for altercation in allowance of maintenance upon proof of change in circumstances such as enhancement of the salary of her husband Narendra Kumar etc. If such application is made, the same shall be decided, expeditiously, by the trial court concerned.

17. So far as plea raised in Criminal Revision No. 176 of 2012 by the husband Narendra Kumar that statement made by the claimant before this Court in the Habeas Corpus writ petition has not been considered by the learned trial court is concerned, the same is not correct as the learned trial court has not only considered the statement of the claimant in the Habeas Corpus writ petition made before this Court but has also considered the statement of the claimant/witness/wife, who has stated that the statement was given as she could not dare to go with her husband and therefore she wanted to go with her uncle.

18. In Habeas corpus writ petition only this much is to be seen whether the detenue has been illegally detained or not. The only interpretation to the statement given by the wife/Poonam Devi before this Court in Habeas Corpus petition can be made that she has not been illegally detained. The learned trial court while considering this statement has simultaneously also considered the conduct of the husband by which he has filed case under Section 9 of the Hindu Marriage Act at Kanpur Family Court and another case under Section 13 Hindu Marriage Act was filed by the husband at Unnao court and has obtained the decree of divorce and has remarried after the decree of divorce and has a girl of 12 months old. All these facts show that learned trial court has rightly held that husband Narendra Kumar wanted to get rid of the claimant/wife and all these facts have not been stated by him in his examination-in-chief or by means of any other evidence rather the same have come before this Court in his cross examination and therefore has rightly held that the husband has tried to conceal these facts from this court and then considering the conduct of the husband, the trial court has rightly held that the claimant is residing away from the husband for justified reasons and she has been neglected by not paying maintenance and husband had to maintain

to her and she is a destitute and has no source of income and therefore she is entitled to get the maintenance from the husband.

19. In view of the forgoing discussion, the **Criminal Revision No. 176 of 2012** filed by the husband/Narendra Kumar is ***dismissed***.

(2022)06ILR A1180
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.06.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Second Appeal No. 169 of 2022

Shantisaran & Ors. ...Appellants
Versus
Sadiq Hasan @ Nibbar & Ors. ...Respondents

Counsel for the Appellants:
Sri Dinesh Kumar Mishra, Sri Dinesh Kr. Chaudhary

Counsel for the Respondents:
Sri A.Z. Siddiqui

A. Civil Law - Code of Civil Procedure, 1908 - Section 100 - Scope - Interference when permissible - second appeal would be maintainable only on substantial question of law & it does not lie on question of facts or of law - existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC - There are two situations in which interference with findings of fact is permissible - first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion - second situation is where a finding has been arrived at by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise (Para 26)

B. Civil Law - Adverse Possession - for claiming title on the basis of adverse possession, it should be nec vi vec, nec precario, i.e., the possession adverse to the competitor - Whatever may be the intention of a person acquiring title by adverse possession, his adverse possession cannot commence unless he obtains required possession with animus - claim of adverse possession being a hostile assertion involving expressly or impliedly a denial of title of the real owner, the burden is always on the person who asserts such a claim to prove by clear and unequivocal evidence that his possession was hostile to the real owner (Para 23)

C. Civil Law - Evidence - civil suit - Burden of proof - initial burden of proof lies on the plaintiff to prove his claim, but when the plaintiff has discharged his burden by proving that his ownership and possession of the land, the onus shifts on the defendant to prove his possession and how he acquired it - when both the parties have led evidence, the question of burden of proof poses its importance and logical conclusion can be drawn on the basis of the entire evidence placed on record by both the parties (Para 25)

Suit for permanent Injunction - Plaintiff averred that taking advantage of his absence, defendants were trying to interfere in his possession - defendant pleaded that the plaintiff had not been residing in the village for the past about 50 years - the site came in possession of the answering defendants & that they were in possession of the land in dispute - Appellate court framed the issue as to whether defendants proved their right over the land in dispute through adverse possession? – first appellate court recorded a finding that the disputed land was in use and possession of the plaintiff till time he shifted to Balrampur City - possession of the defendants in absence of the plaintiff casually and occasionally cannot be

recognized as adverse to plaintiff due to want of his knowledge - it is not defendants case that they entered into possession of the land in a hostile manner in the knowledge of the plaintiff – defendants failed to plead and prove as to when did they enter into possession of the land and what was the nature of their possession - defendants failed to prove by clear and unequivocal evidence that their possession is hostile to real owner, i.e. plaintiff - Held - findings of the First Appellate Court are based upon a thorough and proper examination and scrutiny of the entire evidence available on record and same cannot said to be perverse, so as to warrant interference under Section 100 of the Civil Procedure Code (Para 17, 18, 21, 25)

Dismissed. (E-5)

List of Cases cited:

1. P. Lakshmi Reddy Vs L. Lakshmi Reddy, AIR 1957 314

2. Annasaheb Bapusaheb Patil & ors. Vs Balwant @ Babasaheb Patil (dead) by L.Rs. Etc., AIR 1995 SC 895

3. Vishwanath Bapurao Sabale Vs Shalinibai Nagappa Sabale & ors., (2009) 12 SCC 101

4. S. Subramanian Vs S. Ramasamy, (2019) 6 SCC 46

(Delivered by Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Dinesh Kumar Mishra, Advocate, the learned counsel for the appellants and Sri A.Z. Siddiqui, Advocate who has filed a caveat on behalf of the plaintiff - respondent no. 1.

2. By means of instant second appeal filed under Section 100 of the Code of Civil Procedure, the appellants have challenged the validity of the judgment and decree dated 30.04.2022 passed by the learned District Judge, Balrampur in Civil Appeal No. 19 of 2018 filed under Section 96 of the Code, whereby the first appeal filed against the judgment and decree dated 24.07.2018 passed by the learned Civil Judge (Junior Division), Balrampur in Regular Suit No. 98 of 1987, has been allowed and the judgment and decree of dismissal of suit passed by the learned trial court has been set aside and reversed and the suit has been decreed.

3. The aforesaid suit had been filed by Late Amir Hasan, the predecessor in interest of the respondent no. 1 and 2, pleading that the house and other structures existing on the land shown in the map forming a part of the plaint belong to the plaintiffs and the remains of the structures are still lying on the aforesaid land, which is an abadi land and the land continues to be in possession of the plaintiff. Some Bamboo, Mango, Shisham and Neem trees had also been planted on the aforesaid land by the plaintiff, which are still existing thereon. Three huts were existing on the land in dispute, which were being used by the plaintiff's father and were in his possession. The defendants cut down and sold away some bamboos from the plaintiff's land and the plaintiff had lodged a first information report in police station-Maharajganj complaining about the aforesaid offence. At the time of filing of the suit the plaintiff was aged about 90 years and he used to reside in the Balrampur City and he used to visit the land in question occasionally. Taking advantage of the plaintiff's absence, the defendants were trying to interfere in the possession of the plaintiff over the land in question and for this reason he filed a suit claiming permanent injunction.

4. The defendant nos. 3, 5 to 12 and 14 filed a written statement, inter alia, stating that the description of the land in question given at the foot of the plaint is

not correct and the defendants gave a site plan of the land in question, which according to them was correct. They pleaded that the plaintiff had not been residing in the village for the past about 50 years. When he used to reside in the village, a hut of the plaintiff existed on the land in question and when he started cultivation through other persons his hut also fell down and the site thereof came in possession of the answering defendants. The defendants stated that they were in possession of the land in dispute, therefore, the suit for permanent injunction was not maintainable.

5. During pendency of the suit, the plaintiff Amir Hasan died and his sons - the Respondents no. 1 and 2 in this Second Appeal, were substituted as plaintiffs in his place.

6. The following issues had been framed by the learned trial Court: -

1- Whether the plaintiff is the owner and in possession of the land in dispute, if yes, then whether the plaintiff is entitled to get the decree of perpetual injunction as

2- Whether the trees etc. existing on the land in disputed had been planted by the plaintiff, if yes, then its effect?

3- Whether the plaintiff is entitled to any other relief?

7. The plaintiff as well as the defendants had led evidence and after considering the entire evidence placed by the parties, the learned Civil Judge (Junior Division), Balrampur decided the suit holding that the plaintiffs could not prove their possession and ownership over the land in dispute. The plaint does not mention any boundaries of the land in question and the land cannot be identified by its description given in the plaint. The learned Civil Judge (Junior Division), Balrampur dismissed the suit filed by the plaintiffs for the aforesaid reasons.

8. The substituted plaintiffs challenged the aforesaid judgment and decree dated 24.07.2018 by filing an appeal under Section 96 of the Civil Procedure Code in the court of the learned District Judge, Balrampur and the aforesaid appeal has been allowed by means of the judgment and decree dated 30.04.2022. The aforesaid judgment and decree dated 30-04-2022 has been challenged by the instant second appeal only the defendant no. 2, 6/1 and 14 and rest of the defendants have been arrayed as proforma respondents in the Second Appeal.

9. While deciding the first appeal, the learned appellate court framed the following two points for determination in the appeal: -

(i) Whether the disputed land is owned and possessed by the plaintiff?

(ii) Whether the defendants have proved their right over the land in dispute through adverse possession?

10. The learned District Judge has held that the plaintiff has stated that the disputed land is owned and possessed by the plaintiff, the construction existing on the land were raised by the plaintiff and that he had planted the trees and bamboos on the said land. The defendants pleaded that the plaintiff was in possession over the land about 50 years ago and hut of the plaintiff existed there but the same has been destroyed and the land in question came

into possession of the defendants. The trees and bamboos existing on the land have been claimed to be planted by the defendants.

11. After examining the statement of the witnesses, the learned Appellate Court held that all the witnesses examined on behalf of the plaintiff, namely, P.W.1 Jamal Ahmad, P.W.2 Sadiq Hasan, P.W.3 Ramhet, P.W.4 Mohammad Ali, P.W.5 Shamshulla and P.W.6 Sagir Ahmad had supported the plaint version and all of them have specifically stated that the disputed land along with construction and trees existing over it, is owned and possessed by the plaintiff. No material contradiction arose during examination of the plaintiff's witnesses. The learned First Appellate Court further observed that the defendants' witnesses, namely, D.W. 1, Shanti Saran (the Appellant No. 1 in the Second Appeal) in para 4 D.W. 2 Ganga Prasad in para 5, D.W. 3 Rajendra Prasad in para 4 and 5, D.W. 4 Nanake in para 7 and D.W. 5 Salik Ram in paras 4 and 5 of their respective affidavits filed as their examination-in-chief, had categorically stated that the hut on the land in question had been constructed by the plaintiff and subsequently the plaintiff left the village and started cultivation on his field through other persons.

12. The learned court below came to a conclusion that on the basis of the evidence led by both the parties, it appears that the dispute arose because of absence of the plaintiff from the village for a long period of time through which period the plaintiff used to visit the village casually and occasionally while residing at Balrampur City. In such circumstances, the land in dispute would have been used by the defendants casually and occasionally in absence of the plaintiff or his legal representatives/ successors after his demise. The First Appellate Court has recorded in the judgment under challenge that D.W. 4, Nanake has stated in his cross examination that he has been told by his father that the disputed land / property was owned and possessed by the plaintiff, Late Amir Hasan during his life time and the cowshed etc. existing on the said land was constructed by him.

13. The learned First Appellate Court has held that the law is well settled that when the both the parties have led evidence, the burden to proof looses its significance, the court has to draw a conclusion on the basis of the entire evidence placed on record by both the parties. The evidence adduced by both the parties is sufficient to prove that the disputed land was in use and possession of the plaintiff till the time he shifted to Balrampur City.

14. The learned court below held that lodging of first information report by the plaintiff in the year 1987 regarding theft of bamboo planted on the land in dispute shows that the plaintiff had reacted against the interference by the defendants upon his land and that possession of the defendants in absence of the plaintiff casually and occasionally cannot be recognized as adverse to plaintiff due to want of his knowledge. The defendants have failed to prove by clear and unequivocal evidence that their possession is hostile to real owner, i.e. plaintiff.

15. The learned court below held that the trial court has failed to appreciate the evidence of the parties correctly and it had dismissed the suit filed by the plaintiff wrongly and that the suit deserves to be

decreed, as the plaintiff's possession and ownership over the disputed land has been established by the evidence available on the record. The learned first Appellate Court allowed the appeal and decreed the suit on the basis of the aforesaid findings.

16. Assailing the correctness of the aforesaid judgment and decree passed by the learned First Appellate Court, Sri. Dinesh Kumar Mishra, the learned counsel for the defendant - appellants, has firstly submitted that the judgment of the learned First Appellate Court is not sustainable in the eyes of law for the reason that the First Appellate Court has given its own finding of facts without setting aside the finding recorded by the learned trial court.

17. It is settled law that the powers of First Appellate Court are co-extensive with that of the trial court while deciding the suit. A perusal of the judgment passed by the first appellate court indicates that the court has formulated two point for determination - (1) whether the disputed land is owned and possessed by the plaintiff and (2) whether the defendants have proved their right over the land in dispute through adverse possession. The first Appellate Court has proceeded to examine the entire evidence available on record and after examination of the entire evidence, the learned first appellate court has came to a conclusion that the learned trial court has failed to appreciate the evidence led by the parties correctly and has wrongly dismissed the suit filed by the plaintiff. The first appellate court has recorded a finding that the disputed land was in use and possession of the plaintiff till time he shifted to Balrampur City and use of the land by the defendants in absence of the plaintiff cannot be treated as hostile possession of the defendants and it may not be recognized as possession adverse to the plaintiff due to want of his knowledge.

18. While deciding the issue no. 1 as to whether the plaintiff is owner and in possession of the land in dispute, the learned trial court had held that the plaintiff could not prove his possession and ownership on the land in dispute, which had not been sufficiently described in the plaint. After examining the entire evidence available on record, the learned first Appellate Court held that the trial court has failed to appreciate evidence of the parties correctly and that the evidence adduced by the parties is sufficient to prove that the disputed land was in regular use and occupation of the plaintiff till he shifted to Balrampur City and that the defendants could not prove their title by adverse possession, and thus the learned First Appellate Court has in fact reversed the finding of the learned trial court and therefore, there is no force in the submission of the learned Counsel for the appellants that the learned first Appellate Court has allowed the appeal without reversing the finding of the facts recorded by the trial court and it does not give rise to any substantial question of law.

19. The second submission of the learned counsel for the appellants is that the first Appellate Court has erred in law in allowing the appeal only on the basis of the statement of D.W. 4, Nanake, without considering the evidence of the plaintiff's witnesses, who were four in number.

20. As has already been observed that in the preceding paragraphs, the learned First Appellate Court had referred to the statements of the witnesses of the plaintiff, namely, P.W. 1 Jamal Ahmad, P.W. 2

Sadiq Hasan, P.W. 3 Ramhet, P.W. 4 Mohammad Ali, P.W. 5 Shamshulla and P.W. 6 Sagir Ahmad and has also referred to the specific paragraphs of the examination in chief of the defendants' witnesses, namely, D.W. 1 Shanti Saran, D.W. 2 Ganga Prasad, D.W. 3 Rajendra Prasad, D.W. 4 Nanake and D.W. 5 Salik Ram and all of them had stated that they had been informed by their ancestors regarding the hut constructed by the plaintiff Amir Hasan prior to 70-80 years. Therefore, I find myself unable to accept the submission of learned counsel for the appellants that the judgment of the learned first appellate court is based only on the statements of D.W. 4 Nanake.

21. The learned counsel for the appellants next submitted that the First Appellate Court erred in law in allowing the appeal without deciding the point of possession of contesting respondents / plaintiffs. However, as has been noticed in the previous paragraphs of this judgment, the learned First Appellate Court has thoroughly examined the statements of the witnesses produced by the plaintiff as well as by the defendants and after examining the entire evidence available on record, it has held that the disputed land was in regular use and occupation of the plaintiff till he shifted to Balrampur City and occasional use of the land in question by the defendants cannot be treated as hostile possession of the defendants and that the plaintiff was in possession of the land in dispute and the defendants could not show that they dispossessed the plaintiff and entered into the possession of land in dispute.

22. The defendants pleaded that the land in question was originally in possession of the plaintiff and when he started living in Balrampur City, the land came into possession of the defendants, but they did not plead as to how this transfer of possession took place. It is not the case of the defendants that the plaintiff had handed over possession of the land to the defendants and it is also not their case that they entered into possession of the land in a hostile manner in the knowledge of the plaintiff. Therefore, the defendants have not set up a case of adverse possession also.

23. The learned first Appellate Court has relied upon the decisions of the Hon'ble Supreme Court in **P. Lakshmi Reddy versus L. Lakshmi Reddy, AIR 1957 314** wherein it was laid down that for claiming title on the basis of adverse possession, it should be nec vi vec, nec precario, i.e., the possession adverse to the competitor. Whatever may be the intention of a person acquiring title by adverse possession, his adverse possession can not commence unless he obtains required possession with animus.. The learned first Appellate Court also relied upon **Annasaheb Bapusaheb Patil and others versus Balwant alias Babasaheb Patil (dead) by L.Rs. Etc., AIR 1995 SC 895**, in which it was held that the claim of adverse possession being a hostile assertion involving expressly or impliedly a denial of title of the real owner, the burden is always on the person who asserts such a claim to prove by cledar and unequivocal evidence that his possession was hostile to the real owner.

24. In **Vishwanath Bapurao Sabale versus Shalinibai Nagappa Sabale and others, (2009) 12 SCC 101,** the Hon'ble Supreme Court held that: -

"20. ... Once he proved his title the onus was on Laxmibai and consequently upon the appellant to prove

that they started possessing adversely to the interest of Shivappa. For the purpose of arriving at a finding as to whether the appellant and Laxmibai perfected their title by adverse possession, the relationship of the parties may have to be taken into consideration.

* * *

23. Furthermore for claiming title by adverse possession, it was necessary for the plaintiff to plead and prove animus possidendi. A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession.

24. In P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 23, this Court held: (SCC pp. 71-72, para 23)

"23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner."

(emphasis in original)"

25. The learned first Appellate Court has held that the law is settled that when both the parties have led evidence, the question of burden of proof poses its importance and logical conclusion can be drawn on the basis of the entire evidence. The law in this regard is that the initial burden of proof lies on the plaintiff to prove his claim, but when the plaintiff has discharged his burden by proving that his ownership and possession of the land, the onus shifts on the defendant to prove his possession and how he acquired it. In the present case, the plaintiff's witnesses as well as those of the defendants. had stated that originally the plaintiff was in possession of the land. Although the defendant / appellant had disputed the plaintiff's claim, they failed to plead and prove as to when did they enter into possession of the land and what was the nature of their possession. In these circumstances, the suit was rightly decreed by the learned first Appellate Court and there is no illegality in it.

26. The scope of interference in a Second Appeal is well settled and it has been reiterated by the Hon'ble Supreme Court in **S. Subramanian v. S. Ramasamy, (2019) 6 SCC 46** in the following words: -

"7.3. As per a catena of the decisions of this Court, while deciding the second appeal under Section 100 CPC, the High Court is not required to reappreciate the entire evidence on record and to come to its own conclusion and the High Court cannot set aside the findings of facts recorded by both the courts below when the findings recorded by both the courts below were on appreciation of evidence. That is exactly what is done by the High Court in the present case while deciding the second appeals, which is not permissible under the law.

7.4. Even otherwise, it is required to be noted that as per a catena

of the decisions of this Court and even as provided under Section 100 CPC, the second appeal would be maintainable only on substantial question of law. The second appeal does not lie on question of facts or of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC. As observed and held by this Court in Kondiba Dagadu Kadam3, in a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on inadmissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal.

7.5. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain4. In the aforesaid decision, this Court has specifically observed and held: (SCC p. 437)

"Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

27. The findings of the learned First Appellate Court are based upon a thorough and proper examination and scrutiny of the entire evidence available on record and, in any case, the same cannot said to be perverse, so as to warrant interference by this Court in exercise of its powers under Section 100 of the Civil Procedure Code. All the submissions made by the learned Counsel for the defendants / appellants do not give rise to any substantial question of law. I find no good ground for admission of the appeal.

28. Accordingly, the second appeal is dismissed at the admission stage.

29. However, there will be no order as to costs.

(2022)06ILR A1188
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.06.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Second Appeal No. 470 of 2003

Jagdish Narain Tandon ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Manoj Misra, Sri Anjani Kumar Mishra, Sri Ashwani K. Mishra, Sri O.P. Lohia, Sri Raghuvansh Misra, Sri Rahul Agarwal, Sri Vageesh Pandey, Sri Vrindavan Mishra

Counsel for the Respondents:
S.C., Sri Narendra Mohan, Sri Anil Sharma (Senior Adv.), Sri R.M. Saggi, Sri P.K. Giri (Addl. C.S.C.)

A. Civil Law - Indian Trust Act, 1882 - Charitable and Religious Trusts Act, 1920 - Charitable Endowment Act, 1890 - 'Tandon Trust' created in the memory of the grandparents of the Authors of the Trust - By judicial order, High court held that the 'Tandon Trust' was not a charitable and religious trust - there was no element of charity in the deed created/executed by the Author of the Trust - thus the provisions of Charitable and Endowments Act, 1890 & and Charitable and Religious Trusts Act, 1920 not applicable - Notification of 1972 will have no bearing upon the status of the trust - judicial order of High Court will prevail over the Administrative Notification issued by the State - Once, the declaration was there, neither the defendants nor the Courts below had the right to disregard it (Para 61, 62, 64, 65)

B. Civil Law - 'Judgment in rem', meaning of - judgment in personam refers to a judgment against a person as distinguished judgment against a thing, right or status and judgment in rem refers to judgment that determines the status or conditions of property which operates directly on the property itself - A declaration of the status is always in rem and not in personam - The relief of declaration is for the world to know about the status of the person in favour of whom the declaration has been made - In the present case, the Court while decreeing the Suit of K.N. Shivpuri declared the status of the 'Tandon Trust', not being a charitable and a religious trust covered under the Act of 1920 - declaration made by the Court as to the status of the trust is to the world at large and not to any particular party in a suit, as it affects people at large - judgment rendered in second appeal was binding on the defendants-respondents even though they were not the party, as the said judgment was in rem (51, 52 53, 54, 55)

Allowed. (E-5)

List of Cases cited:

1. Natha Singh & anr. Vs Heet Singh & ors. AIR 1980 All 358

2. Booz-Allen & Hamilton Inc Vs SBI Home Finance Ltd. & ors. 2011 (5) SCC 532

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Anil Sharma, learned Senior Counsel, assisted by Sri R.M. Saggi, learned counsel for the appellant and Sri P.K. Giri, learned Additional Chief Standing Counsel for the respondents.

2. This case has a long chequered history. A brief narration of the case is necessary for better appreciation of the case, which are as under:-

3. On 06th June, 1946, Baijnath Tandon, Kedarnath Tandon and Rajnath

Tandon sons of one Lala Lallumal created a trust named "Tandon Trust' in memory of Smt. Hira Devi and Lala Lallumal consisting of immovable properties with the object of encouraging education, culture, study of Hindu Religion, Philosophy and Social Service in order to perpetuate the memory of the grand mother and father of the Authors of the Trust.

4. The Trust consisted of the original nine trustees who were to manage the properties of the Trust. Para 7 provided for the vacancy caused in case of a trustee is removed, the same was to be filled according to the provisions of Indian Trust Act, 1882.

5. On 29.01.1966, two of the trustees, Dr. Govardhan Das Agarwal and Manohar Lal Shahaney applied to the Court of District Judge, Jhansi under Section 3 of the Charitable and Religious Trusts Act, 1920 (hereinafter called as "Act of 1920") claiming the opposite parties, who were the other trustees, to furnish to the Court the full particulars as regards the nature and objects of the Trust, of the value, condition, management and application of all Trust properties, of the income that has arisen from the said property so far, directing Accounts of the Trust properties and money to be taken, examined and audited. The said case was registered as Case No.32 of 1966.

6. In the said Suit, opposite party no.8, Kailash Narain Shivpuri moved an application under Section 5 (3) of the Act of 1920 and gave an undertaking for instituting a suit for declaration before the Civil Court. The District Judge, on 17.08.1968, passed an order staying the proceedings of Case No.32 of 1966 and granted time for filing declaratory suit.

7. Kailash Narain Shivpuri, thereafter, filed an Original Suit No.1268 of 1968 in the Court of Munsif, Jhansi seeking a relief of declaration to the effect that the Trust in Suit (Misc. Case No.32/66-67 of the Court of District Judge, Jhansi) is not one to which the Act, 1920 applies. In the said Suit, both Dr. Govardhan Das Agarwal and Manohar Lal Shahaney, who were the plaintiffs in Case No.32 of 1966 were arrayed as the defendants. The said Suit was contested and the trial Court vide judgment and decree dated 17.05.1971 dismissed the Suit. Against the said judgment, First Appeal No.121 of 1971 was filed by Kailash Narain Shivpuri.

8. During the pendency of the said proceedings, six out of living eight trustees moved an application under Section 4 (1) of the Charitable Endowment Act, 1890 (hereinafter called as "Act of 1890") for including and declaring a trust as Charitable Trust. A Government Notification was made on 07.07.1972 through Treasurer, Charitable Endowment, U.P. including the trust as a Charitable Endowment. Scheme of Administration was drawn and Committee of Management was constituted which was headed by the District Magistrate. The notification was published in the Gazette on 15.07.1972. The Additional District Judge, Jhansi on 05.08.1974 dismissed the appeal filed by Kailash Narain Shivpuri.

9. Against the said judgment, a second appeal being Second Appeal No.2655 of 1974 was preferred. This Court vide judgment dated 21.10.1981 set aside the judgment and decree passed by both the Courts below while allowing the appeal and decreed the Suit filed by Kailash Narain Shivpuri, holding that the Tandon Trust was not the trust for charitable

purpose so as to be governed by the provisions of Act of 1920.

10. The judgment rendered by this Court was not challenged by any of the trustee or the State. One of the trustees Kailash Narain Tandon moved an application on 20.09.1990, before the Collector, Jhansi along with copy of the judgment. The Collector, Jhansi sought written opinion of the District Government Counsel (DGC), who on 01.11.1990 opined that the judgment of this Court was final, once it was held that the Trust is not a Charitable and Religious Trust and was a private Trust and the Government Notification of 1972 needs to be amended.

11. Despite, the opinion of the DGC (Civil) when the order was not complied with by the defendants, notice under Section 80 of CPC was served on 01.11.1991 and thereafter, Suit No.11 of 1992 was filed by the present plaintiff-appellant seeking a relief for a decree for declaration to this effect be passed that the vesting order dated 07.07.1972 in respect of the properties of "Tandon Trust', Jhansi vested in defendant no.2 is illegal and without jurisdiction, and the properties of "Tandon Trust' stand divested from defendant no.2 and re-vested in old trustees and continued to be vested in old trustees and their successors as per terms of Trust deed before the Notification, and Trust Committee or Management formed under Scheme of Administration in consequence of vesting order presided over by the District Magistrate, Jhansi has no existence in the eye of law and should be dissolved.

12. Further, relief for permanent injunction restraining the defendant from transacting any business, or dealing with properties of "Tandon Trust' in any manner whatsoever and non-interference in working of old trustees and their successors was also sought. The said Suit was contested by defendants-respondents no.1 to 3 who filed their written statement denying the plaint allegation. The trial Court framed the following issues:-

"1- क्या आदेश दिनांक 7-7-72 जिसके द्वारा टण्डन ट्रस्ट की सम्पत्ति को प्रतिवादी संख्या-2 में निहित किया गया है, अवैध एवं बिना क्षेत्राधिकार है ?

2- क्या वादी की वाद अल्प मूल्यांकित तथा न्यायशुल्क अपर्याप्त है?

3- क्या माननीय उच्च न्यायालय इलाहाबाद द्वारा द्वितीय अपील संख्या-2655/74 में पारित किये गए आदेश प्रतिवादीगण पर बन्धनकारी नही है और राज्य सरकार का आदेश दिनांकित 7-7-72 इससे प्रभावित नही है?

4- क्या चैरीटैबिल एण्ड रिलीजियस ट्रस्ट एक्ट के प्राविधान प्रतिवादी संख्या-3 पर लागू नही होते जैसा कि प्रतिवादपत्र के पैरा 24 में कहा गया है?

5- क्या दावा चैरिटैबिल एण्ड इन्डावमेंट 1890 के प्राविधान से बाधित है?

6- क्या दावे में दारा-80 सी०पी०सी० की नोटिस की कमी का दोष है?

7- क्या वादी के पूर्वज श्री बैजनाथ टण्डन अन्य ट्रस्टियों के साथ टण्डन ट्रस्ट की सम्पत्ति को ट्रजरार चैरिटैबिल एण्डावमेंट एक्ट 1890 के तहत निहित करने की शासन से प्रार्थना की थी।? यदि हाँ तो प्रभाव?

8- क्या वादी ट्रस्ट सम्पत्ति को क्षति पहुँचाने एवं ट्रस्ट के उद्देश्यों को विफल करने का कार्य कर रहा है?

9- क्या वादी को राजाज्ञा एवं प्रशासन योजना को चुनौती देने का अधिकार नही है?

10- वादी किस अनुतोष को पाने का अधिकारी है?

11- क्या वादीगण का वाद स्टापेल के सिद्धान्तों से बाधित है?

12- क्या वादी कैलाश नारायण एवं उनके पिता श्री बैजनाथ टण्डन ने राजाज्ञा में वर्णित सम्पत्ति को ट्रस्ट की सम्पत्ति स्वीकार किया है? यदि हां तो प्रभाव?

13- क्या वादी का वाद काल बाधित है?

14- क्या कैलाश नारायण टण्डन दावा दायर करते समय काफी वृद्ध थे एवं उन्हें दिखाई नहीं देता था?

15- क्या शासनादेश दिनांकित 7-7-72 के पूर्व वाद संख्या- 1268/68 दायर किया जा चुका था जिसकी जानकारी टण्डन ट्रस्ट के समस्त ट्रस्टियों को थी, जैसा कि रेप्लीकेशन के पैरा-4 में वर्णित है? यदि हाँ तो प्रभाव?

16- क्या शासन द्वारा अनुमोदित प्रबन्ध के अन्तर्गत गठित ट्रस्ट कमेटी जो चैरिटेबिल इण्डावमेंट एक्ट के अन्तर्गत बनाई गई, उचित प्रकार से कार्य नहीं कर रही है और क्या शासन द्वारा ट्रस्ट की समस्त चल अचल सम्पत्ति अपने अधिकार में नही ली गई? यदि हां तो प्रभाव?

17- क्या माननीय उच्च न्यायालय द्वारा निगरानी संख्या-1605/77 में दिए गए निर्णय दिनांक 23-4-80 से वादी पाबन्द है तथा प्रस्तुत वाद दायर करने से विवंधित है?

18- क्या उच्च न्यायालय को वाद की सुनवाई की अधिकारिता प्राप्त नही है?"

13. Issue no.1 was in regard to the fact that whether by Notification dated 07.07.1972, the properties of "Tandon Trust' came within the purview of defendant-respondent no.2. Issue no.3 was in regard to the fact that whether the judgment rendered in Second Appeal No.2655 of 1974 by the High Court was binding and affected the Notification dated 07.07.1972 and further issue no.9 was framed to the effect that whether plaintiff can challenge the Government Notification.

14. Issues no.1, 3 and 9 were tried together by the trial Court and it was held that the Notification dated 07.07.1972 could not be challenged in a suit. The Court further held that no benefit of the judgment rendered in second appeal could benefit the plaintiff-appellant. The Suit was dismissed on 30.05.1998. Against the said judgment, Civil Appeal No.65 of 1998 was filed, wherein the lower appellate Court framed following points of determination:-

"मुख्य रूप से निर्धारण के लिए प्रश्न यह है की क्या टंडन ट्रस्ट चैरिटेबिल प्रयोजन का नहीं है और राजाज्ञा दिनांकित 07.07.72 अवैध व बिना क्षेत्राधिकार के है तथा माननीय उच्च न्यायालय की द्वितीय अपील संख्या-2655/74 के आदेश दिनांक 21.10.81का निर्णय उक्त ट्रस्ट पर लागू होता है?"

15. The lower Appellate Court held that the Scheme of Administration made under Section 5 (4) of the Act of 1890 cannot be challenged in the present proceedings and further held that judgment rendered in second appeal was not binding on the defendants-respondents as they were

not the party and the said judgment was not in rem and therefore, dismissed the appeal on 17.01.2003. Hence, the present second appeal.

16. This Court, on 23.04.2003, admitted the appeal on following substantial questions of law:-

(i) Whether the Trust which is not Charitable can be governed by the provisions of Charitable Endowment Act, 1890 and,

(ii) Whether the Notification dated 07.07.1972 issued under Section 4 of Charitable Endowment Act, 1890 was void and without jurisdiction?

17. Sri Anil Sharma, learned Senior Counsel submitted that before the Notification dated 07.07.1972, two trustees, namely, Govardhan Das Agarwal and Manohar Lal Shahaney in the year 1966 had moved application under Section 3 of Act, 1920 seeking particulars as regards nature and objects of the Trust. In the said proceedings, another trustee Kailash Nath Shivpuri had objected and moved application under Section 5(3) of the Act of 1920 and the District Judge granted permission to file a suit for declaration. According to him, the suit filed in the year 1968 was categorical to the effect that a declaration was sought that the Trust in Suit/Case No.32/67 is not one to which Charitable and Religious Trusts Act, 1920 applies.

18. Once, the dispute as to the status of the Trust was raised before the Notification, it will have no effect as this Court in Second Appeal No.2655 of 1974 decreed the Suit holding Tandon Trust not to be Trust for charitable purpose on 21.10.1981, and the judgment so rendered was in rem and not in persona.

19. According to Senior Counsel, the declaration by this Court was to the status of the Trust which was in litigation since 1968. Once, it was held to be Trust not covered under the Act of 1920 or 1890, Notification dated 07.07.1972 will have no consequence.

20. He next contended that after the judgment of 1981, request was being made by the trustees to the Collector, Jhansi for divesting the properties of the Trust from the Treasurer and re-vesting it into the old trustees and for dissolution of the Trust Committee. The Collector has also sought the opinion of the DGC, who opined in favour of the plaintiff-appellant on 01.11.1990, but when no action was taken, plaintiff-appellant was left with no option, but to file a Suit for declaration for divesting the properties from defendant no.2 and re-vesting in the old trustees.

21. He further laid emphasis that both the Courts below were not correct to hold that the judgment passed in second appeal was not applicable upon the defendants-respondents in the present case as they were not the party to the Suit. According to him, as the Suit filed by Kailash Nath Shivpuri for the status of the Trust, which was declared to be not covered under the Act of 1920, was a judgment in rem and binding upon the present defendants.

22. Moreover, neither any appeal nor review was filed by the present defendants-respondents against the judgment of 1981 which became final, as it declared the status of the Trust. Further, on the question of limitation, he has relied upon Article 58 of the Limitation Act, which provides

limitation for declaratory suit from the date of denial. Reliance has been placed upon the decision of Co-ordinate Bench of this Court in case of **Natha Singh and Another Vs. Heet Singh and Ors. AIR 1980 All 358** and **Booz-Allen & Hamilton Inc Vs. SBI Home Finance Ltd. and Ors. 2011 (5) SCC 532.**

23. Sri P.K. Giri, learned Additional Chief Standing Counsel appearing for the defendants-respondents while defending the judgment passed by Courts below submitted that Suit filed by Kailash Nath Shivpuri was inter se between the trustees and the present defendants were not party to the same. According to him, once the application was moved under Section 4 of the Act of 1890 by six of the trustees and a Notification was made on 07.07.1972, the property of the Trust came within the purview of the Act of 1890 and the relief claimed by the plaintiff cannot be granted.

24. According to the State Counsel, the judgment rendered in second appeal is of the year 1981, while the plaintiff-appellant instituted the Suit in the year 1992 and the same was barred by limitation and no explanation has been afforded as to why there was such delay on his part. He then contended that both the Courts below had rightly recorded the findings that once the State Government notified on 07.07.1972, the said Notification cannot be quashed in a suit proceedings.

25. He lastly contended that the finding recorded in Second Appeal No.2655 of 1974 is not binding as the defendants-respondents were not the party in the Suit, nor the plaintiffs of that Suit, after the Notification, had either amended their Suit or appeal impleading the present defendants as the party. According to him, the said judgment was binding inter se between the parties and not upon the present defendants-respondents. Apart from this, no other argument has been raised from the State side.

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

27. Before proceeding to consider and decide the substantial questions of law framed above, it would be necessary to have a brief glimpse of Religious Endowments Act, 1863 (hereinafter called as "Act of 1863"), The Indian Trust Act, 1882 (hereinafter called as "Act of 1882"), The Charitable Endowments Act, 1890 (hereinafter called as "Act of 1890") and The Charitable and Religious Trusts Act, 1920 (hereinafter called as "Act of 1920") as well as the definition and meaning of the word "Trust", "Religious Endowment" and "Charitable Endowment."

28. Religious and Charitable Trust exists, in some shape or other, in almost all the civilized countries and their origin can be traced primarily to the instincts of piety and benevolence which are implanted in the human nature. The form and nature of these trusts undoubtedly defer according to spiritual and moral ideas of different nations, and even among the same people, ideas are seen to vary.

29. In Tagore Law Lectures, His Lordship Justice B.K. Mukherjea traced the concepts of Religious and Charitable Trust from the days of Roman Empire till the present time. He wrote that Imperial Rome under the Christian Emperors was dissimilar in many respects to Pagan Rome, and the religious and charitable institutions in England undoubtedly took a different

shape when she abjured, Catholicism and became Protestant. The popular Hindu religion of modern times is not the same as religion of the Vedas though the latter are still held to be the ultimate source and authority of all that is held sacred by the Hindus.

30. Before proceeding further, it is necessary to have clear idea as to what is meant by the expression "Religious and Charitable Trusts" in its proper juristic sense. For this purpose, a little excursion into the yields of English and Roman law is necessary. A trust would obviously be denominated a religious or charitable trust if it is created for purposes of religion or charity. Two things, therefore, require to be considered in this connection, viz., (I) what are religious and charitable purposes? and (ii) what is a trust?

31. It is well known, "religion" is a matter of faith with individuals and communities, and it is not necessarily theistic (e.g., Buddhism). All that we understand by religious purpose is that the purpose or object is to secure the spiritual well-being of a person or persons according to the tenets of the particular religion which he or they believe in.

32. On the other hand, "Charity" means benevolence and in its wide and popular sense it comprehends all forms of benefit, physical, intellectual, moral, ethical or religious, bestowed upon persons who are in need of them.

33. The conception of word "Trust' was devised by the Chancery Courts in England, which as Courts of Conscience attempted to supply the deficiencies of the English Common Law, by administering what were known as principles of equity and natural justice. These principles were imported to a large extent from the Roman Civil Law.

34. Lewin in his well-known treaties on the Law of Trusts defines "Trust" to be a "confidence reposed in some other, not issuing out of the land, but as thing collateral, annexed in privity to the estate of the land, for which cestui que trust has no remedy, but by *Subpoena"* (by which an unscrupulous defendant who could not be touched in the common law courts was compelled to appear before an Equity Judge and made to carry out his orders, the proceeding being entirely one i*n persona*m in the Chancery).

35. Trust as understood in English Law were unknown in both Hindu and Muslim jurisprudence. But, Hindus have also Religious Institutions which were governed by their own customs and rites, both public and private. Muslims have also evolved the concepts of Waqf. But, they were strictly governed by Muslims Personal Law.

36. Under the Hindu system, there is no line of demarcation between the religion and charity. On the other hand, charity is regarded as a part of religion. The Hindu religion recognises the existence of life after death and it believes in the law of Karma according to which good or bad deeds of a man produce corresponding results in the life to come.

37. Hindu Religious and Charitable Acts have been from the earliest time classified under two heads viz. Istha and Purtta. The two words are often used conjointly and they are as old as Rigveda.

38. During the British Rule, for the first time, Law relating to Religious Endowments was codified and the

Religious Endowments Act, 1863 came into existence. The preamble of the Act is extracted hereasunder:-

"An Act to enable the Government to divest itself of the management of Religious Endowments.

Preamble.--Whereas it is expedient to relieve the Boards of Revenue, and the local Agents, in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX, 1810 (Ben. Reg. 19 of 1810), of the Bengal Code (for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples, Colleges and other purposes; for the maintenance and repair of Bridges, Sarais, Kattras, and other public buildings; and for the custody and disposal of Nazul Property or Escheats), and Regulation VII, 1817 (Mad. Reg. 7 of 1817), of the Madras Code (for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples and Colleges or other public purposes; for the maintenance and repair of Bridges, Choultries, or Chattrams, and other public buildings; and for the custody and disposal of Escheats), so far as those duties embrace the superintendence of lands granted for the support of Mosques or Hindu Temples and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments; the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof; or involve any connexion with the management of such religious establishments."

39. Thereafter, need was felt for precise legislation relating to trust when the increasing number of European and Eurasian population had to face problems in administering the trust created by them, prior to which they were governed by the Indian Trust Act, 1866. The British Rule enacted the Indian Trust Act, 1882 which was introduced to amend the law relating private trust and trustees. The preamble of the Act of 1882 reads as under:-

"An Act to define and amend the law relating to Private Trusts and Trustees.

Preamble.--WHEREAS it is expedient to define and amend the law relating to private trusts and trustees."

40. Likewise, Section 3 defines "Trust" which is extracted as under:-

"3. Interpretation-clause--"trust":--A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner:"

41. Subsequently, in the year 1890, it was found that an Act be enforced on the lines of the Act which was in existence in England, wherein an official was appointed who was capable of discharging the function as official trustee of charity lands and official trustee of charitable funds, with this objects, the Charitable Endowments Act, 1890 was enacted. Section 2 of the Act provides for the definition of the word "charitable purpose" which is extracted hereasunder:-

"2. Definition. --In this Act "charitable purpose" includes relief of the poor, education, medical relief and the

advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship."

42. Simultaneously, Section 3 provides for the appointment and incorporation of Treasurer of Charitable Endowment. Section 4 provides for the orders vesting property in the Treasurer so appointed under Section 3, whereas Section 5 provides for the Scheme for Administration of property vested in the Treasurer.

43. As the Government at that time found that Act of 1863 was the result of the decision of the Government to divest its officer of all direct Superintendence and control of Religious and Charitable Endowment in India, transferring their function to manager or managing committee and merely making provisions for intervention by the Civil Court on application made by any person interested in a particular institution. This policy, however, did not long remain unchallenged and there was consistent complaint.

44. The Government decided to enact a law, whereby any person interested in a trust may apply a petition to the District Judge for an order directing the trustee to furnish him with information as to nature and objects of trust and of the value, condition, management, and application of the subject matter of the trust, and of the income belonging thereto, or as to any of these matters, and also directing that the accounts of the trust shall be examined and audited.

45. Thus, it came into existence The Charitable and Religious Trusts Act, 1920. Section 3 provided the power to apply to the Court in respect of a trust of a charitable or the religious nature. Section 5 provided the procedure of the petition to be heard. Further, Section 12 provided that no appeal shall lie against any order passed or against any opinion, advice or direction given under the Act.

46. Thus, what culls out from the above is to the nature of a trust or a religious and charitable endowment created under the various statutory provisions of the Act enacted from 1863 to 1920.

47. In the present case, the dispute is in regard to "Tandon Trust" which is alleged to have been created by its Author on 06th June, 1946. The trust deed clearly defines the object, which is of Encouraging Education, Culture, Study of Hindu Philosophy and Social Service in order to perpetuate the memory of the grand mother and father of the Author of the Trust.

48. Clause 7 of the trust deed in clear terms provides that in case of removal of any trustee under the Indian Trust Act, the vacancy so caused will be filled by the provisions of the terms of the Clause No.3 and 4, meaning thereby that the trust under consideration is a private trust and its incorporation and functioning has to be considered under the scope of Act of 1882.

49. This Court in Second Appeal No.2655 of 1974 while deciding as to whether "Tandon Trust' in question was a trust for charitable purpose, so as to be governed by the provisions of the Act of 1920 held it not to be a charitable trust and found it to be out from it's purview. The matter regarding declaring "Tandon Trust' was initiated by one of the original trustee Kailash Narain Shivpuri in the year 1968 after having been granted permission by the

District Judge on his application filed under Section 5 (3) of the Act of 1920 in Misc. Case No.32 of 1967.

50. This Court while allowing the appeal of one of the trustees had decreed the Suit No.1268 of 1968, declaring "Tandon Trust' not to be a charitable and religious trust. Once, the character and status of the trust was declared by this Court, which remained unchallenged by the present defendants-respondents since 1981, cannot change the nature and hold the same to be guided by the Act of 1920 on the strength of Government Notification dated 07.07.1972 published in Gazette on 15.07.1972.

51. As this Court, on 21.10.1981, having decreed the Suit of 1968, the declaration as to the status will be from the date of institution of the Suit and not from the pronouncement of the judgment. Moreover, the judgment rendered on 21.10.1981 was a judgment in rem, as it declared the status of the trust, and not in personam as claimed by the defendants-respondents and held by the Courts below.

52. A declaration of the status is always in rem and not in personam. The relief of declaration is for the world to know about the status of the person in favour of whom the declaration has been made.

53. In **Booz-Allen & Hamilton Inc. (Supra**), the Apex Court held that a right in rem is a right exercisable against the world at large as contrasted from the right in personam which is an interest protected solely against specific individuals. Actions in personam referred to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem referred in actions determining the title of property and rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property.

54. Correspondingly, the judgment in personam refers to a judgment against a person as distinguished judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or conditions of property which operates directly on the property itself.

55. In the present case, the Court while decreeing the Suit of K.N. Shivpuri had declared the status of the "Tandon Trust', not being a charitable and a religious trust covered under the Act of 1920. The declaration made by the Court as to the status of the trust is to the world at large and not to any particular party in a suit, as it affects people at large.

56. Once, the declaration was made of status and nature of the trust in 1981 decreeing the Suit of 1968, the subsequent Notification of 1972 lost its relevance and only needed a consequential order from the Collector for getting the same denotified.

57. The argument of the State counsel that the present Suit filed in the year 1992 was time barred and further, the State was not a party in the Suit of 1968 has no legs to stand, as once the declaration was made, the subsequent Suit filed claiming relief of divesting the property from the defendants cannot be said to be time barred as neither the State nor the defendants in the Suit of 1968 had challenged the judgment of this Court till date and the status declared by the Court stands as it is.

58. The claim for divesting the property from the realm of defendants cannot be said to be time barred, once the property has been declared to be non-religious and non-charitable and being a private trust. The defendants continue over the same as an illegal occupants and cannot claim right to continue on the ground of limitation.

59. Moreover, the DGC (Civil) had given his opinion on 01.11.1990 being Paper No.27-C-1/156/12 that the Notification of 1972 be amended, but still the defendants continued defying the judgment rendered in the second appeal on 21.10.1981.

60. Both the Courts below wrongly held that the Notification dated 07.07.1972 cannot be challenged and quashed in the present proceedings, as the only relief sought by the plaintiff-appellant was to the extent of divesting the property from the defendants and re-vesting the same in the plaintiff-appellant on the basis of the judgment dated 21.10.1981. Both the Courts below fell into error that once, it was notified in the year 1972 and the property was brought within the ambit of Act of 1920, the Suit was not maintainable at the behest of the appellant ignoring the judgment of this Court dated 21.10.1981.

61. The judgment and order passed by both the Courts below are illegal and arbitrary as they have failed to honour and comply the judgment of this Court dated 21.10.1981, declaring the status of the "Tandon Trust'. Once, the declaration was there, the defendants nor the Courts below had the right to dishonour the same.

62. Considering the facts that the "Tandon Trust' created in 1946 having been declared to be a non-religious and non-charitable trust and out of the scope of Act of 1920, the same cannot be governed by the provisions of the Charitable and Endowments Act, 1890, as there was no element of charity in the deed created/executed by the Author of the Trust.

63. Moreover, the distinction has been made clear as to which Trust will fall under the Act of 1863, 1882, 1890 and 1920. Thus, the first substantial question of law framed stands answered in negative i.e. in favour of the appellant and against the defendants-respondents.

64. Once, it is held that the "Tandon Trust' is not a charitable and religious trust and the provisions of the Act of 1890 is not applicable in view of the judgment dated 21.10.1981, and the status of the trust having been declared by this Court decreeing the Suit of 1968, the Notification dated 07.07.1972 will not be applicable upon the trust bringing it within the ambit of the Act of 1920.

65. Once, the status of the trust having been declared by this Court and the same having been remained unchallenged by the defendants-respondents, the Notification of 1972 will have no bearing of it upon the status of the trust, as the trust has been declared out of the purview of the Act of 1890 and 1920 by a judicial order of this Court and will prevail over the Administrative Notification issued by the State on 07.07.1972 published in Gazette on 15.07.1972. Thus, the second substantial question of law stands answered i.e. in favour of the appellant and against the defendants-respondents. Thus, both the substantial questions of law as framed stand answered.

66. Having considered material on record, this Court finds that the judgments and decree passed by both the Courts below are illegal and arbitrary and cannot be sustained in the eye of law and are thus, set aside.

63. The Second Appeal stands **allowed.**

64. The Suit of the plaintiff-appellant being Suit No.11 of 1992 stands decreed.

65. Office to transfer back the records of the Courts below.

(2022)06ILR A1199
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.05.2022

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

First Appeal From Order No. 817 of 2016
And
First Appeal From Order No. 51 of 2018

The National Insurance Co. Ltd.
...Appellant
Versus
Vishram & Ors. ...Respondents

Counsel for the Appellant:
Sri Anil Srivastava

Counsel for the Respondents:
Sri Jagat Pal Singh, Sri Maneesh Pandey

A. Civil Law - Motor Vehicles Act, 1988 - Computation of Compensation - Just compensation - Rule 220-A(4) of the Rules, 1998 - if a statutory instrument affords greater or better benefits, said statutory instrument shall operate and the norms laid down by different judicial precedents shall not limit the operation of such statutory instrument - statutory instrument shall prevail over the norms laid down by judicial precedents only to the extent it gives greater or better benefit than the judicial precedents - If the norms laid down by judicial pronouncements give greater or better benefit than the formula devised by the statutory instrument, the judicial precedents shall prevail over the statutory instrument (Para 34)

B. Civil Law - Motor Vehicles Act, 1988 - Section 173 - Delay in F.I.R. - mere delay in registering a First Information Report regarding the accident cannot be a ground to doubt the case of the claimants - if there was no indication of fabrication or concoction to implicate innocent persons then, even if there was a delay in lodging the First Information Report, the claim case cannot be dismissed merely on the ground of delay in lodging the F.I.R. –

Accident occurred on 22.12.2014 - injured admitted in the Trauma Centre in K.G.M.U. on 22.12.2014 itself - injured died on 6.1.2015 - Held - family of the deceased was occupied in the treatment of the deceased - case of the claimants cannot be rejected only on the ground that the First Information Report was registered nine days after the incident (Para 10)

C. Civil Law - Motor Vehicles Act, 1988 - Evidence - Proof - Preponderance of probability - claimants are required to establish their case on the touchstone of preponderance of probability and the standard of proof beyond reasonable doubt is not applied while inquiring into the case

Accident proved by the testimony of eyewitness of the incident (P.W. – 2) - charge-sheet filed by the police against the driver of the offending vehicle - Post mortem report indicates that death occurred due to ante-mortem injuries and the nature of the injuries shows that the same were caused in an accident - evidence on record proves that Sushil was injured in the accident that took place due to rash and negligent driving of the offending vehicle and subsequently died due to the injuries caused in the accident (Para 14)

Testimony of P.W. - 2 cannot be rejected merely on the ground that the date of admission of the deceased in the Trauma Centre as stated by P.W. – 1 (wife of deceased) and P.W. - 2 is different from the date of his admission in the Trauma Centre as recorded in the discharge slip - P.W. - 2 who got the deceased admitted in Trauma Centre was not cross-examined by the opposite parties regarding the entries in the discharge slip (Para 11)

Insurance counsel argued that the site plan falsifies the testimony of P.W. - 2 - P.W. - 2 stated that the accident occurred in front of Bajrang Hospital while the site plan shows that the accident occurred in front of Heera Complex – Held - both Heera Complex and Bajrang Hospital are adjacent to the road on which the accident took place - not much importance is to be given to the difference between the statement of P.W. - 2 and the site plan regarding location of different buildings (Para 11)

D. Civil Law - Motor Vehicles Act, 1988 - Computation of Compensation - Notional Income - Deceased worked as a Loader with Usha Company and with private traders and earned Rs.9,000/- per month - said fact testified by P.W. – 1 - there is no document on record to prove the income of the deceased - Tribunal has computed the compensation payable to the claimants on the notional income of the deceased as Rs.100/- per day - Held - it would be just to treat the notional income of the deceased as Rs. 200/- per day, i.e., Rs 6,000/- per month (Para 20)

E. Civil Law - Motor Vehicles Act, 1988 - Computation of Compensation - compensation is to be determined on notional income of the deceased which in turn, is to be determined on the minimum wages of an unskilled labour and as the deceased was 24 years old, therefore, in accordance with the Rules, 1998, 50% has to be added as future prospects in his notional income while determining the multiplicand (Para 38)

F. Civil Law - Motor Vehicles Act, 1988 - Computation of Compensation - deductions towards personal and living expenses of the deceased - Father – Held - subject to evidence to the contrary, father was likely to have his own income and would not be considered to be a dependent - claimants have not filed any evidence to show that the father of the deceased had no income of his own - only the mother, the wife and the minor son of the deceased shall be considered his dependent for deciding the deductions to be made towards personal and living expenses of the deceased (Para 21)

Rule 220-A(4) of the Rules, 1998 identifies 'loss of love and affection' and 'loss of consortium' as separate categories of non-pecuniary damages - Loss of love and affection at the rate of Rs.50000 to each of the claimants - Loss of spousal consortium to opposite wife of deceased Rs.40,000 - Loss of filial consortium to parents of deceased i.e. Rs.40,000 to each of the claimants (Para 42)

Allowed. (E-5)

List of Cases cited:

1. Ravi Vs Badrinarayan & ors. 2011 (4) SCC 693

2. New India Assurance Co. Ltd. Vs Smt. Resha Devi & ors. (2017) 3 ADJ 685

3. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors., 2021 (11) SCC 780

4. Sarla Verma (Smt) & ors. vs Delhi Transport Corporation & anr. 2009 (6) SCC 121

5. Kirti & anr. Vs Oriental Insurance Co. Ltd. 2021 (2) SCC 166

6. Magma General Insurance Co. Ltd. Vs Nanu Ram 2018 SCC OnLine SC 1546

7. National Insurance Company Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

8. New India Assurance Co. Ltd. Vs Smt. Somwati & ors., (2020) 9 SCC 644

9. New India Assurance Co. Ltd. Vs Urmila Shukla & ors. 2021 SCC OnLine SC 822

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

1. The above First Appeal From Orders have been filed under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as, "Act, 1988') against the judgment and award dated 30.5.2016 passed by the Motor Accident Claims Tribunal, Lucknow in Motor Accident Claim Petition No. 99 of 2015. First Appeal From Order No. 817 of 2016 has been filed by the National Insurance Company Ltd., Lucknow (hereinafter referred to as, "Insurance Company') for setting-aside the award dated 30.5.2016 while First Appeal From Order No. 51 of 2018 has been filed by the claimants for enhancement of compensation. The appellant in First Appeal From Order No. 817 of 2016 shall hereinafter be referred as the Insurance Company in the present appeal. The opposite party nos. 1 to 4 in First Appeal From Order No. 817 of 2016 shall hereinafter be referred as the claimants in the present appeal, the opposite party no. 5 in First Appeal From Order No. 817 of 2016 is the owner of the vehicle and shall hereinafter be referred as owner of the offending vehicle and opposite party no. 6 is the driver of the offending vehicle and shall hereinafter be referred as driver of the offending vehicle in the present judgment.

2. The facts of the case are that Motor Accident Claim Petition No. 99 of 2015 was instituted by the claimants claiming a compensation of Rs.22,00,000/- for the death of Sushil (hereinafter referred to as, "the deceased') due to the injuries caused in the accident which allegedly took place due to rash and negligent driving of Bus No. U.P. 32 C.N. - 4757 (hereinafter referred to as, "offending vehicle'). The accident took place on 22.12.2014 at 7:50 a.m. In the claim petition, the accident was alleged to have occurred in front of Bajrang Hospital. The case of the claimants is that on 22.12.2014 the deceased was going on a bicycle to join his duties in Usha Company and, at 7:50 a.m. when he was in front of Bajrang Hospital, the offending vehicle hit the bicycle from the front causing injuries to the deceased who subsequently died on 6.1.2015 due to the injuries caused in the accident. It has been stated by the claimants that the deceased was initially admitted in Bajrang Hospital who after giving first aid to the deceased referred him to Trauma Centre in King George Medical University, Lucknow (hereinafter referred to as, "K.G.M.U.') where the deceased died on 6.1.2015. According to the claimants, the deceased was admitted in the K.G.M.U. on 22.12.2014 itself. A First Information Report registering Case Crime No. 476 of 2014 under Sections 279, 338 and 427 of the Indian Penal Code was also registered against the driver of the offending vehicle on 31.12.2014. It is the case of the claimants that the deceased was working as a Loader in Usha Company as well as for certain private traders and earned Rs.9,000/- per month. On the aforesaid pleas, the claimants claimed a compensation of Rs.22,00,000/- for the death of the deceased. The opposite party no. 1 / claimant no. 1 is the father of the deceased, opposite party no. 2 / claimant no. 2 is the mother of the deceased, opposite party no. 3 / claimant no. 3 is the wife of the deceased and opposite party no. 4 / claimant no. 4 is the minor son of the deceased. Opposite party no. 4 was one year old at the time of accident.

3. The owner and the driver of the vehicle filed their written statements denying the incident and the involvement

of the offending vehicle in the accident and also denied the allegation that Sushil died due to any injuries caused in the accident. The case of the owner and the driver of the vehicle was that on the date of accident, the offending vehicle was not plying on the route on which the accident occurred. It was additionally pleaded by the owner and the driver of the vehicle that at the time of accident, the vehicle was insured with the Insurance Company and the driver of the vehicle had a valid driving licence. The Insurance Company, i.e., the appellant also filed its written statement denying the incident and the involvement of the offending vehicle in the accident and additionally pleaded that there was contributory negligence on the part of the deceased in the accident.

4. In Motor Accident Claim Petition No. 99 of 2015, the Tribunal framed five Issues. Issue No. 1 was regarding the factum of accident and the involvement of the offending vehicle in the accident. Issue No. 2 was as to whether there was any contributory negligence on the part of the deceased in causing the accident, Issue No. 3 was as to whether at the time of accident, the driver of the offending vehicle had a valid driving licence. Issue No. 4 was as to whether at the time of accident, the offending vehicle was insured with the Insurance Company. Issue No. 5 was regarding the amount of compensation payable to the claimants and the defendant liable to pay the said compensation.

5. In the Tribunal, the opposite party no. 3 / claimant no. 3 deposed as plaintiff witness no. 1 and one Mahesh deposed as plaintiff witness no. 2 for the claimants. In the Tribunal, the claimants filed the First Information Report, the post-mortem report of the deceased, the inquest report, the charge-sheet filed by the police against the driver of the offending vehicle in Case Crime No. 476 of 2014, the discharge certificate of the King George Medical University and the medical receipts showing expenses on the treatment of the deceased. The defendant produced the driver of the offending vehicle as D.W. - 1 and the owner of the vehicle as D.W. - 2 and also filed the route chart of 31st July, 2015 and 27th January, 2016 to show that the offending vehicle did not ply on the route on which the accident took place.

6. The Tribunal decided Issue No. 1 in favour of the claimants relying on the testimony of plaintiff witness nos. 1 and 2 as well as after taking note of the First Information Report and the fact that a charge-sheet had been filed against the driver of the offending vehicle regarding the accident. So far as Issue No. 2 is concerned, the Tribunal after considering the site plan held that there was no contributory negligence by the deceased in causing the accident as the deceased was on the left side of the road when the accident occurred. Issue Nos. 3 and 4 were decided in favour of the owner and the driver of the offending vehicle and it was held by the Tribunal that, at the time of accident, the driver of the offending vehicle had a valid driving licence and the vehicle was insured with the appellant - Insurance Company. So far as Issue No. 5 is concerned, the Tribunal in light of the findings on Issue Nos. 3 and 4 held the Insurance Company liable to indemnify the owner of the vehicle. The Tribunal determined the compensation after taking the notional income of the deceased as Rs. 3,000/- per month and after adding of 50% future prospects in the income of the deceased. The Tribunal deducted 1/4 against personal and living expenses of the deceased and

applied a multiplier of 18 holding that the age of the deceased was 24 years. The Tribunal awarded Rs.5,000/- for loss of consortium, loss of love and affection and funeral expenses, in accordance with Rule 220-A (4) of the Uttar Pradesh Motor Vehicles Rules, 1998 (hereinafter referred to as, "Rules, 1998') and further Rs.25,078/- for the medical expenses incurred by the claimants on the treatment of the deceased. On the aforesaid, the Tribunal awarded a total compensation of Rs.7,69,078/- as compensation to the claimants with 7% interest from the date of instituting the claim petition till the date of final payment. Hence, the present appeals.

7. It was argued by the counsel for the appellant that the discharge certificate issued by the Medical Officer on duty at King George Medical University showed that the deceased was admitted in the Trauma Centre on 23.12.2014 at 3:15 p.m. It was argued that the aforesaid document which was marked as Paper No. C-4/8 in the Tribunal clearly falsified the testimony of P.W. - 1 and P.W. - 2 that the accident occurred on 22.12.2014 and their testimony regarding the accident was not reliable. It was argued the delay in filing the First Information Report had not been explained by the claimants. It was further argued that the route chart filed by the owner and the driver of the offending vehicle clearly showed that the offending vehicle did not ply on the route on which the accident took place and the allegation of the claimants that the accident took place because of rash and negligent driving of the offending vehicle was false. It was further argued that the site plan prepared by the police in Case Crime No. 476 of 2014 showed that the accident happened in front of Heera Complex and not in front of Bajrang Hospital as alleged by the claimants. It was argued that the documentary evidence on record clearly contradicted the case of the claimants. It was further argued that the Tribunal has ignored the aforesaid evidence which went to show that a false case was set-up by the claimants to get compensation and the findings of the Tribunal on Issue No. 1 are contrary to the evidence on record and are liable to be set-aside. It was argued that for the aforesaid reasons, First Appeal From Order No. 817 of 2016 is to be allowed and the award dated 30.5.2016 passed by the Tribunal is to be set-aside.

8. Rebutting the arguments of the counsel for the appellant, the counsel for the claimants has supported the reasons given by the Tribunal in support of its findings and has argued that the accident was proved by the testimony of P.W. - 2, who was an eye-witness to the incident. It was argued that the discharge certificate issued by the Medical Officer of K.G.M.U. did not correctly record the date of admission of the deceased and the fact that the deceased was admitted in K.G.M.U. on 22.12.2014 was proved by other documents available on record, especially Paper Nos. C-24/1 and C-24/2. It was argued that the evidence on record clearly showed that the deceased died due to the injuries caused in the accident which took place because of rash and negligent driving of the offending vehicle and there is no error in the findings of the Tribunal on Issue Nos. 1 and 2. It was further argued that the Tribunal has awarded very meager compensation to the deceased and the compensation had to be computed on a notional income of Rs.200/- per day. It was further argued that the Tribunal has awarded very meager amount for loss of consortium and loss of love and affection to the claimants and for the funeral expenses and the Tribunal has not awarded any amount to the claimants for

loss of estate. It was argued that the claimants were entitled to separate compensation for loss of consortium and loss of love and affection. It was argued that in the aforesaid circumstances, the compensation is to be enhanced and the award of the Tribunal is to be modified. It was argued that for the aforesaid reasons, First Appeal From Order No. 51 of 2018 is to be allowed and First Appeal From Order No. 817 of 2016 is liable to be dismissed.

9. I have considered the rival submissions of the counsel for the parties and also perused the records.

10. It is settled law that in claim cases registered under the Act, 1988, the claimants are required to establish their case on the touchstone of preponderance of probability and the standard of proof beyond reasonable doubt is not applied while inquiring into the case. Further, in ***Ravi vs Badrinarayan & Ors. 2011 (4) SCC 693,*** it was observed that mere delay in registering a First Information Report regarding the accident cannot be a ground to doubt the case of the claimants. It was observed by the Supreme Court that if there was no indication of fabrication or concoction to implicate innocent persons then, even if there was a delay in lodging the First Information Report, the claim case cannot be dismissed merely on that ground and delay in lodging the First Information Report cannot be treated as fatal to the case of the claimants. It is the case of the claimants that the accident occurred on 22.12.2014. The injured died on 6.1.2015. The injured, according to the claimants, was admitted in the Trauma Centre in K.G.M.U. on 22.12.2014 itself. Apparently, the family of the deceased was occupied in the treatment of the deceased. From the said reason, the case of the claimants cannot be rejected only on the ground that the First Information Report was registered nine days after the incident.

11. In his testimony, the plaintiff witness no. 2, who is an eye-witness of the accident, has stated that he and the deceased, were going on their bicycles to join their duties and when they were in front of Bajrang Hospital, the offending vehicle hit the bicycle of the deceased from the front resulting in injuries to Sushil. It has been stated by P.W. - 2 that he initially got Sushil admitted in Bajrang Hospital from where the deceased was referred to Trauma Centre in K.G.M.U. and consequently he got the deceased admitted in Trauma Centre in K.G.M.U. on 22.12.2014 itself. The fact that the injured / deceased was admitted in the Trauma Centre on 22.12.2014 has also been proved by the plaintiff witness no. 1, who is the wife of the deceased. The discharge slip issued by the Medical Officer on duty of K.G.M.U. shows that the deceased was admitted in the Trauma Centre on 23.12.2014. However, Paper No. C-22/15 which is a receipt issued by the Care Diagnostic Private Ltd. shows that the deceased was referred by Doctor Bajrang Hospital on 22.12.2014 and Paper Nos. C-24/1 and C-24/2 also show that the deceased was given medicine by the K.G.M.U. Welfare Society, Lucknow on 22.12.2014 itself. Paper Nos. C-24/1 and C-24/2 indicate that the injured was an In-patient on the date the receipts were issued, i.e., 22.12.2014. Paper Nos. C-24/1 and C-24/2 have not been denied by the defendants and the authenticity of the said documents have not been questioned by the defendants. The Medical Officer on duty who issued the discharge certificate was not examined by either of the parties. There can be many reasons for the entry in the

discharge slip showing that the injured was admitted in the Trauma Centre on 23.12.2014. The said entry could be an error caused due to over sight or could be because the deceased may not have been officially admitted on the said date in the Trauma Centre because of shortage of space / beds and may have been admitted on the next date after space / bed was available. It is common knowledge that many times patients are unofficially acommodated in the verandahs and galleries of the hospitals because of shortage of space and beds in the hospitals but are treated by the doctors and are admitted officially only when beds are vacated by the already admitted patients. The aforesaid practice explains the entries in Paper Nos. C-24/1 and C-24/2. It may also be noted that P.W. - 2 who got the deceased admitted in Trauma Centre was not cross-examined by the opposite parties regarding the entries in the discharge slip even though from the cross-examination of P.W. - 1, it appears that the attention of P.W. - 1 was brought to the aforesaid entry in the discharge slip. P.W. - 1 is not an eye-witness of the incident or the fact regarding admission of the injured / deceased in the Trauma Centre on 22.12.2014 and in her testimony, P.W. - 1 has stated that she did not go to K.G.M.U. but has testified that her husband was taken to K.G.M.U. from Bajrang Hospital by P.W. - 2 on the same date. In light of the aforesaid, the testimony of P.W. - 2 cannot be rejected merely on the ground that the date of admission of the deceased in the Trauma Centre as stated by P.W. - 1 and P.W. - 2 is different from the date of his admission in the Trauma Centre as recorded in the discharge slip.

12. It was also argued by the counsel for the appellant that the site plan also falsifies the testimony of P.W. - 2 in as much as in his testimony, the P.W. - 2 has stated that the accident occurred in front of Bajrang Hospital while the site plan shows that the accident occurred in front of Heera Complex. I have perused the site plan prepared by the police in Case Crime No. 476 of 2014 which is part of the paper book submitted by the appellant. A perusal of the site plan shows that both Heera Complex and Bajrang Hospital are adjacent to the road on which the accident took place. Heera Complex is on the north side of the road while Bajrang Hospital is on the south side of the road. The site plan does show that the accident occurred on the north side of the road which is adjacent to Heera Complex. But in light of the locations of Bajrang Hospital and Heera Complex as well as the fact that the injured was immediately shifted to Bajrang Hospital, not much importance is to be given to the difference between the statement of P.W. - 2 and the site plan regarding location of different buildings.

13. The route chart of the offending vehicle filed by the defendant does not by itself disprove the case of the claimants as there is no evidence that the offending vehicle had scrupulously followed the schedule given in the route chart.

14. The accident has been proved by the testimony of P.W. - 2, who is an eye-witness of the incident. A charge-sheet has also been filed by the police against the driver of the offending vehicle in Case Crime No. 476 of 2014. The post-mortem indicates that death occurred due to ante-mortem injuries and the nature of the injuries shows that the same were caused in an accident. In light of the aforesaid, the evidence on record proves that Sushil was injured on 22.12.2014 in the accident that took place due to rash and negligent driving

of the offending vehicle and subsequently died due to the injuries caused in the accident. The findings of the Tribunal on Issue No. 1 are affirmed.

15. So far as the findings of the Tribunal on Issue No. 2 is concerned, there is no evidence to show any contributory negligence of the deceased. The site plan submitted by the police indicates that the deceased was on the left side of the road. In view of the aforesaid, the findings of the Tribunal on Issue No. 2 are also affirmed.

16. So far as the findings on Issue Nos. 3 and 4 are concerned, the same have not been challenged by the Insurance Company in their present appeal. The policy documents filed by the owner of the vehicle showed that the vehicle was insured with the appellant from 15.10.2014 to 14.10.2015. The accident took place on 22.12.2014. The vehicle was insured with the appellant on the date of accident. Similarly, the driver of the offending vehicle was issued a driving licence on 19.10.2004 which was valid till 18.7.2023. In light of the aforesaid, the findings of the Tribunal on Issue Nos. 3 and 4 are also affirmed.

17. So far as the grant of compensation to the claimants is concerned, the Tribunal has held the age of the deceased as 24 years old. The findings of the Tribunal on the age of the deceased has not been challenged either by the claimants or the appellant. In light of the aforesaid, the compensation has to be computed holding the age of the deceased to be 24 years.

18. It was the case of the claimants that the deceased worked as a Loader with Usha Company and with private traders and earned Rs.9,000/- per month. The said fact has been testified by P.W. - 1. In his testimony, the P.W. - 2 has also stated that the deceased was going with him to join his duty at Usha Company and they were the employees of the contractor engaged by the Usha Company and did the job of a Loader. However, there is no document on record to prove the income of the deceased. The Tribunal has computed the compensation payable to the claimants on the notional income of the deceased as Rs.100/- per day.

19. In **New India Assurance Co. Ltd. vs Smt. Resha Devi & Others (2017) 3 ADJ 685,** a Division Bench of this Court held that the notional income of an unskilled labour cannot be taken to be less than Rs.200/- per day. The observations of this Court in Paragraph Nos. 9 and 11 are reproduced below :-

"9. The next submission of the learned counsel for the appellant that income of Rs.100/- per day presumed by the tribunal is extremely on higher side is without any force and not liable to be accepted. Tribunal in recording the said claim has relied upon the judgment of the Hon'ble Apex Court in the case of Laxmi Devi and another Vs. Mohammad Tabbar and others, 2008 (2) TAC 394 SC wherein notional income to unskilled labour was presumed to be Rs.100/- per day. Much water has flown since 2008. It is a matter of common knowledge that with the rise in price index, there has been considerable increase in the wages of salaried as well as self employed person. ***The average income of even a daily labour in 2014 when the accident took place cannot be presumed to be less than Rs.200/- per day****. In our considered opinion, the tribunal committed a manifest error of law in presuming the notional income of the deceased to be Rs.100/- per day.*

10. .....

11. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations. Obviously award of damages would depend upon the particular facts and circumstances of the case but the element of fairness in the amount of compensation so determined is the ultimate guiding factor. In such view of the matter, presumption of Rs.100/- per day as notional income even for a unskilled labour in the year 2014 appears to us to be frugal and by no stretch of imagination to be just even the minimum wages fixed by the State Government is much higher than that looking to the rise in cost index. We are of the considered upon that notional income of an unskilled labour could not be less than Rs.200/- per day."

(emphasis added)

20. In the present case, the accident occurred in 2014. Following the judgment of the Division Bench of this Court, it would be just to treat the notional income of the deceased as Rs. 200/- per day, i.e., Rs.6,000/- per month.

21. The opposite party no. 1 / claimant no. 1 is the father of the deceased, opposite party no. 2 / claimant no. 2 is the mother of the deceased, opposite party no. 3 / claimant no. 3 is the wife of the deceased and opposite party no. 4 / claimant no. 4 is the minor son of the deceased. In ***United India Insurance Company Ltd. vs. Satinder Kaur @ Satwinder Kaur & Ors., 2021 (11) SCC 780,*** it has been held that "subject to evidence to the contrary, the father was likely to have his own income and would not be considered to be a dependent, hence, the mother alone will be considered to be a dependent.' The claimants have not filed any evidence to show that the father of the deceased had no income of his own. In view of the judgment of the Supreme Court in ***Satinder Kaur (supra)***, only the mother, the wife and the minor son of the deceased shall be considered his dependent for deciding the deductions to be made towards personal and living expenses of the deceased. It was held in ***Sarla Verma (Smt) & Ors. vs Delhi Transport Corporation & Anr. 2009 (6) SCC 121*** that where the dependent family members of the deceased are 2 to 3, 1/3 is to be deducted towards personal and living expenses of the deceased. The Tribunal has wrongly deducted 1/4 as personal and living expenses of the deceased on the premise that more than three persons were dependent on the deceased. In view of the aforesaid, 1/3 is to be deducted towards personal and living expenses of the deceased.

22. The deceased was 24 years old and, therefore, according to ***Sarla Verma (supra),*** a multiplier of 18 has to be applied while computing the compensation payable to the claimants.

23. In ***Kirti & Anr. vs Oriental Insurance Company Ltd. 2021 (2) SCC 166***, the Supreme Court has held that adding future prospects where compensation is computed on the notional income of the deceased is a component of just compensation. The observations of the Supreme Court in Paragraph Nos. 13 and 39 of the aforesaid judgment are reproduced below :-

"13. Given how both deceased were below 40 years and how they have not

*been established to be permanent employees, future prospects to the tune of 40% must be paid. T**he argument that no such future prospects ought to be allowed for those with notional income, is both incorrect in law and without merit considering the constant** inflation-induced increase in wages. It would be sufficient to quote the observations of this Court in Hem Raj v. Oriental Insurance Co. Ltd., as it puts at rest any argument concerning non-payment of future prospects to the deceased in the present case:*

"7. We are of the view that there cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in the facts and circumstances of a case. Both the situations stand at the same footing. Accordingly, in the present case, addition of 40% to the income assessed by the Tribunal is required to be made."

39. Taking the above rationale into account, the situation is quite clear with respect to notional income determined by a court in the first category of cases outlined earlier, those where the victim is proved to be employed but claimants are unable to prove the income before the court. Once the victim has been proved to be employed at some venture, the necessary corollary is that they would be earning an income. It is clear that no rational distinction can be drawn with respect to the granting of future prospects merely on the basis that their income was not proved, particularly when the court has determined their notional income."

(emphasis added)

24. Thus, the future prospects have to be added in the notional income of the deceased. The deceased was 24 years old. The proportion of the income to be added in the future prospects of the deceased shall be considered subsequently in the judgment. At this stage, it may be noted that 50% has been added by the Tribunal as future prospects in the income of the deceased.

25. It was argued by the counsel for the claimants that the claimants were entitled to separate compensation for loss of consortium as awarded in ***Magma General Insurance Company Ltd. vs. Nanu Ram 2018 SCC OnLine SC 1546*** and also for loss of love and affection and the amount to be awarded in the aforesaid categories is to be decided on the basis of the amounts awarded in **National Insurance Company Ltd. vs Pranay Sethi & Ors. (2017) 16 SCC 680** as well as Magma General Insurance (supra). It was also argued by the counsel for the claimants that the claimants are entitled to compensation for loss of estate and funeral expenses as held in ***Pranay Sethi (supra).***

26. There is some difference between the parameters for award of compensation as prescribed by Rule 220-A and the principles for award of compensation as laid down by the Supreme Court in its different judgments. Two differences which are relevant for the present case are considered below.

27. Rule 220-A (3) of the Rules, 1998 provides that 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 years of age : 30% of the salary

(iii) More than 50 years of age : 20% of the salary

*(iv) W**hen wages not sufficiently proved. : 50% towards inflation and price index.***

28. In ***Pranay Sethi (supra)***, the Supreme Court endorsed addition of 50% as future prospects in the established income of the deceased if he was below 40 years and was in a permanent job, 30% if he was between 40 and 50 years and 15% if the deceased was between 50 to 60 years. It was further laid down in ***Pranay Sethi (supra)*** that if the deceased was self employed or on a fixed salary, 40% should be added as future prospects in his established income if he was less than 40 years, 25% should be added if he was between the age of 40 and 50 years and 10% should be added if he was between 50 and 60 years. In ***Pranay Sethi (supra)***, it was laid down that there should be no addition of future prospects in the income of the deceased if he was more than 60 years. The relevant observations of the Supreme Court in ***Pranay Sethi (supra)*** are reproduced below : -

"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 thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. 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.*

59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

(emphasis added)

29. The difference between the parameters prescribed by Rule 220-A(3) for addition of future prospects in the income of the deceased and the norms, for the said purpose, laid down in ***Pranay Sethi (supra)*** are evident. The difference is not only regarding the percentage of the income of the deceased which is to be added as future prospects while determining compensation but also regarding the age of the deceased till which future prospects are to be added to his income. ***Pranay Sethi (supra)*** recommends that there should be no addition of future prospects if the deceased was above 60 years while Rule 220-A(3) provides for addition of 20% as future prospects in the income of the deceased if he was above 50 years and prescribes no maximum age after which future prospects are not to be added in the income of the deceased. Further, for the purposes of adding future prospects, Rule 220-A(3) does not differentiate between a deceased who had a permanent job and a deceased who was on a fixed salary or a deceased whose income is determined on minimum wages while in Pranay Sethi (supra) different norms have been prescribed for adding future prospects in cases of deceased who had a permanent job and a deceased who was on a fixed salary. No standard has been laid down in Pranay Sethi (supra) for adding future prospects in case the income of the deceased is determined on the basis of minimum wages payable to skilled, semi-skilled or unskilled worker at the relevant time.

30. The other difference between the principles laid down by the Supreme Court in its different judgments and the norms prescribed by Rule 220-A is regarding the different category of non-pecuniary damages payable as compensation.

31. The Supreme Court in ***Pranay Sethi (supra***) referred to only three conventional heads, namely, loss of estate, loss of consortium and funeral expenses which are to be awarded to the claimants under Section 166 of the Act, 1988. In ***Pranay Sethi (supra),*** it was laid down that compensation under the aforesaid conventional heads should be Rs.15,000/-, Rs.40,000/- and Rs.15,000/-, respectively. In ***Magma General (supra)***, the Supreme Court awarded compensations for both loss of love and affection and for loss of consortium. The compensation for loss of love and affection was determined as Rs.50,000/- and the compensation for loss of consortium, in accordance with ***Pranay Sethi (supra),*** was determined as Rs.40,000/-. The compensation under the aforesaid heads were paid separately to each of the claimants by the Supreme Court in Magma General (supra). However, subsequently, the Supreme Court in ***Satinder Kaur (supra***) held that loss of love and affection is included in loss of consortium and, therefore, there was no justification to award compensation towards loss of love and affection as a separate category. In ***Satinder Kaur (supra),*** the Supreme Court observed that in ***Pranay Sethi (supra)*** the Constitution Bench had held that in death cases, compensation would be awarded only under three conventional heads, viz - loss of estate, loss of consortium and funeral expenses. The aforesaid principle was reiterated by the Supreme Court in The ***New India Assurance Company Ltd. vs. Smt. Somwati & Ors., (2020) 9 SCC 644.***

32. However, Rule 220-A(4) of the Rules, 1998 identifies 'loss of love and affection' and 'loss of consortium' as separate categories of non-pecuniary damages. Rule 220-A(4) of the Rules, 1998 is reproduced below :-

"(4) The non-pecuniary damages shall also be payable in the compensation as follow :-

(i) Compensation for loss of estate : Rs. 5,000 to Rs. 10,000

(ii) Compensation for loss of consortium : Rs. 5,000 to Rs. 10,000

(iii) Compensation for loss of love and affection : Rs. 5,000 to Rs. 15,000

(iv) Funeral expenses costs of transportation of body : Rs. 5,000 or actual expenses whichever is less

(v) Medical expenses : actual expenses proved to the satisfaction of the Claims Tribunal."

33. A reading of the judgments of the Supreme Court in ***Pranay Sethi (supra), Satinder Kaur (supra) and Smt. Somwati (supra)*** do not indicate that Rules, 1998 were brought to the notice of the Supreme Court in the aforesaid cases. Subsequently, the Supreme Court in ***New India Assurance Company Ltd. vs. Urmila Shukla & Ors. 2021 SCC OnLine SC 822*** held that if an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in ***Pranay Sethi (supra)*** cannot be taken to have limited the operation of such statutory provision especially when the validity of the statute was not put under challenge. It was observed by the Supreme Court that 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. The issue before the Supreme Court in ***Urmila Shukla (supra)*** was whether in accordance with Rule 220-A(3)(iii), 20% was to be added as future prospects in the income of the deceased if the deceased was above 50 years or whether the addition is to be 15% as laid down in ***Pranay Sethi (supra***). The Supreme Court, in ***Urmila Shukla (supra)***, applying the principle stated before, affirmed the award of the Tribunal and the High Court which had added 20% as future prospects in the income of the deceased who was above 50 years. The observations of the Supreme Court from Paragraph Nos. 8 to 11 are reproduced below :-

"8. It is submitted by Mr. Rao that the judgment in Pranay Sethi does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in Pranay Sethi. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in Pranay Sethi ought not to be considered to limit the application of such statutory Rule.

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 in Pranay Sethi was 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 in Pranay Sethi cannot 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 in Pranay Sethi cannot 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."

(emphasis added)

34. There is no reason or logic to restrict the principle enumerated in ***Urmila Shukla (supra)*** only to the difference between Rule 220-A(3)(iii) and the norms laid down in ***Pranay Sethi (supra).*** The principle enumerated in ***Urmila Shukla (supra)*** is that if a statutory instrument affords ***greater or better benefits***, said statutory instrument shall operate and the norms laid down by different judicial precedents shall not limit the operation of such statutory instrument. It is to be noted that the statutory instrument shall prevail over the norms laid down by judicial precedents only to the extent it gives greater or better benefit than the judicial precedents. If the norms laid down by judicial pronouncements give greater or better benefit than the formula devised by the statutory instrument, the judicial precedents shall prevail over the statutory instrument. ***In other words, just compensation under Section 168 of the Act, 1988 is to be determined applying the norms prescribed in Rule 220-A and the principles laid down by the judicial precedents, whichever gives greater or better benefit to the claimants.***

35. Rule 220-A(4) of Rules, 1998 identifies 'loss of consortium' and 'loss of love and affection' as different heads for award of non-pecuniary damages. In that respect, Rule 220-A(4) gives better benefit than the principles laid down by the Supreme Court in **Satinder Kaur (supra)** which held that 'loss of love and affection' is included in "loss of consortium' and no separate compensation is to be paid for loss of love and affection. However, so far as the amount to be awarded under the conventional heads is concerned, the amounts prescribed in ***Pranay Sethi (supra) and Magma General (supra)*** give greater benefit than Rule 220-A.

36. Thus, the categories under which the non-pecuniary damages are to be awarded is to be decided in light of Rule 220-A(4) and the amount to be awarded under the aforesaid categories is to be the amount fixed by the Supreme Court in ***Pranay Sethi (supra) and Magma General (supra)***. Further, future prospects is to be added in the income of the deceased on the formula prescribed in Rule 220-A(3) of the Rules, 1998.

37. It is clarified that compensation on the aforesaid principle is to be determined in cases of accidents that took place after 26.9.2011 as Rule 220-A was inserted in Rules, 1998 with effect from 26.9.2011.

38. Applying the aforesaid principle in the present case, the compensation is to be determined on notional income of the deceased which in turn, is to be determined on the

minimum wages of an unskilled labour and as the deceased was 24 years old, therefore, in accordance with the Rules, 1998, 50% has to be added as future prospects in his notional income while determining the multiplicand.

39. It is further held that the claimants were entitled to separate compensations for both 'loss of consortium' and for 'loss of love and affection.'

40. In light of the principles enumerated above, the compensation to be awarded to the claimants is computed as follows :-

(1) Monthly income of the deceased = Rs.6,000/- per month, i.e., Rs.72,000/- per annum.

(2) Addition of 50% as future prospects = Rs.36,000/-.

Thus, total income of the deceased for purposes of compensation = Rs.1,08,000/-

(3) Deductions of 1/3 towards personal and living expenses of the deceased = Rs.36,000/-

(4) Thus, the multiplicand = Rs.72,000/- (Rs.1,08,000 - Rs. 36,000)

(5) Thus, the pecuniary damages payable to the claimants = Rs. 12,96,000/- (72,000 x 18)

(6) Loss of filial consortium to opposite party no. 1 / claimant no. 1 and opposite party no. 2 / claimant no. 2 = Rs.40,000 x 2 = Rs.80,000/- (Rs.40,000 to each of the claimants).

(7) Loss of spousal consortium to opposite party no. 3 / claimant no. 3 = Rs.40,000/-.

(8) Loss of parental consortium to opposite party no. 4 / claimant no. 4 = Rs.40,000/-.

(9) Loss of love and affection to opposite party nos. 1 to 4 / claimant nos. 1 to 4 = Rs.50,000 x 4 = Rs.2,00,000/- (Rs.50,000 to each of the claimants).

(10) Loss of estate = Rs.15,000/-.

(11) Funeral expenses = Rs.15,000/-.

(12) Medical expenses in the treatment of the injured / deceased = Rs.25,078/-

Thus, total compensation = Rs.17,11,078/- [Adding Item Nos. 5 to 12]

41. ***Thus, it is held that the claimants are entitled to a compensation of Rs.17,11,078/-.*** The claimants shall be entitled to interest at the rate of 7% per annum as awarded by the Tribunal. First Appeal From Order No. 817 of 2016 is dismissed and First Appeal From Order No. 51 of 2018 is allowed and the award of the Tribunal is modified to the aforesaid extent.

42. The pecuniary damages determined above at Item No. 5 along with the interest accruing on the same shall be divided equally between opposite party no. 3 / claimant no. 3 and opposite party no. 4 / claimant no. 4. The opposite party no. 3 / claimant no. 3 shall also be paid the compensation for loss of spousal consortium, loss of estate, funeral expenses and loss of love and affection as computed above along with the interest accruing on the same. The opposite party nos. 1 and 2 / claimant nos. 1 and 2 shall be paid the compensation computed above for loss of filial consortium and for loss of love and

affection along with the interest accruing on the same. The opposite party no. 4 / claimant no. 4 shall be paid the compensation computed above for loss of parental consortium and for loss of love and affection along with the interest accruing on the same. The medical expenses incurred on the treatment of the deceased shall be divided equally between opposite party no. 1 / claimant no. 1 and opposite party no. 3 / claimant no. 3.

43. The balance amount / excess amount as awarded by this Court in the present appeals shall be deposited by the National Insurance Company Ltd., Lucknow in the Tribunal within three months from today. The amount so deposited by the National Insurance Company Ltd. under the present order of this Court, shall in turn be deposited by the Motor Accident Claims Tribunal, Lucknow in the highest interest bearing fixed deposit schemes, either of the post office or of any nationalized bank. The receipts of the fixed deposit shall be handed over to the claimants who shall be entitled to withdraw the maturity amount on the maturity of the fixed deposits. The maturity amount shall be credited by the bank/post office in any savings account held by the claimants singly. The concerned bank or post office shall not permit any loan or advance against the fixed deposits made in favour of the claimants. The Tribunal, while depositing the amount in any fixed deposit scheme, shall communicate the directions issued by this Court to the concerned bank/post office.

44. With the aforesaid directions and observations, First Appeal From Order No. 817 of 2016 is ***dismissed*** and First Appeal From Order No. 51 of 2018 is ***allowed***. Parties shall bear their own cost.

45. The office shall transmit the records of the case to the Tribunal, at the earliest.

(2022)06ILR A1214
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.06.2022

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

First Appeal From Order No. 566 of 2016
With
First Appeal From Order No. 145 of 2017

New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Washeema Bano & Ors. ...Respondents

Counsel for the Appellant:
Sri Asit Srivastava

Counsel for the Respondents:
Sri Satendra Nath Rai

A. Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 - Sections 166 & 173 - n U.P. Motor Vehicle Rules, 1998, R. 203-A, 211-A - Site Plan - under Rule 203-A of the Rules 1998, the Investigating Police Officer is enjoined to prepare a site plan of the accident, and submit it to the Claims Tribunal - By virtue of Section 211-A of the Rules, 1998 the site plan submitted under Rule 203-A is presumed to be correct and is to be read in evidence without formal proof unless proved contrary – in the instant case site plan shows that the offending vehicle was initially on the left side but subsequently turned right causing the accident which is corroborated by the testimony of P.W. 2 (Para 18)

B. Civil Law - Motor Accident Claim - Motor Vehicles Act, 1988 – Charge-sheet –

Relevance - charge-sheet is an important piece of evidence in motor accident claim cases where proof of accident required is not proof beyond reasonable doubt, but the case has to be considered on the touchstone of preponderance of probability- In the instant case, Charge-sheet against the driver of the offending vehicle filed - filing of a charge-sheet against the driver of the offending vehicle prima facie points to his culpability - First Information Report, the charge-sheet, the site plan and the testimony of the P.W. 2 read jointly and as a whole prove the case of the claimants that the accident was caused due to rash and negligent driving of the offending vehicle (Para 20)

C. Civil Law - Motor Accident Claim - Motor Vehicles Act - Major sons entitled for compensation - Tribunal refused compensation to respondent Nos. 3 to 6 on the ground that they were major at the time of accident, and were therefore not entitled to compensation – Held - compensation to the legal representatives of the deceased who are major is not limited only to conventional heads and they may be entitled to compensation for loss of dependency even if they are earning members (Para 25)

D. Civil Law - Motor Accident Claim - Motor Vehicles Act - Claim - future prospects - if a statutory instrument affords greater or better benefits, said statutory instrument shall operate and the norms laid down by different judicial precedents shall not limit the operation of such statutory instrument - statutory instrument shall prevail over the norms laid down by judicial precedents only to the extent it gives greater or better benefit than the judicial precedents - If the norms laid down by judicial pronouncements give greater or better benefit than the formula devised by the statutory instrument, the judicial precedents shall 20 prevail over the statutory instrument. - Supreme Court, in Urmila Shukla case affirmed the award of the Tribunal and the High Court which had added 20% as future prospects in the income of the deceased who was above 50 years- Held - deceased more than 50 years of age - in accordance with Rule 220-A(3) of the Rules, 1998, 20% had to be added as future prospects in the established income of the deceased (Para 36, 40)

E. Civil Law - Motor Accident Claim - Motor Vehicles Act - Claim - 'loss of consortium' and 'loss of love and affection' - Rule 220-A(4) of Rules, 1998 identifies 'loss of consortium' and 'loss of love and affection' as different heads for award of non-pecuniary damages - Rule 220-A(4) gives better benefit than the principles laid down by the Supreme Court in Satinder Kaur (supra) which held that no separate compensation is to be paid for loss of love and affection - so far as the amount to be awarded under the conventional heads is concerned, the amounts prescribed in Pranay Sethi case and Magma General case give greater benefit than Rule 220- A - the categories under which the non-pecuniary damages are to be awarded is to be decided in light of Rule 220- A(4) and the amount to be awarded under the aforesaid categories is to be the amount fixed by the Supreme Court in Pranay Sethi (supra) and Magma General (supra) - claimants were entitled separate compensations under both categories, i.e., for loss of love and affection and also for loss of consortium - compensation for loss of love and affection determined as Rs.50,000/- and the compensation for loss of consortium, determined as Rs.40,000/ (para 37, 38)

Dismissed (E-5)

List of Cases cited:-

1. National Insurance Company Ltd. Vs Pranay Sethi & ors., (2017) 16 S.C.C. 680

2. Magma General Insurance Company Ltd. Vs Nanu Ram, (2018) SCC OnLine SC 1546

3. Anita Sharma Vs New India Assurance Company Limited & anr., (2021) 1 S.C.C. 171

4. Mangla Ram Vs Oriental Insurance Company Limited & ors., (2018) 5 S.C.C. 656

5. Dr. Anoop Kumar Bhattacharya & anr. Vs National Insurance Co. Ltd., (2021) 12 ADJ 596

6. National Insurance Company Limited Vs Birender & ors., (2020) 11 S.C.C. 356

7. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors., (2021) 11 S.C.C. 780

8. Sarla Verma (Smt) & ors. Vs Delhi Transport Corporation & anr., 2009 (6) SCC 121

9. The New India Assurance Company Ltd. Vs Smt. Somwati & ors., (2020) 9 SCC 644

10. New India Assurance Company Ltd. Vs Urmila Shukla & ors., (2021) SCC OnLine SC 822

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

1. Both the First Appeals From Order have been filed under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as, 'Act, 1988') and arise from the same award of the Tribunal, i.e., the judgment and award dated 26.3.2016 passed by the Motor Accident Claims Tribunal/FTC Court, District-Lakhimpur Kheri (hereinafter referred to as, 'Tribunal') in Motor Accident Claim Petition No. 339 of 2014 and were therefore connected and have been heard together.

2. Motor Accident Claim Petition No. 566 of 2016 has been filed by the Insurance Company, which was one of the defendant in Motor Accident Claim Petition No. 339 of 2014 and has been filed to set aside the award dated 26.3.2016. Motor Accident Claim Petition No. 145 of 2017 has been filed by the claimants for enhancement of compensation. The Insurance Company is the appellant in F.A.F.O. No. 566 of 2016 and shall be referred as Insurance Company in the present judgement, the claimants are respondent Nos. 1 to 8 in the aforesaid appeal and shall be referred as claimants in the present judgement. The owner of the offending vehicle is respondent No. 9 in F.A.F.O. No. 566 of 2016 and shall be referred as the owner of the vehicle. The driver of the offending vehicle has been arrayed as respondent No. 10 in F.A.F.O. No. 566 of 2016 and shall be referred as driver of the offending vehicle in the present

3. Claimant No. 1 is the wife of the deceased, claimant No. 2 is the mother of the deceased, claimant Nos. 3 to 7 are the sons of the deceased and claimant No. 8 is the daughter of the deceased. On the date of the accident claimant Nos. 3 to 6 were major and between 18 to 23 years.

4. The order-sheet of the First Appeal From Order No. 145 of 2017 shows that vide order dated 13.12.2017 a Division Bench of this Court had condoned the delay in filing the aforesaid appeal. However, it appears that regular number has not yet been allotted to First Appeal From Order No. 145 of 2017 and the records reflect the defective number. However, as the delay in filing the appeal has been condoned, the Court proceeded to hear the appeal on merits. Apart from the aforesaid, the order-sheet of the case also indicates that service of notice on the owner of the vehicle was held to be sufficient, but service of notice on the driver of he offending vehicle, who has been arrayed as respondent No. 2 in First Appeal From Order No. 145 of 2017, was held not to be sufficient by noting dated 1.3.2019 of the Joint Registrar (J)(L). However, as the Insurance Company has

not questioned the award of the Tribunal so far as the award holds it liable to indemnify the owner of the vehicle, therefore, the Court has proceeded to hear both the appeals on merits without waiting for service of notice of the appeal on the driver of the offending vehicle.

5. The facts of the case are that the claimants instituted Motor Accident Claim Petition Case No. 339 of 2014 before the Tribunal alleging that one Rafiq (hereinafter referred to as, "deceased') was killed in an accident which happened on 1.8.2014 due to rash and negligent driving of a tanker bearing Registration No. UP 31 T 5208 (hereinafter referred to as, "offending vehicle'). It was stated in the claim petition that on 1.8.2014 at 4:30 p.m. the deceased was going on a motorcycle to join his duties when the offending vehicle hit the motorcycle from the front as a result of which the deceased suffered injuries and subsequently died on 17.8.2014 due to the aforesaid injuries. It was further stated in the claim petition that the deceased was aged 45 years and was working as Fodder Cutter in the Forest Department getting a salary of Rs. 26,280/- per month and the claimants were dependent on the deceased. On the aforesaid pleadings the claimants sought compensation of Rs. 50 lacs for the death of Rafiq. It is also on record that a First Information Report registering Case Crime No. 630 of 2014 under Sections 279, 358 and 427 I.P.C. was registered against the driver of the offending vehicle on 4.8.2014 and a charge-sheet against the driver has been filed in the aforesaid case.

6. The owner and the driver of the offending vehicle as well as the Insurance Company contested the appeal and filed their written statements. In their written statements the owner and driver of the offending vehicle denied the involvement of the offending vehicle in the accident and also the allegation regarding negligence of the driver in causing the accident. The Insurance Company also filed its written statement contesting the claim petition and, apart from denying the involvement of the vehicle in the accident, the Insurance Company also pleaded that the accident occurred because of the negligence of the deceased. It was also pleaded by the Insurance Company that the deceased was more than 55 years of age at the time of accident and did not have a valid driving license at the time of accident.

7. On the pleadings of the parties, the Tribunal framed five issues. Issue No. 1 was as to whether on 1.8.2014 at 4:30 p.m. the deceased was injured in an accident caused due to rash and negligent driving of the offending vehicle and died on 17.8.2014 because of the injuries caused in the accident. Issue No. 2 was as to whether at the time of accident the driver of the offending vehicle had a valid driving license. Issue No. 3 was as to whether at the time of the accident the offending vehicle was insured with the Insurance Company and Issue No. 4 was as to whether at the time of the accident the offending vehicle was being driven contrary to the terms of the insurance contract. Issue No. 5 framed by the Tribunal was regarding entitlement of the claimants to compensation, the amount of compensation they were entitled to and the defendant liabl

8. Before the Tribunal, the claimants filed the First Information Report registering Case Crime No. 630 of 2014 (marked as Paper No. 6Ga and 28Ga/2 in the Tribunal), the Post-Mortem Report of the deceased (marked as Paper No. 8Ga in

the Tribunal), the Charge-sheet filed against the driver of the offending vehicle (marked as Paper No. 28Ga/10 in the Tribunal), the site plan prepared by the Investigating Officer in Case Crime No. 630 of 2014 (marked as Paper No. 28Ga/8in the Tribunal), the driving license of the deceased (marked as Paper No. 46Ga in the Tribunal), pay bills of the deceased (marked as Paper Nos. 48Ga to 50Ga in the Tribunal), service book of the deceased (marked as Paper No. 47Ga in the Tribunal) and receipts showing medical expenses incurred in the treatment of the deceased (marked as paper Nos. 30Ga/1 and 30Ga/135 in the Tribunal). The owner and the driver of the offending vehicle filed the driving license of the driver of the offending vehicle, fitness certificate and the insurance cover note of the offending vehicle as well as tax receipts relating to the offending vehicle.

9. In the Tribunal, the claimant No. 1 deposed as plaintiff-witness No. 1 and one Mohd. Farooq, who is the eye-witness of the incident deposed as plaintiff-witness No. 2.

10. The Tribunal after considering the testimony of P.W. 2, the First Information Report, the charge-sheet filed against the owner of the offending vehicle, the site plan and the postmortem report of the deceased, decided Issue No. 1 in favour of the claimants and against the defendants. While recording its findings on issue No. 1, the Tribunal rejected the arguments of the defendants regarding any contributory negligence by the deceased.

11. Issue Nos. 2, 3 and 4 were decided in favour of the owner of the offending vehicle and against the Insurance Company.

12. So far as issue No. 5 is concerned, the Tribunal held the Insurance Company liable to pay compensation and awarded a total compensation of Rs. 23,32,640/- with 7% simple interest from the date of filing of the claim petition. The Tribunal held the age of the deceased to be 52 years on the basis of his driving license and therefore applied a multiplier of 11 while determining the loss of dependency caused due to the death of the deceased. Relying on the salary bills of the deceased, the Tribunal determined the multiplicand as Rs. 26,280/- and deducted 1/3 as personal and living expenses of the deceased. The Tribunal did not make any allowance for future prospects while determining the loss of dependency and paid Rs. 5,000/- for funeral expenses, loss of love and affection and loss of consortium and Rs. 10,000/- for medical expenses incurred by the claimants in the treatment of the deceased. The Tribunal has awarded compensation only to the claimant Nos. 1, 2, 7 and 8 and has refused compensation to respondent Nos. 3 to 6 on the ground that they were major at the time of accident.

13. It was argued by the counsel for the Insurance Company that in its judgement and award dated 26.3.2016 the Tribunal has erroneously shifted the burden of proof on the defendants even though the settled law is that the burden to prove the negligence of the driver of the offending vehicle in case of accident is on the claimants. It was argued that in his cross-examination, the P.W. 2 had admitted, that half of the road on the right side of the offending vehicle was vacant when the offending vehicle hit the motorcycle and the width of the road was 15 feet, which proves that almost 7.5 feet on the left side of the motorcycle of the deceased was vacant when the offending vehicle

allegedly hit the motorcycle and, therefore, the deceased could have easily avoided the accident if he was careful. It was argued that the accident as shown in the site plan which shows that the offending vehicle hit the motorcycle of the deceased on the right side of the road, is not corroborated by the testimony of P.W. 2 and, therefore, can not be relied upon to accept the plea of the claimants. It was argued that the Tribunal has misread the documentary and oral evidence on record which clearly went to show that the accident was not caused due to the negligence of the driver of the offending vehicle. It was argued that for the aforesaid reasons the judgement and award dated 26.3.2016 passed by the Tribunal is liable to be set aside.

14. Rebutting the contention of the counsel for the appellant, the counsel for the claimants has supported the reasons given by the Tribunal for its finding on issue No. 1. It was argued by the counsel for the claimants that the oral and the documentary evidence on record conclusively proved that the deceased was injured in the accident and died because of the injuries and the accident took place due to the negligence of the driver of the offending vehicle. The counsel for the claimants has argued that the Tribunal, however, has awarded very less compensation to the claimants. It was argued that the postmortem report of the deceased showed that deceased was 45 years old and, therefore, a multiplier of 14 had to be applied while determining the pecuniary damages payable to the claimants. It was argued that the Tribunal has wrongly deducted 1/3 as personal and living expenses of the deceased and has also erred in not adding future prospects in the income of the deceased while determining the pecuniary damages. It was further argued that the claimants were entitled to compensation for loss of estate, funeral expenses and separate compensations for loss of consortium as well as for loss of love and affection as determined in ***National Insurance Company Ltd. Vs. Pranay Sethi & Others, (2017) 16 S.C.C. 680 and Magma General Insurance Company Ltd. vs. Nanu Ram, (2018) SCC OnLine SC 1546*** and as provided in U.P. Motor Vehicle Rules, 1998 (hereinafter referred to as, "Rules, 1998'). It was further argued that the claimants had proved the medical expenses of Rs. 40,000/- incurred in the treatment of the deceased and the Tribunal has wrongly awarded only Rs. 10,000/- against the medical expenses. It was argued that for the aforesaid reasons, the compensation awarded by the Tribunal is to be enhanced, First Appeal From Order No. 566 of 2016 is liable to be dismissed and First Appeal From Order No. 145 of 2017 is to be allowed.

15. I have considered the submissions of the counsel for the parties and perused the records of the Tribunal.

16. The first issue that arises for determination by this Court is as to whether the accident which took place on 1.8.2014 injuring the deceased and ultimately resulting in his death on 17.8.2014 was caused due to rash and negligent driving of the offending vehicle by its driver.

17. It is settled law that the standard of proof required in motor accident claim cases under the Act is preponderance of probabilities and not that of proof beyond reasonable doubt. The strict principles of evidence and standard of proof required in a criminal trial are not applicable in accident cases registered under the Act. In

this context, the observations of the Supreme Court in ***Anita Sharma Vs. New India Assurance Company Limited & Another, (2021) 1 S.C.C. 171*** is reproduced below :-

"21. Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eye-witnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true.

22. A somewhat similar situation arose in Dulcina Fernandes v. Joaquim Xavier Cruz wherein this Court reiterated that: (SCC p. 650, para 7)

"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pick-up van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi v. Himachal RTC)."

(Emphasis added)

18. The plaintiff-witness No. 2, i.e., Mohd. Farooq, who was riding on another motorcycle behind the deceased and was an eye-witness of the accident has proved the accident as pleaded in the claim petition. The statement of P.W. 2 in his cross-examination that, at the time of accident half of the road on the right side of the offending vehicle was vacant does not necessarily prove that the accident occurred because of the negligence of the deceased. An eye-witness can only give a rough, and not an exact account, of the width of the road and the position of the vehicles at the time of accident. The statement of P.W. 2 in his cross-examination does not contradict the site plan so far as the position of the vehicles at the time of accident is concerned. The site plan shows that the offending vehicle was initially on its left side, i.e., on the west side of the road, but had turned right and hit the motorcycle of the deceased. The clause "at the time of accident' in the statement of P.W. 2 can not be read to identify the position of the vehicles at the exact time when the offending vehicle collided with the motorcycle but, on a reading of the testimony of P.W. 2 as a whole, it indicates the position of the offending vehicle slightly before the collision. The site plan which shows that the offending vehicle was initially on the left side but subsequently turned right causing the accident is corroborated by the testimony of P.W. 2. At this stage it would be relevant to note that under Rule 203-A of the Rules 1998, the Investigating Police Officer is enjoined to prepare a site plan of the accident, and submit it to the Claims Tribunal. By virtue of Section 211-A of the Rules, 1998 the site plan submitted under Rule 203-A is presumed to be correct and is to be read in evidence without formal proof unless proved contrary. Rules 203-A and 211-A, are reproduced below :-

"203-A. Duties of Investigating Police Officer-(1) The Investigating Police Officer shall prepare a site plan, drawn on

scale as to indicate the layout and width etc. of the road/roads or place as the case may be, the position of Vehicle/Vehicles, or persons, involved and such other facts as the case may be relevant, authenticated by the witnesses and in case no witness is available same shall be recorded, so as to preserved the evidence relating to accident. He shall also get the scene of accident photographed from such angles as to clearly depict the accident, as above, inter-alia for the purpose of proceeding before the Claims Tribunal.

211-A. Presumption about the papers- The reports, certificates and papers submitted or issued under Rules 203-A, 203-C and 203-D shall be presumed to be correct and shall be read in evidence without formal proof unless proved contrary."

19. It may also be noted that there is no plea of any contributory negligence on the part of the deceased by the driver of the offending vehicle in his written statement. The driver of the offending vehicle also did not appear as a witness to prove that the deceased was negligent or not careful and if the deceased was careful the accident could have been avoided.

20. The plea of the claimants that the accident was caused due to rash and negligent driving of the offending vehicle is also proved by the contents of the First Information Report and the fact that charge-sheet against the driver of the offending vehicle has been filed in the aforesaid case. The filing of a charge-sheet against the driver of the offending vehicle prima facie points to his culpability. The charge-sheet is an important piece of evidence in motor accident claim cases where proof of accident required is not proof beyond reasonable doubt, but the case has to be considered on the touchstone of preponderance of probability. In this context the observations of the Supreme Court in ***Mangla Ram Vs. Oriental Insurance Company Limited & Others, (2018) 5 S.C.C. 656*** is reproduced below :-

"27. Another reason which weighted with the High Court to interfere in the first appeal filed by respondents 2 & 3, was absence of finding by the Tribunal about the factum of negligence of the driver of the subject jeep. Factually, this view is untenable. Our understanding of the analysis done by the Tribunal is to hold that Jeep No. RST 4701 was driven rashly and negligently by respondent 2 when it collided with the motorcycle of the appellant leading to the accident. This can be discerned from the evidence of witnesses and the contents of the charge-sheet file by the police, naming Respondent 2. This Court in a recent decision in Dulcina Fernandes, noted that the plea of negligence on the part of the driver of the offending vehicle as set up by the claimants was required to be decided by the Tribunal on the touchstone of preponderance or probability and certainly not by standard of proof beyond reasonable doubt. **Suffice it to observe that the exposition in the judgements already adverted to by us, filing of charge-sheet against Respondent 2 prima facie points towards his complicity in driving the vehicle negligently and rashly**. Further, even when the accused were to be acquitted in the criminal cases, this Court opined that the same may be of no effect on the assessment of the liability required in respect of motor accident cases by the Tribunal."

(Emphasis added)

21. The observations of the Division Bench of this Court in paragraph Nos. 29 and 30 of its judgement reported in ***Dr.***

Anoop Kumar Bhattacharya & Another Vs. National Insurance Co. Ltd., (2021) 12 ADJ 596 are also relevant for the purpose and are reproduced below :-

"29. We may now revert to the original question whether Tribunal was correct in altogether excluding from evidence the documents such as the FIR, the site plan and the charge-sheet, which form part of the police record.

30. We have no doubt in our mind that the answer to the aforesaid question must be a resounding 'No'. The Tribunal opted to ignore the FIR, the charge-sheet and the site plan on the ground that they do not establish either that the driver of the offending truck was involved in the accident or that he was guilty of rash and negligent driving. In our opinion, the Tribunal would have been correct had the standard of proof in claim proceedings been that of beyond reasonable doubt as is the case with criminal proceedings. Even in a criminal proceedings, these documents may be considered to corroborate the evidence led in the Court and not to be completely disregarded or ignored. In any case, corroborative value of the police record cannot be ignored completely though decision may not be based solely upon them. Moreover, the standard of proof in the claim proceedings is not that of proof beyond reasonable doubt but that of preponderance of probabilities. The Tribunal on assessment of evidence before it had to satisfy itself that it was more likely than not that the events as alleged in the claim petition had transpired. **To our mind, the documents such as the FIR, the site map and the charge-sheet, which form part of the police record, even though they do not establish the occurrence when considered holistically and prudently could help draw an informed and intelligent inference as to the degree of probability which lends itself to the case set up by a claimant.** Was the FIR promptly lodged or was it lodged after an undue delay? Does the site plan conform to the recital contained in the FIR? Do injuries sustained corroborate the recital contained in the FIR? Does the charge-sheet bolster the allegations contained in the FIR? These are the factors which when considered fairly and prudently could help to assess if the case set up by the claimants was more probable or not. **As such, we consider it an error to altogether ignore the said documents on the ground that they were not conclusive proof of the occurrence more sosince that is not the goal of claim proceedings in the first place."**

(Emphasis added)

22. The First Information Report, the charge-sheet, the site plan and the testimony of the P.W. 2 read jointly and as a whole prove the case of the claimants as pleaded in their claim petition, i.e., the accident was caused due to rash and negligent driving of the offending vehicle.

23. For the aforesaid, reasons the findings of the Tribunal on Issue no. 1 are affirmed.

24. So far as the other point that arises for determination by this Court is regarding the compensation payable to the claimants. Before proceeding further, it would be relevant to note that the Tribunal has denied compensation to claimant Nos. 3 to 6 on the ground that they were major at the time of the accident and were therefore not entitled to compensation. The aforesaid

opinion of the Tribunal is not correct. Under Section 166 of the Act, 1988 an application for compensation arising out of an accident may be made, "by all or any of the legal representatives of the deceased, where death has resulted from the accident'. Proviso to Section 166 of the Act, 1988 provides that where all the legal representatives of the deceased have not joined in the 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. Section 166(1) of the Act, 1988 is reproduced below :-

"166. 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;**

(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."

(Emphasis added)

25. Recently, the Supreme Court in ***National Insurance Company Limited Vs. Birender & Others, (2020) 11 S.C.C. 356*** reiterated that the compensation to the legal representatives of the deceased who are major is not limited only to conventional heads and they may be entitled to compensation for loss of dependency even if they are earning members. The observations of the Supreme Court in paragraph Nos. 13 and 14 of its judgement in ***Birender (Supra)*** are reproduced below :-

"13. In para 15 of Manjuri Bera, while adverting to the provisions of Section 140 of the Act, the Court observed that even if there is no loss of dependency, the claimant, if he was a legal representative, will be entitled to compensation. In the concurring judgment of Justice S.H. Kapadia, as His Lordship then was, it is observed that there is distinction between "right to apply for compensation" and "entitlement to compensation". The compensation constitutes part of the estate of the deceased. As a result, the legal representative of the deceased would inherit the estate. Indeed, in that case, the Court was dealing with the case of a married daughter of the deceased and the efficacy of Section 140 of the Act. Nevertheless, the principle underlying the exposition in this decision would clearly come to the aid of the respondent Nos. 1 and 2 (claimants) even though they are major sons of the deceased and also earning.

14. It is thus settled by now that the legal representatives of the deceased have a right to apply for compensation. Having said that, it must necessarily

follow that even the major married and earning sons of the deceased being legal representatives have a right to apply for compensation and it would be the bounden duty of the Tribunal to consider the application irrespective of the fact whether the concerned legal representative was fully dependent on the deceased and not to limit the claim towards conventional heads only. The evidence on record in the present case would suggest that the claimants were working as agricultural labourers on contract basis and were earning meagre income between Rs.1,00,000/- and Rs.1,50,000/- per annum. In that sense, they were largely dependent on the earning of their mother and in fact, were staying with her, who met with an accident at the young age of 48 years."

(Emphasis added)

26. In view of the law laid down by the Supreme Court in ***Birender (Supra)***, the claimant nos. 3 to 6 can not be denied compensation merely because they were major at the time of accident. In the present case, the Tribunal has not only not awarded compensation for loss of dependency to respondent Nos. 3 to 6 but has also not awarded any compensation to respondent Nos. 3 to 6 under the conventional heads. In her affidavit, the P.W. 1, i.e., the claimant No. 1 has stated that family of the deceased which included his major sons, i.e., the respondent Nos. 3 to 6 were dependent on the deceased. However, in her cross-examination the P.W. 1 has stated that the claimant No. 3 was working in Forest Department and the claimant No. 4 was doing odd jobs as casual worker. In light of the testimony of P.W. 2, the claimant no. 4 is to be considered as dependent on the deceased and the claimant No. 3 was entitled to compensation, at least, under the conventional heads. Similarly, the claimant Nos. 5 and 6 were entitled to compensation for loss of dependency as well as under the conventional heads as there is no evidence that they were employed at the time of accident and were not dependent on the deceased. The Tribunal has clearly erred on the aforesaid count and it is held that respondent Nos. 3 to 6 were also entitled to compensation for the death of their father in the accident.

27. In ***United India Insurance Co. Ltd. Vs. Satinder Kaur @ Satwinder Kaur & Others, (2021) 11 S.C.C. 780***, it was held that mother is to be considered as dependent on the deceased. Thus, in the present case there were seven dependents of the deceased. In accordance with the judgement of the Supreme Court in ***Sarla Verma (Smt) & Others Vs. Delhi Transport Corporation & Another, 2009 (6) SCC 121***, 1/5 is to be deducted towards the personal and living expenses from the established income of the deceased while determining the multiplicand.

28. The other question that arises while determining compensation is regarding the multiplier to be applied which is dependent on the age of the deceased. In the claim petition, the age of the deceased was stated to be 47 years. The postmortem report records the age of the deceased as 45 years. The service-book of the deceased shows the date of birth of the deceased to be 27.6.1967, i.e., 47 years at the time of his death. The driving license of the deceased shows the date of birth of the deceased as 1.1.1962, i.e., the deceased was 52 years old at the time of his death. None of the aforesaid documents are conclusive proof of the age of the deceased. However,

the date of birth of a licensee on the driving license is recorded on the particulars given by the holder of the driving license himself. Apparently, it was on the information of the deceasd that his date of birth was recorded in the driving license. The Tribunal committed no illegality in holding the age of the deceased to be 52 years on the basis of his driving license. The findings of the Tribunal on the aforesaid issue is affirmed. On the age of the deceased, in accordance with the law laid down in ***Sarla Verma (Supra)***, a multiplier of 11 has to be applied while determining the pecuniary damages payable to the claimants.

29. The income of the deceased has been proved by his pay-bills which showed that the deceased earned Rs. 26,280/- per month and the deceased was working as fodder cutter in the Forest Department. The income of the deceased as determined by the Tribunal has not been disputed by the Insurance Company in the present appeal. Thus, the multiplicand is to be determined on the aforesaid income of the deceased.

30. It was argued by the counsel for the claimants that the multiplicand and thus the pecuniary damages had to be determined by adding future prospects in the established income of the deceased in accordance with Rule 220-A of the Rules 1998 and the claimants were also entitled to separate compensations for loss of consortium and loss of love and affection as well as compensations for loss of estate and funeral expenses as determined in ***Pranay Sethi (Supra)*** and ***Magma General Insurance (Supra).***

31. There is some difference between the parameters for award of compensation as prescribed by Rule 220-A and the principles for award of compensation as laid down by the Supreme Court in its different judgments. Two differences which are relevant for the present case are considered below.

32. Rule 220-A (3) of the Rules, 1998 provides that 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 years of age : 30% of the salary

(iii) More than 50 years of age : 20% of the salary

(iv) **When wages not sufficiently proved. : 50% towards inflation and price index.**

33. In ***Pranay Sethi (supra)***, the Supreme Court endorsed addition of 50% as future prospects in the established income of the deceased if he was below 40 years and was in a permanent job, 30% if he was between 40 and 50 years and 15% if the deceased was between 50 to 60 years. It was further laid down in ***Pranay Sethi (supra)*** that if the deceased was self employed or on a fixed salary, 40% should be added as future prospects in his established income if he was less than 40 years, 25% should be added if he was between the age of 40 and 50 years and 10% should be added if he was between 50 and 60 years. In ***Pranay Sethi (supra)***, it was laid down that there should be no addition of future prospects in the income of the deceased if he was more than 60 years. The relevant observations of the

Supreme Court in ***Pranay Sethi (supra)*** are reproduced below : -

"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 thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. 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.

59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. **In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."**

(Emphasis added)

34. The difference between the parameters prescribed by Rule 220-A(3) for addition of future prospects in the income of the deceased and the norms, for the said purpose, laid down in Pranay Sethi (supra) are evident. The difference is not only regarding the percentage of the income of the deceased which is to be added as future prospects while determining compensation but also regarding the age of the deceased till which future prospects are to be added to his income. ***Pranay Sethi (supra)*** recommends that there should be no addition of future prospects if the deceased was above 60 years while Rule 220-A(3) provides for addition of 20% as future prospects in the income of the deceased if he was above 50 years and prescribes no maximum age after which future prospects are not to be added in the income of the deceased. Further, for the purposes of adding future prospects, Rule 220-A(3) does not differentiate between a deceased who had a permanent job and a deceased who was on a fixed salary or a deceased whose income is determined on minimum wages while in ***Pranay Sethi (supra)*** different norms have been prescribed for adding future prospects in cases of deceased who had a permanent job and a deceased who was on a fixed salary. No standard has been laid down in ***Pranay***

Sethi (supra) for adding future prospects in case the income of the deceased is determined on the basis of minimum wages payable to skilled, semi-skilled or unskilled worker at the relevant time.

35. The other difference between the principles laid down by the Supreme Court in its different judgments and the norms prescribed by Rule 220-A is regarding the different category of non-pecuniary damages payable as compensation. The Supreme Court in ***Pranay Sethi (supra)*** referred to only three conventional heads, namely, loss of estate, loss of consortium and funeral expenses which are to be awarded to the claimants under Section 166 of the Act, 1988. In ***Pranay Sethi (supra)***, it was laid down that compensation under the aforesaid conventional heads should be Rs.15,000/-, Rs.40,000/- and Rs.15,000/-, respectively. In ***Magma General (supra)***, the Supreme Court awarded compensations for both loss of love and affection and for loss of consortium. The compensation for loss of love and affection was determined as Rs.50,000/- and the compensation for loss of consortium, in accordance with ***Pranay Sethi (supra),*** was determined as Rs.40,000/-. The compensation under the aforesaid heads were paid separately to each of the claimants by the Supreme Court in ***Magma General (supra).*** However, subsequently, the Supreme Court in ***Satinder Kaur (supra)*** held that loss of love and affection is included in loss of consortium and, therefore, there was no justification to award compensation towards loss of love and affection as a separate category. In ***Satinder Kaur (supra),*** the Supreme Court observed that in ***Pranay Sethi (supra)*** the Constitution Bench had held that in death cases, compensation would be awarded only under three conventional heads, viz - loss of estate, loss of consortium and funeral expenses. The aforesaid principle was reiterated by the Supreme Court in The New India Assurance Company Ltd. Vs. Smt. Somwati & Others, (2020) 9 SCC 644.

However, Rule 220-A(4) of the Rules, 1998 identifies 'loss of love and affection' and 'loss of consortium' as separate categories of non-pecuniary damages. Rule 220-A(4) of the Rules, 1998 is reproduced below :-

"(4) The non-pecuniary damages shall also be payable in the compensation as follow :-

(i) Compensation for loss of estate : Rs. 5,000 to Rs. 10,000

(ii) Compensation for loss of consortium : Rs. 5,000 to Rs. 10,000

(iii) Compensation for loss of love and affection : Rs. 5,000 to Rs. 15,000

(iv) Funeral expenses costs of transportation of body : Rs. 5,000 or actual expenses whichever is less

(v) Medical expenses : actual expenses proved to the satisfaction of the Claims Tribunal."

A reading of the judgments of the Supreme Court in ***Pranay Sethi (supra), Satinder Kaur (supra)*** and ***Smt. Somwati (supra)*** do not indicate that Rules, 1998 were brought to the notice of the Supreme Court in the aforesaid cases. Subsequently, the Supreme Court in ***New India Assurance Company Ltd. Vs. Urmila Shukla & Others, (2021) SCC OnLine SC 822*** held that if an indicia is made available

in the form of a statutory instrument which affords a favourable treatment, the decision in ***Pranay Sethi (supra)*** cannot be taken to have limited the operation of such statutory provision especially when the validity of the statute was not put under challenge. It was observed by the Supreme Court that 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. The issue before the Supreme Court in ***Urmila Shukla (supra)*** was whether in accordance with Rule 220-A(3)(iii), 20% was to be added as future prospects in the income of the deceased if the deceased was above 50 years or whether the addition is to be 15% as laid down in ***Pranay Sethi (supra).*** The Supreme Court, in ***Urmila Shukla (supra),*** applying the principle stated before, affirmed the award of the Tribunal and the High Court which had added 20% as future prospects in the income of the deceased who was above 50 years. The observations of the Supreme Court from Paragraph Nos. 8 to 11 are reproduced below :-

"8. It is submitted by Mr. Rao that the judgment in Pranay Sethi does not show that the attention of the Court was invited to the specific rules such as Rule 3(iii) which contemplates addition of 20% of the salary as against 15% which was stated as a measure in Pranay Sethi. In his submission, since the statutory instrument has been put in place which affords more advantageous treatment, the decision in Pranay Sethi ought not to be considered to limit the application of such statutory Rule.

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 in Pranay Sethi was 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 in Pranay Sethi cannot 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 in Pranay Sethi cannot 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."

(Emphasis added)

36. There is no reason to restrict the principle enumerated in ***Urmila Shukla (supra)*** only to the difference between Rule 220-A(3)(iii) and the norms laid down in ***Pranay Sethi (supra)***. The principle enumerated in ***Urmila Shukla (supra)*** is that if a statutory instrument affords greater or better benefits, said statutory instrument shall operate and the norms laid down by different judicial precedents shall not limit

the operation of such statutory instrument. It is to be noted that the statutory instrument shall prevail over the norms laid down by judicial precedents only to the extent it gives greater or better benefit than the judicial precedents. If the norms laid down by judicial pronouncements give greater or better benefit than the formula devised by the statutory instrument, the judicial precedents shall prevail over the statutory instrument. **In other words, just compensation under Section 168 of the Act, 1988 is to be determined applying the norms prescribed in Rule 220-A and the principles laid down by the judicial precedents, whichever gives greater or better benefit to the claimants.**

37. Rule 220-A(4) of Rules, 1998 identifies 'loss of consortium' and 'loss of love and affection' as different heads for award of non-pecuniary damages. In that respect, Rule 220-A(4) gives better benefit than the principles laid down by the Supreme Court in ***Satinder Kaur (supra)*** which held that 'loss of love and affection' is included in "loss of consortium' and no separate compensation is to be paid for loss of love and affection. However, so far as the amount to be awarded under the conventional heads is concerned, the amounts prescribed in ***Pranay Sethi (supra)*** and ***Magma General (supra)*** give greater benefit than Rule 220-A.

38. Thus, the categories under which the non-pecuniary damages are to be awarded is to be decided in light of Rule 220-A(4) and the amount to be awarded under the aforesaid categories is to be the amount fixed by the Supreme Court in ***Pranay Sethi (supra)*** and ***Magma General (supra)***. Further, future prospects is to be added in the income of the deceased on the formula prescribed in Rule 220-A(3) of the Rules, 1998.

39. It is clarified that compensation on the aforesaid principle is to be determined in cases of accidents that took place after 26.9.2011 as Rule 220-A was inserted in Rules, 1998 with effect from 26.9.2011.

40. The accident in the present case took place on 1.8.2014. Thus, it is held that in accordance with Rule 220-A(3) of the Rules, 1998, 20% had to be added as future prospects in the established income of the deceased while determining the multiplicand. Further, the claimants were entitled separate compensations under both categories, i.e., for loss of love and affection and also for loss of consortium.

41. Apart from the aforesaid, the Tribunal has awarded only Rs. 10,000/- as medical expenses for the treatment of the deceased. The accident occurred on 1.8.2014 and the deceased died on 17.8.2014. The deceased was hospitalized for almost 16 days. The receipts regarding the diagnostics tests, purchase of medicines, payment of ambulance as well as under other heads were filed by the claimants and marked as paper Nos. 30Ga/1 and 30Ga/135 in the Tribunal. The receipts show that approximately Rs. 40,000/- was spent by the claimants on the treatment of the deceased. The receipts filed by the claimants were not rebutted by the defendants including the Insurance Company. In the circumstances, the claimants are entitled to Rs. 40,000/- as medical expenses for the treatment of the deceased.

42. In light of the aforesaid principles, the compensation payable to the claimants is computed as below :-

(a) Pecuniary Damages

(i) Income of the deceased = Rs. 26,280/- per month, i.e., Rs. 26,280x12 = Rs. 3,15,360/- per annum

(ii) Adding 20% as future prospects in the income of the deceased = Rs. 3,15,360 + 63072= Rs. 3,78,432/-

(iii) Deductions towards personal expenses of the deceased (1/5 of his income) = Rs. 75,686.40

(iv) Thus multiplicand = Rs. 3,78,432 - Rs. 75,686.40 = Rs. 3,02,745.60

(v) Applying a multiplier of 11, the total amount of pecuniary damages = Rs. 3,02,745.60 x 11 = Rs. 33,30,201.60

Thus, the **pecuniary damages** payable to the claimants is **Rs. 33,30,201.60**

(b) Compensation for loss of estate = **Rs. 15,000/-**

(c) Compensation for loss of spousal consortium to claimant No. 1 = **Rs. 40,000/-**

(d) Compensation for loss of filial consortium to claimant No. 2 **Rs. 40,000/-**

(e) Compensation for loss of parental consortium to claimant Nos. 3 to 8= Rs. 2,40,000/-

(Rs. 40,000x6 and **Rs. 40,000/-** to each claimant separately)

(f) Compensation for loss of love and affection to the claimants = Rs. 4,00,000/- (Rs. 50,000 x 8, i.e., Rs. 50,000/- to each claimant separately)

(g) Funeral expenses = **Rs. 15,000/-**

(h) Medical expenses incurred in the treatment of the deceased Rs. 40,000/-

Thus, the total compensation payable to the claimants = **Rs. 41,20,201.60 (a+b+c+d+e+f+g+h)** which is rounded off as **Rs. 41,20,200/-.**

43. In view of the aforesaid, it is held that the claimants were entitled to compensation of Rs. 41,20,200/-. It is apparent that the Tribunal has awarded very less compensation to the claimants. The award of the Tribunal is modified to the extent stated above. The compensation as awarded by this Court shall carry the same interest as awarded by the Tribunal.

44. Compensation for pecuniary damages as computed in the present judgement alongwith the interest accruing on the same shall be divided equally amongst all the claimants excepting claimant No. 3. Compensation for funeral expenses and medical expenses alongwith the interest accruing on the same shall be paid exclusively to claimant No. 1. Compensation for loss of estate alongwih the interest accruing on the same shall be divided equally amongst all the claimants. Compensation for loss of consortium and for loss of love and affection alongwith the interest accruing on the same shall be paid as indicated above in **Paragraph No. 42.**

45. The appellant in F.A.F.O. No 566 of 2016, i.e., The New India Assurance Company Limited shall deposit the balance/excess amount (including the interest) in the Motor Accident Claims Tribunal, Lakhimpur Kheri within three months from today. The amount so deposited by the New India Assurance

Company Limited, shall, in turn, be deposited by the Motor Accident Claims Tribunal, Lakhimpur Kheri in the highest interest bearing fixed deposit schemes, either of the post office or of any nationalized bank. The receipts of the fixed deposit shall be given to the claimants who shall be entitled to withdraw the maturity amount when the fixed deposits mature. The maturity amount shall be credited by the bank/post office in any savings account of the claimants. The concerned bank or post office shall not permit any loan or advance against the fixed deposits made in favour of the claimants. The Tribunal, while depositing the amount in any fixed deposit scheme, shall communicate the directions issued by this Court to the concerned bank/post office. In case, the New India Assurance Company Limited fails to deposit the awarded amount within three months from today, the Tribunal shall recover the same from the New India Assurance Company Limited in accordance with law.

46. With the aforesaid directions and observations, the First Appeal From Order No. 566 of 2016 is ***dismissed*** and First Appeal From Order No. 145 of 2017 is ***allowed.*** Parties shall bear their own cost.

47. Office shall transmit the records of the case to the Tribunal, at the earliest.

(2022)06ILR A1231

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.05.2022 & 19.05.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Second Appeal No. 283 of 2022

Smt. Sarita Gupta @ Savita Gupta & Ors. ...Appellants

Versus

Smt. Shanti Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri Kshitji Shailendra

Counsel for the Respondents:
Sri Tarun Agarwal, Sri Ravi Kant

A. Civil Law - Transfer of Property Act, 1882, Section 3 - "a person is said to have notice" - Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property shall be deemed to have notice of such instrument as from the date of registration - legal presumption of knowledge of notice arises from omission to search registration in the register kept under the Registration Act - Specific Relief Act, 1963, Section 19 - specific performance of a contract may be enforced against— (a) either party thereto; (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract - question as to whether subsequent purchasers are bona fide purchasers for value without notice - burden of proving exception of the general rule given in Section 19 of the Specific Relief Act is on the party pleading it - it is upon subsequent purchasers to show that they are the bonafide transferee for value without notice - subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff - They are bona fide purchasers for valuable consideration, though they were not necessary parties to the suit. (Para 21, 34)

In the present case, it is upon the appellants to show that they are the bonafide transferee for value without notice - a registered

agreement to sale was entered between plaintiff respondent and late Jaswant Singh, the defendant, on 26.08.1985 - Original Suit No. 849 of 1987 was filed by the plaintiff respondent against late Jaswant Singh for specific performance of the contract entered on 26.08.1985 - Jaswant Singh after filing of Original Suit No. 849 of 1987 executed a registered sale-deed on 28.10.1987 in favour of Ravi Prakash Agrawal and others - Subsequently, on 08.03.1988 the suit property was transferred by Ravi Prakash Agrawal and others in favour of present appellants - agreement to sale was registered on 26.08. thus, the appellants will be deemed to have notice of the fact that an agreement to sale was entered between the plaintiff respondent and defendant (deceased Jaswant Singh) 937)

B. Civil Law - Code of Civil Procedure, 1908 - Order 41 Rule 31 C.P.C. - Order 41 Rule 31 C.P.C. mandates that a judgment of the appellate court shall be in writing and shall state the points for determination - substantial compliance - effect - Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination - Non-compliance - Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate (Para 18)

Issue/point of determination with regard to bonafide/malafide purchase by the appellant having knowledge/no knowledge of the agreement to sale was framed never framed nor decided. – Held – Held - Appellate court has considered the entire evidence on record and discussed the same in detail and has come to conclusion and recorded its finding though the point of determination has not been framed by the lower appellate court, but still there is substantial compliance of the provisions of Order 41 Rule 31 C.P.C. - lower appellate court rightly decreed the suit of plaintiff respondent no. 1 for specific performance for which he is entitled pursuant to the registered agreement to sale executed on 26.08.1985 between the plaintiff and the defendant (deceased Jaswant Singh) under whom the present appellants are litigating (Para 40)

Dismissed. (E-5)

List of Cases cited:-

1. Ram Pravesh & ors. Vs Ram Bilash & ors., 2015 (5) ADJ 690,

2. Ram Chander Vs Imtiyaz Ali & anr. S.A. No. 226 of 2018 dt 30.03.2022

3. Guruswamy Nadar Vs P. Lakshmi Ammal (Dead) Through LRS. & ors., 2008 (5) SCC 796

4. Veluyudhan Sathyadas Vs Govindan Dakshyani, JT 2002 (5) SC 357

5. G. Jayashree & ors. Vs Bhagwandas S. Patel & ors., 2009 (3) SCC 141

6. J.P. Builders & anr. Vs A. Ramadas Rao & anr., 2011 (1) SCC 429

7. Jugraj Singh & anr. Vs Labh Singh & ors. Vs 1995 (2) SCC 31

8. G. Amalorpavam & ors. Vs R.C. Diocese of Madurai & ors., 2006 (3) SCC 224

9. Awadh Raj & ors. Vs Gulab Singh & ors., 2005 (2) AWC 1827 (All)

10. Smt. Ram Peary & ors. Vs Gauri & ors., AIR 1978 All 318

11. M. L. Abdul Jabbar Sahid Vs H. Venkata Sastri and Sons & ors., AIR 1969 SC 1147

12. Kripa Ram (deceased) through Legal Representatives & ors. Vs Surendra Deo Gaur &

ors., Civil Appeal No.8971 of 2010 dt 16.11.2020

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Kshitij Shailendra, learned counsel for the appellants and Sri Ravi Kant, learned Senior Counsel, assisted by Sri Tarun Agrawal, learned counsel for the respondents.

2. This is defendant-III set/appellants' second appeal under Section 100 C.P.C. challenging the judgment and decree dated 19.01.2022 passed by the District Judge, Aligarh in Civil Appeal No. 132 of 2016 arising out of Original Suit No. 849 of 1987, and judgment and decree dated 28.10.2016 passed by the Additional Civil Judge (Senior Division), Court No. 2, Aligarh in Original Suit No. 849 of 1987.

3. This appeal has a chequered history. A brief description is necessary for better appreciation of the case, which is as follows;

4. Plaintiff respondent nos. 1 and 2 entered into a registered agreement of sale with one Jaswant Singh, the original defendant Ist set/respondent on 26.08.1985 for the sale of bhumidhari land for Rs. 98,195 for which an advance of Rs. 5000/- was given at the time of agreement of sale and balance amount of Rs. 93,195/- was to be paid by the plaintiff respondent at the time of execution of sale-deed. According to the agreement to sale the sale-deed was to be executed within four months on taking balance sale consideration and defendant (deceased Jaswant Singh) was to take necessary permission of sale, if any.

5. According to the plaintiff respondent several requests were made with the defendant to obtain income tax exemption certificate but the sale-deed was not executed. Thus, a letter was sent by the plaintiff respondent to the defendant (deceased Jaswant Singh) on 05.12.1985 calling upon him to appear in the office of Sub-Registrar, Koil, Aligarh with income tax exemption certificate on 24.12.1985. When the defendant did not reach the office of Sub-Registrar, on his request the sale-deed was to be executed on 26.12.1985. On that day again, the defendant did not reach the office of Sub-Registrar and gave excuse that once the certificate is received regarding exemption from the Income Tax Department, he will execute the sale-deed. When the sale-deed was not executed by the defendant, the plaintiff respondent filed Original Suit No. 849 of 1987 on 26.10.1987 claiming relief of specific performance of contract in favour of the plaintiff respondent against the defendant and defendant be directed to execute the sale-deed after taking balance sale consideration of Rs. 93,195/-. An alternate plea was also taken that in case the relief cannot be legally granted then decree of return of Rs. 5000/- pendente lite in future be passed in favour of plaintiff respondent and against the defendant. The defendant (deceased Jaswant Singh) on 28.10.1987 executed a sale-deed in favour of one Ravi Prakash Agrawal. The said transferee through sale-deed dated 08.03.1988 transferred the said property in favour of present appellants' predecessor as well as the appellant.

6. Original Suit No. 849 of 1987 filed by the plaintiff respondent no. 1 was decreed ex parte on 05.12.1989. The trial court had directed the heirs of late Jaswant Singh to execute registered sale-deed in favour of plaintiff after depositing the balance amount of Rs. 93,195/- The heirs of defendant Ist set (deceased Jaswant

Singh) filed an application under Order 9 Rule 13 C.P.C. for setting aside the ex parte decree dated 05.12.1989. In the meantime, the ex parte decree was put into execution which was registered as Execution Case No. 36 of 1990 and an amount of Rs. 93,195/- was deposited by the decree holder before the execution court. The application under Order 9 Rule 13 C.P.C. was allowed on 07.03.1998. The trial court again decreed the suit under Order 8 Rule 10 C.P.C. on 28.11.2000 directing for refund of Rs. 5000/- alongwith 12% interest per annum. The judgment and decree of trial court was put to challenge by the plaintiff respondent nos. 1 and 2 by filing Civil Appeal No. 12 of 2001 requesting that the suit be decreed for relief of specific performance of the contract. The said appeal was allowed on 30.10.2003 and the matter was again remitted to the trial court for decision afresh on merits after hearing the parties concerned.

7. Meanwhile, the heirs of defendant Ist set/respondent no. 3 (deceased Jaswant Singh) filed Suit No. 314 of 1992 before the Civil Judge (Junior Division), Hawali, Aligarh for cancellation of sale-deed executed by their father late Jaswant Singh against the respondent no. 4 Ravi Prakash Agrawal on 08.03.1988. In the said suit the present appellants were also arrayed as defendant and they had filed their written statement. The said suit was dismissed on 31.07.2015.

8. While in the Suit No. 849 of 1987 an amendment application was moved by the plaintiff respondent Paper No. 155-Ka for impleading the subsequent purchaser including the appellants, which was allowed on 03.08.2016. The trial court found that subsequent purchaser having not appeared despite notices and publication made proceeded ex parte as there was direction of this Court to conclude the suit proceedings and on 28.10.2016 partly decreed the suit of the plaintiff respondent to the extent that they were entitled to a decree for refund of Rs. 5000/- deposited at the time of execution of agreement to sale alongwith interest and as the litigation has been going on for 30 years they were entitled for compensation of Rs. 2,00,000/-. Being dissatisfied by the judgment of trial court, the plaintiff respondent nos. 1 and 2 filed Civil Appeal No. 132 of 2016 before the District Judge, Aligarh who allowed the appeal and directed for the execution of the sale-deed in view of the fact that the balance sale consideration money of Rs. 93,195/- is already deposited in the court. Hence, this present appeal by the subsequent purchaser and his legal heirs.

9. Sri Kshitij Shailendra, learned counsel appearing for the appellants, assailed the order of lower appellate court on the ground that the mandatory provisions of Order 41 Rule 31 C.P.C. has not been complied with and not even a single point of determination has been framed. He has relief upon a decision of coordinate Bench of this Court in case of **Ram Pravesh and others Vs. Ram Bilash and others, 2015 (5) ADJ 690**, a decision of this Court in case of **Ram Chander Vs. Imtiyaz Ali and another, Second Appeal No. 226 of 2018**, decided on 30.03.2022.

10. He next contended that initially the suit for specific performance was filed against the defendant vendor Jaswant Singh and the present appellants who are subsequent purchaser were for the first time impleaded in suit by order of trial court on 03.08.2016 and no opportunity has been granted to file written statement. He then submitted that Section 19 (b) of the

Specific Relief Act, 1963 (hereinafter referred as the "Act of 1963') protects the case of subsequent purchaser and the said provision can only be invoked when an issue/point of determination with regard to bonafide/malafide purchase by the appellant having knowledge/no knowledge of the agreement to sale was framed, admittedly, this issue was never framed nor decided.

11. Reliance has been placed upon a decision of Apex Court in case of **Guruswamy Nadar Vs. P. Lakshmi Ammal (Dead) Through LRS. and Others, 2008 (5) SCC 796.** He then contended that once the decree passed by the trial court on 05.12.1989 was set aside, the Execution Case No. 36 of 1990 has lost its significance and amount deposited in the said execution proceedings would be of no consequence and the lower appellate court directing for enforcement of the contract of the year 1985 and co-relation to the amount deposited in execution case is totally illegal. He next submitted that the plaintiff having called upon the defendant to execute sale-deed on 24.12.1985 there was no notice on record and mere receipt dated 24.12.19985 and 26.12.1985 filed by the plaintiff alongwith list 98-C would not be sufficient to satisfy the requirement of Section 16 (c) of the Act of 1963.

12. Reliance has been placed upon a decision of Apex Court in case of **Veluyudhan Sathyadas Vs. Govindan Dakshyani, JT 2002 (5) SC 357, G. Jayashree and others Vs. Bhagwandas S. Patel and others, 2009 (3) SCC 141**, relevant paragraph nos. 32 to 35 are extracted here as under;

"32. The civil courts, in the matter of enforcement of an agreement to sell, exercise a discretionary jurisdiction. Discretionary jurisdiction albeit must be exercised judiciously and not arbitrarily or capriciously. A plaintiff is expected to approach the court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a court of law. In Mohammadia Cooperative Building Society Limited v. Lakshmi Srinivasa Cooperative Building Society Limited & ors. [(2008) 7 SCC 310], this Court held:

"71. Grant of a decree for specific performance of contract is a discretionary relief. There cannot be any doubt whatsoever that the discretion has to be exercised judiciously and not arbitrarily. But for the said purpose, the conduct of the plaintiff plays an important role. The courts ordinarily would not grant any relief in favour of the person who approaches the court with a pair of dirty hands."

33. In Sanjana M. Wig (Ms.) v. Hindustan Petroleum Corpn. Ltd. [2005) 8 SCC 242] in regard to exercise of the discretionary jurisdiction, this Court held that the same depends upon the facts and circumstances of each case wherefor no hard and fast rule can be laid down.

34. We may notice that B.P. Jeevan Reddy, J. in K.S. Vidyanadam & ors. v. Vairavan(1997) 3 SCC 1] held that a new look is required to be given and the rigour of the rule is required to be relaxed by courts as regards the principle that time is not of the essence of the contract in case of immovable properties as when the said principle was

"11.....The learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that

prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as nonexistent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit (s) cannot be ignored altogether on the ground that time has not been made the essence of the contract [relating to immovable properties]."

This court therein noticed the decision rendered in Mademsetty Satyanarayana v. G. Yellogi Rao[(1965) 2 SCR 221] where Subba Rao, J. (As His Lordship then was) made a distinction between Indian law and the English law on the subject to hold that some delay may not be a bar in granting a relief of specific performance as the limitation for filing such suit is prescribed under the Limitation Act, 1963, stating:

"13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices- according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."

35. Mr. Nariman, however, would contend that somewhat different view has been taken by this Court in Nirmala Anand v. Advent Corporation (P) Ltd. & ors. [(2002) 8 SCC 146], wherein this Court in a situation of this nature had directed payment of a higher price. Each case is, thus, required to be considered on its own facts. No hard and fast rule, therefore, can be laid down. While determining the lis in a suit for specific performance of contract, no legal principle in absolute terms can be laid down. Relief in a matter of this nature has to be granted keeping in view a large number of facts."

13. Reliance has also been placed upon decision of Apex Court in case of **J.P. Builders and another Vs. A. Ramadas Rao and another, 2011 (1) SCC 429,** relevant paragraph nos. 22, 24, 25, 26 and 27 are extracted here as under;

"22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contact. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

24. In P.D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649 paras 19 and 21, this Court observed:

"19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstance of each case. No strait-jacket formula can be laid down in this behalf....

21.....The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

25. Section 16 (c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors., (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c)of the Specific Relief Act and when there is non- compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

14. Lastly, he contended that the impleadment application impleading the subsequent purchaser was allowed on 03.08.2016 and notices having been issued on 22.08.2016 and the trial court on the next date i.e. 26.09.2016 observing that the suit has to be expeditiously decided in view of the directions of the High Court fixed for 27.09.2016 and thereafter publication was permitted on 24.10.2016 and the suit was decreed on 28.10.2016 leaving no time for the appellants to contest the same.

15. Sri Ravi Kant, learned Senior Counsel, appearing for the plaintiff respondent nos. 1 and 2, submitted that the agreement to sale which was entered on 26.08.1985 between the plaintiff and defendant (deceased Jaswant Singh) is a registered document. The sale-deed was to be executed within four months during which Jaswant Singh was required to take necessary permission from the Income Tax Department. According to him, the notice was given by the plaintiff to the defendant on 05.12.1985 for executing the sale-deed on 24.12.1985. The plaintiff having been present in the office of Sub-Registrar on that day and then again on 26.12.1985 had brought on record the receipt dated 24.12.1985 and 26.12.1985 through Paper No. 98-Ga which clearly proves that the plaintiff was always ready and willing to perform the essential terms of the contract

which are to be performed by him and, thus, the provisions of Section 16 (c) of the Act of 1963 should be read in favour of plaintiff having complied the said provision.

16. He further submitted that a subsequent purchaser from vendor defendant, though necessary party to a suit, cannot raise such a plea and it is only the vendor defendant who can raise such plea. Reliance has been placed upon the decision of Apex Court in case of **Jugraj Singh and another Vs. Labh Singh and others Vs. 1995 (2) SCC 31.** Relevant paragraph nos. 3 to 5 are extracted here as under;

"3. Section 16 (c) of the Specific Relief Act, 1963 provides that the plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract. The continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract.

4.The Privy Council in Ardeshir H. Mama v. Flora Sassonhas held that in a suit for specific performance the averment of readiness and willingness on plaintiff's part up to the date of the decree is necessary.

5.This Court in Gomathinayagam Pillai v. Palaniswami Nadarquoting with approval Ardeshir case had held as follows:

"But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail."

That plea is specifically available to the vendor/defendant. It is personal to him. The subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff. They are bona fide purchasers for valuable consideration. Though they are necessary parties to the suit, since any decree obtained by the plaintiff would be binding on the subsequent purchasers, the plea that the plaintiff must always be ready and willing to perform his part of the contract must be available only to the vendor or his legal representatives, but not to the subsequent purchasers. The High Court, therefore, was right in rejecting the petitioners' contention and rightly did not accept the plea. We do not find any ground warranting interference."

17. He then submitted that the lower appellate court had categorically recorded the finding as to the readiness and willingness of the plaintiff for execution of sale-deed by the defendant in his favour. He then contended that the lower appellate court had substantially complied the provisions of Order 41 Rule 31 C.P.C. as it is clear from the judgment of lower appellate court that there is substantial compliance of requirement of Order 41 Rule 31 C.P.C.

18. According to him, the lower appellate court had considered the entire evidence and discussed in detail, and the conclusion and findings are supported by reasons even though no point of

determination has been framed. Reliance has been placed upon the decision of Apex Court in case of **G. Amalorpavam and others Vs. R.C. Diocese of Madurai and others, 2006 (3) SCC 224**. Relevant paragraph no. 9 is extracted here as under;

"9. The question whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the Rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of Second Appeal conferred by Section 100 CPC."

19. He next submitted that the defendant (deceased Jaswant Singh) executed the sale-deed in favour of Ravi Prakash Agrawal on 28.10.1987 while the suit for specific performance was filed by the plaintiff respondent nos. 1 and 2 on 26.10.1987 i.e. prior to the execution of sale-deed in favour of Ravi Prakash Agrawal and others. According to him, the doctrine of lis pendens will apply and the party purchasing the property after suit has been filed by the original purchaser will not get the title and benefit. Thus, exemption of Section 19 (b) of the Act of 1963 will not be available to appellants in view of doctrine of lis pendens.

20. Reliance has been placed upon the judgment of Apex Court in case of **Guruswamy Nadar (Supra)**. Relevant paragraph nos. 9, 10 and 17 are extracted here as under;

"9. Section 19 of the Specific Relief Act clearly says subsequent sale can be enforced for good and sufficient reason but in the present case, there is no difficulty because the suit was filed on 3.5.1975 for specific performance of the agreement and

the second sale took place on 5.5.1975. Therefore, it is the admitted position that the second sale was definitely after the filing of the suit in question. Had that not been the position then we would have evaluated the effect of Section Section 52 the Transfer of Property Act. But in the present case it is more than apparent that the suit was filed before the second sale of the property. Therefore, the principle of lis pendens will govern the present case and the second sale cannot have the overriding effect on the first sale.

10. The principle of lis pendens is still settled principle of law. In this connection, the Full Bench of the Allahabad High Court in Smt. Ram Peary (supra) has considered the scope of Section 52 the Transfer of Property Act. The Full Bench has referred to a decision in Bellamy v. Sabine[(1857) 44 ER 842 at p.847)wherein it was observed as under:

"4..... It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.

Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be finding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this wsere not so, there could be no certainty that the litigation would ever come to an end."

17. Similarly, in Jugraj Singh & Anr. V. Labh Singh & Ors. [(1995) 2 SCC 31], it was also emphasized that the plea that the plaintiff was to prove that he was ready and willing to perform his part of the contract. It is personal to him. The subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff. They are bona fide purchasers for valuable consideration, though they were not necessary parties to the suit. But in the present case, the second purchaser was a defendant in the suit and this plea was also considered by learned Single Judge and it found that there was sufficient allegation made in the plaint that the plaintiff was ready and willing to perform his part of the contract. This aspect was dealt with by learned Single Judge in its order dated 24.7.1990 and learned Single Judge in paragraph 8 held as follows:

" On the first of these submissions, I find that as against the definite plea in paragraph 7 of the Plant that Plaintiff has been and is still ready and is still ready and willingly specifically to perform the agreement on her part of which the 1st Defendant has had notice. The only plea in the written statement of the 1st Respondent is " the allegations in Para 7 of the Plaint that this Defendant is aware of the contract is denied as false". Thus, it is found that there is no denial at all t the plea that the Plaintiff was ready and willing to perform her part of the contract. Likewise, the 2nd Respondent also has not denied the said plea, in his written statement. Further, to the specific averment in para 5 of the

Plaint "by the latter part of July, 1974, the Plaintiff informed the Defendants of her readiness to complete the sale", there is no specific denial at all. There is only a vague and evasive denial by the 1st Respondent as follows:

" The allegation contained in para 5 of the Plaint are frivolous and denied.'

Likewise, the 2nd Respondent also has not specifically denied the above said averment in the Plaint."

Therefore, from this finding it is more than apparent that the plaintiff while filed the suit for specific performance of the contract was ready and willing to perform her part of the contract. This argument was though not specifically argued before the Division Bench, the only question which was argued was whether the principle of lis pendens will be applicable or Section 19 of the Specific Relief Act will have overriding effect to which we have already answered. In the present case the principle of lis pndens will be applicable as the second sale has taken place after the filing of the suit. Therefore, the view taken by the Division Bench of the High Court is correct and we do not find any merit in this appeal and the same is accordingly dismissed with no order as to costs."

21. Reliance has also been placed upon a decision of coordinate Bench of this Court in case of **Awadh Raj and others Vs. Gulab Singh and others, 2005 (2) AWC 1827 (All).** Relevant paragraph nos. 17 and 18 are extracted here as under;

"17. The fourth substantial question of law relates to the question as to whether the defendant-appellants are bona fide purchasers for value without notice. I may again refer to the exception of the general rule given in Section 19 of the Specific Relief Act. This exception has been created in Section 19 of the Specific Relief Act in favour of the bona fide transferee without notice. The burden of proving this exception is on the party pleading it. Here, in the instant case, the defendant-appellants are pleading that they are the bona fide transferees for value without notice. In order to challenge the finding of the lower appellate court; the defendant-appellants have raised this contention. The learned first appellate court has recorded a finding that the agreement in question executed in favour of the plaintiff is a registered document and the defendant-appellants have not made any enquiry before getting the sale deed executed from the office of the Sub-Registrar about the title over the disputed land. The first appellate court has referred the admission of the defendant No. 2 Lalta Prasad Singh in which he has stated that he had not made any enquiry before the execution of the sale deed. It has been argued that the registration of the agreement cannot be said to be sufficient notice to the purchaser. This contention has no force of law. For this purchase, I may refer the interpretation of a phrase "a person is said to have notice" given under Section 3 of the Transfer of Property Act, 1882 which is as follows :

" 'a person is said to have notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation 1.--Where any transaction relating to immovable property is required by law to be and has been

effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or where the property is not all situated in one sub-district, or where the registered instrument has been registered under Sub-section (2) of Section 30 of the Indian Registration Act, 1908 from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated ;

Provided that--

(1) The instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 and the rules made thereunder.

(2) The instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and ;

(3) The particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

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.

Explanation III.--A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

18. The Transfer of Property Act, 1882 contemplates three kinds of notice ; (i) actual notice, (ii) constructive or implied notice and (iii) notice to an Agent. Notice includes both actual and constructive notice. The legal presumption of knowledge of notice arises from (a) a wilful abstention from inquiry and search ; (b) gross negligence ; (c) omission to search registration in the register kept under the Registration Act; (d) Actual possession and (e) Notice to Agent. (See Ram Saran and Anr. v. Kuriamal and Ors., 1988 ALJ 1288). The person who is bound to make an inquiry and fails to do it should be held to have notice of all facts which would have come to his knowledge had he made the inquiry. Where a document has been registered a person would, as a matter of law be deemed to have notice in the circumstances and to the extent mentioned in the Explanation / to Section 3 of the Transfer of Property Act, 1882 cited above. It has been held by the Supreme Court that if, there is a charge on immovable property by registered instrument, the subsequent transferee will have notice of charge (See M.L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and Ors., AIR 1969 SC 1147). Therefore, in view of the aforesaid legal proposition of law, I hold that the registration of an agreement to sell can be termed as sufficient notice to the purchaser in the circumstance when the subsequent purchaser himself admits that he had not made any enquiry before getting the sale

deed executed from the vendor. The question as to whether the finding whether the defendant-appellants are bona fide purchaser for value without notice or not? is a finding of fact or law? Here, in this case when the defendant-appellants have not made any enquiry, there is a legal presumption of knowledge of notice arising from wilful abstention from enquiry and search. There can be a case of constructive notice and in that case, it will be a question of fact."

22. Sri Ravi Kant, learned Senior Counsel, lastly submitted that the impleadment application was allowed on 03.08.2016 and, thereafter, the order-sheet reveals that when the matter was fixed for 26.09.2016 there being a direction of this Court for early disposal of the matters which are prior to the year 2000, the Court fixed 27.10.2016. On that day the trial court found that the registered notice sent to the some of the defendant had returned back, order was passed for publication. On 14.10.2016 the court found that publication having been made and no one had appeared the court fixed 19.10.2016 for proceeding ex parte. Thereafter, 26.10.2016 was fixed for argument and on 28.10.2016 the judgment was passed by the trial court.

23. According to him, the defendant appellants deliberately did not appear before the trial court. He invited the attention of the Court to the Original Suit No. 314 of 1992 filed by the legal heirs of late Jaswant Singh for cancellation of the sale-deed executed in the year 1987 and 1988 in favour of Ravi Prakash Agrawal and others, and thereafter in favour of appellants' predecessor as well as the appellants, wherein the appellants have filed their written statement and the issue was framed regarding the cancellation of the sale-deed in view of the agreement to sale which had been executed by the father of the plaintiff of that suit in favour of plaintiff respondent nos. 1 and 2. The defendants have contested the suit and the said suit was dismissed on 31.07.2015. Thus, it can safely be said that the present appellants were fully aware of the fact that suit of plaintiff respondent nos. 1 and 2 was pending for specific performance.

24. I have heard rival submissions and perused the material on record.

25. Before proceeding to decide the present appeal, a cursory glance of Section 16 and Section 19 of the Act of 1963 are necessary for better appreciation of the case.

"16. Personal bars to relief.--Specific performance of a contract cannot be enforced in favour of a person--

2 [(a) who has obtained substituted performance of contract under section 20; or]

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) 3 [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.--For the purposes of clause (c),--

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff 4 [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.

19. Relief against parties and persons claiming under them by subsequent title.--Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against--

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

[(ca) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.]

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

26. Section 16 (c) of the Act of 1963 provides that specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. Thus, a suit at the instance of a person seeking enforcement of a contract has to prove that he was ready and willing to execute his part of contract. Likewise, Section 19 provides that subsequent sale can be enforced for good and sufficient reasons where the transferee has paid his money in good faith and without notice of the original contract.

27. In the case in hand, it is an admitted position from both the sides that a registered agreement to sale was entered between plaintiff respondent nos. 1 and 2 and late Jaswant Singh, the defendant, on 26.08.1985. It is also not in dispute that Original Suit No. 849 of 1987 was filed by the plaintiff respondent against late Jaswant Singh for specific performance of the contract entered on 26.08.1985. Moreover, Jaswant Singh after filing of Original Suit No. 849 of 1987 executed a registered sale-deed on 28.10.1987 in favour of Ravi Prakash Agrawal and others. Subsequently, on 08.03.1988 the suit property was transferred by Ravi Prakash Agrawal and others in favour of present appellants' predecessor and appellant as well.

28. A finding has been returned by the lower appellate court to the extent that on 05.12.1985 plaintiff respondent gave notice to the defendant (deceased Jaswant Singh) for executing the sale-deed on 24.12.1985, on that day the plaintiff appeared before the office of Sub-Registrar but defendant did not turn up to execute the sale-deed. Again, it was agreed between the parties to appear on 26.12.1985, but that day also the defendant failed to appear and sought time for obtaining exemption certificate from the Income Tax Department. The finding recorded by the lower appellate court that the plaintiff respondent no. 1 was ready and willing to perform his part of contract and through document Paper No. 98-C, receipt of presence of plaintiff respondent before the office of Sub-Registrar on 24.12.1985 and 26.12.1985, has been brought on record to establish the readiness and willingness of the plaintiff respondent.

29. The decisions relied upon by the appellants' counsel is not applicable in the present case as plaintiff respondent was always ready and willing to perform his part of the contract. Apex Court in case of J.P. Builders (Supra) in fact supported the case of the plaintiff respondent who by his conduct and document brought on record has established his readiness and willingness to carry out the terms of the contract. There is no dispute to the fact that a decree of specific performance can only be granted when once the plaintiff establishes his case that he was ready and willing to perform his part of contract. The law in regard to Section 16 (c) of the Act of 1963 is no more res integra.

30. Moreover, the Apex Court in case of Jugraj Singh and another (Supra) in categorical terms held that the subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff and they are bonafide purchasers for valuable consideration. The plea regarding readiness and willingness can only be raised by the vendor defendant and not by the subsequent purchaser or his legal representatives.

31. Now coming to the argument raised by the appellants that lower appellate court having decreed the suit for specific performance and directing defendants to execute sale-deed in favour of plaintiff respondent and not granting benefit of Section 19 (b) of the Act of 1963 cannot be done unless the issue/point of determination was framed by the court below and the same was decided.

32. The arguments, so raised, have no merits as the sale-deed executed on 28.10.1987 by the defendant (deceased Jaswant Singh) in favour of Ravi Prakash Agrawal and others was hit by doctrine of lis pendens as the suit was filed by the plaintiff respondent on 26.10.1987. The law regarding lis pendens has already been settled by Full Bench of this Court in case of **Smt. Ram Peary and others Vs. Gauri and others, AIR 1978 All 318.** The Supreme Court relying upon this judgment held that the sale as well as the subsequent sale of the property during pendency of the suit cannot have overriding effect and doctrine of lis pendens will apply.

33. Apex Court in case of **Guruswamy Nadar (Supra)** relying upon the judgment of **Smt. Ram Peary (Supra)** and **Jugraj Singh (Supra)** held that second sale cannot have overriding effect over the first sale due to principle of lis pendens and the subsequent purchaser has only got the

right to defend their purchase on the premise that they have no prior knowledge of the sale to the plaintiff.

34. In case of **Awadh Raj (Supra)** the Court while deciding the issue "whether registration of an agreement to sell can be termed as sufficient notice to the purchaser" held that the exception created in Section 19 of the Act of 1963 in favour of the bonafide transferee without notice, the burden of proving this exception is on the party pleading it.

35. In the present case, it is upon the appellants to show that they are the bonafide transferee for value without notice. In this regard Section 3 of the Transfer of Property Act, 1882 (hereinafter referred as the "Act of 1882') is of great significance where the interpretation of phrase "a person said to have notice" has been given, which is extracted here as under;

"["a person is said to have notice"] of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation 1.--Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, [where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated]:

Provided that--

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian. Registration Act, 1908 (16 of 1908) and the rules made thereunder,

(2) the instrument 3 [or memorandum] has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.--Any person acquiring any immoveable 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.

Explanation III.--A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.]"

36. Thus, the Act of 1882 contemplates three kind of notice, (i) actual notice, (ii) constructive or implied notice and (iii) notice to an agent. The legal presumption of knowledge of notice arises from (a) a wilful abstention from inquiry and search; (b) gross negligence; (c) omission to search registration in the register kept under the Registration Act; (d) Actual possession and (e) Notice to Agent. The Supreme Court in case of **M. L. Abdul Jabbar Sahid Vs. H. Venkata Sastri and Sons and others, AIR 1969 SC 1147**, held that if there is a charge on immovable property by registered instrument, the subsequent transferee will have notice of charge.

37. In the present case the agreement to sale was registered on 26.08.1985, thus, the appellants will be deemed to have notice of the fact that an agreement to sale was entered between the plaintiff respondent and defendant (deceased Jaswant Singh). Moreover, the present appellants as well as their vendor Ravi Prakash Agrawal and others were party to the suit filed by the legal heirs of Jaswant Singh for cancellation of sale-deed in the year 1992, wherein while deciding the issue no. 1 the fact regarding pendency of suit filed by the plaintiff respondent had come into light and the said suit was dismissed in the year 2015 itself.

38. The argument raised by the appellants' counsel that no notice was given nor they were party to the suit and the trial court in a hurried manner partly decreed the suit, has no legs to stand in view of the provisions of the Act of 1882, wherein the registration of agreement to sale and omission on the part of the appellants to such registration in the register kept under the Registration Act would amount to notice, and also the fact that they were the defendants in the suit filed by the legal heirs of the defendant (deceased Jaswant Singh) since 1992, thus, taking a plea in the year 2016 that they were not aware of the fact cannot be accepted.

39. Lastly, it has been argued that the lower appellate court without framing the point of determination, as mandated under Order 41 Rule 31 C.P.C. has decided the appeal.

40. From the reading of the judgment of lower appellate court, it is clear that the court has considered the entire evidence on record and discussed the same in detail and has come to conclusion and recorded its finding though the point of determination has not been framed by the lower appellate court, but still there is substantial compliance of the provisions of Order 41 Rule 31 C.P.C.

41. The provisions of Order 41 Rule 31 C.P.C. mandates that a judgment of the appellate court shall be in writing and shall state (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision, and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

42. In the present case an honest endeavour has been made on the part of lower appellate court to consider the controversy between the parties. There is proper appraisement of the respective case of both the sides and after considering and balancing all the evidence, facts and other consideration, the lower appellate court had proceeded to pronounce the judgment.

43. In case of **G. Amalorpavam (Supra)**, the Apex Court while dealing

with the said issue had held that the very object of Order 41 Rule 31 C.P.C. is in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 C.P.C.

44. In the present case, substantial compliance of the Order 41 Rule 31 C.P.C. has been made out by the lower appellate court and the judgment has been passed after re-appreciating the judgment as well as considering and weighing the respective cases of the parties.

45. Considering the facts and circumstances of the case, I find that no substantial question of law arises in the present appeal and the lower appellate court has rightly decreed the suit of plaintiff respondent no. 1 for specific performance for which he is entitled pursuant to the registered agreement to sale executed on 26.08.1985 between the plaintiff and the defendant (deceased Jaswant Singh) under whom the present appellants are litigating. No interference is required by this Court with the judgment and decree passed by the lower appellate court on 19.01.2022 in Civil Appeal No. 132 of 2016.

46. The Apex Court in **Civil Appeal No.8971 of 2010 (Kripa Ram (deceased) through Legal Representatives and others vs. Surendra Deo Gaur and others**, decided on 16.11.2020 has held that the second appeal can be dismissed without even formulating the substantial question of law. Relevant paras 25 and 26 reads as under :

"25. In a judgment reported as **Ashok Rangnath Magar v. Shrikant Govindrao Sangvikar (2015) 16 SCC 763**, this Court held that the second appeal can be dismissed without even formulating the substantial question of law. The Court held as under:

"18. In the light of the provision contained in Section 100 Code of Civil Procedure and the ratio decided by this Court, we come to the following conclusion:

(i) On the day when the second appeal is listed for hearing on admission if the High Court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law;

(ii) In cases where the High Court after hearing the appeal is satisfied that the substantial question of law is involved, it shall formulate that question and then the appeal shall be heard on those substantial question of law, after giving notice and opportunity of hearing to the Respondent;

(iii) In no circumstances the High Court can reverse the judgment of the trial court and the first appellate court without formulating the substantial question of law and complying with the mandatory requirements of Section 100 Code of Civil Procedure."

26. In view of the above findings, we do not find any error in the judgment and order of the High Court dismissing the Second Appeal. The present appeal is thus dismissed. Pending applications, if any, shall stand disposed of."

47. Both the Courts below had rightly dismissed the suit of the plaintiffs-appellants, which needs no interference by this Court. No substantial question of law is made out.

48. Second Appeal fails and is, hereby, **dismissed.**

CIVIL MISC. CORRECTION APPLICATION No. 2 Of 2022

This is an application seeking correction in para 47 of my judgment dated 06.5.2022 passed in the aforesaid appeal.

Heard.

Allowed.

Para 47 of my judgment dated 06.5.2022 is modified and shall be read as under :

"47. The judgment passed by lower Appellate Court needs no interference by this Court. No substantial question of law is made out."

This order shall form part of judgment dated 06.5.2022.
